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RENEWED NON-DISCRIMINATION AND EQUALITY PROMISES FOR NATIONAL MINORITIES IN EUROPE

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This Working Paper explores evidence for the use of recently renewed, extended, non-discrimination, and equality mechanisms like Full and Effective Equality and Substantive Equality. While we found evidence for the use of positive action and renewed forms of non-discrimination mechanisms, we also found that these reforms are still in their infancy and only seldomly used for the improvement of the situation of national minorities. This seems to be due to top-down measures, which are not structurally implemented and are therefore missing a link with social reality. This Working Paper combines different disciplinary perspectives such as social science, political science and international law. However, the following does not provide a comprehensive overview or a strictly analytical discussion of the case law and literature on the topic of non-discrimination and equality. Rather, it offers an analysis of the research we conducted at ECMI.

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I. INTRODUCTION

One of the founding principles of the European Union is the recognition that every individual is of equal value.[1] On top of this, the 2000 Race Directive[2] reaffirms the principle of equal treatment between persons irrespective of racial or ethnic origin. Discrimination and inequality are nevertheless still major problems for vulnerable ethnic and national minorities in Europe, as the results of the most recent EU MIDI-survey describes.[3] Bearing in mind the principle of equality, it is not surprising that two new equality concepts arrived at the Council of Europe and EU level in the last years: 'The new commitment to equality and non-discrimination' and 'full and effective equality.' In a communication Note from July 2008, the European Commission expressed its desire for this 'renewed commitment to non-discrimination and equal opportunity,' which proposes a shift from formal equality to a more substantive

equality approach.[4] In this paper, we will consider whether this statement is an exemplary expression of an assumed development in the EU, namely that of broadening and strengthening equality and non-discrimination legislation and, furthermore, whether a possible development from formal to substantive equality is also effectively taking place. We analysed whether this trend is only visible in the European Commission or also present within other players in the non-discrimination and equality field. We then sought to understand whether this trend is visible in theory as well as practice. This paper furthermore analyzes whether this trend enlarges the protection scope against discrimination for national minorities, or if this equality manifestation truly supports national minorities to be recognized as equals with the majority.

Part of this shift from formal to substantial equality is, *inter alia*, the idea of a change in non-discrimination legislation. Specifically, non-discrimination will need to be extended in scope and depth of its application, in particular concerning indirect discrimination. Changes in discrimination law could therefore be an evidence of such a change in the protection of national minorities. Second, we examined if the 'renewed commitment to non-discrimination and equality' of the European Committee and 'Full and Effective Equality' (FEE) are current manifestations of genuine equality. In order to the changed attention for substantive equality we searched for empirical evidence substantiating these proposed developments, restricted to its value to and use for national minorities. Two closely connected research areas were designed to find evidence for these new proposed developments, one relating to the concept of equality and one to the mechanism of non-discrimination. In both areas a few research questions where formulated.

For the area of equality we began with the examination of the question "what do we understand by 'equality'? What kind of different forms of equality exist and which form of equality would, if any, provide genuine equality for national minorities or which form of equality would place a minority on the same (society) level as the majority? And, along the same lines, is there a difference between a general equality mechanism and an equality mechanism for minorities? More practically, what is the implementation level of the examined equality notions for national minorities in the European Union? What is meant by Full and Effective Equality and what evidence can be found specifically for its use? Secondly, we formulated several questions for the area of non-discrimination, such as: how should a substantive non-discrimination mechanism look? And, is there evidence for such an extended mechanism? As it cannot be emphasized enough, the research tasks are embedded in the broader question of how desirable such a development is and/ or how efficient regarding the claims of national minorities. Some of the above questions are more answered than others. However, they have in common that they formed a way of thinking we used conducting this paper.

The first part of this working paper contains different theoretical notions of equality, while the second part will focus on eventual extended non-discrimination mechanisms. Part three has a more practical approach through searching for evidence of an extended manifestation of equality and in particular the use of FEE.

All three parts will include details of the proposed transition from a purely formal to a more substantive equality approach. Just as has been said before, we will start this

paper with an introduction regarding the definition of equality.

II. EQUALITY NOTIONS, FORMAL EQUALITY & SUBSTANTIVE EQUALITY

International law has no comprehensive and overall accepted definition of equality.[5] Therefore, speaking about a single principle of equality is not possible and even problematic. According to Gosepath, the idea of equality should be understood as a 'complex group of principles forming the basic core of today's egalitarianism.'[6] This working paper begins therefore with an exposition of several distinctive equality notions which, although not completely, form the main idea of equality. The equality notions discussed below are those of formal equality, substantive equality, equality of opportunities and equality of results or outcome. Depending on which equality principle one adopts, contrary outcomes arise.[7] To get a view of the current use of equality, we will examine how the different notions of equality are defined, by whom, and what kind of role they have in the current equality debate for national minorities.

Many international law instruments have reinforced the equal enjoyment of equality, if only in terms of formal equality, equality before the law, equal protection of the law and equality before courts and tribunals.[8] By rethinking the notion of equality, we see that *formal equality* is today's most commonly used form of equality. Formal equality is based on *individual justice* and the *merit principle.* It focuses on *equality among individuals, formal neutrality* and *procedural justice.*[9] This is why formal equality is mostly known as the approach behind the general prohibition of unjustified direct discrimination. In this formal, *liberal* or *symmetrical* equality approach lies the assumption that 'likes should be treated alike'[10] and that it is prohibited to treat people differently on particular grounds without a justified reason. Its underlying logic, of equal rights to all, requires inequality to be eliminated.

A weakness of this restrictive formal equality approach is that it only provides a minimal standard of protection against discrimination. It requires a comparator in order to identity discrimination.[11] Formal equality is essentially passive and static and does not assure any particular outcome, 'as it disregards the inherent collective dimension of inequality such as group membership, entrenched inequality or societal realities.'[12] But most of all, formal equality does not provide space for social mobility and social restructuring, and thereby reaffirms the current status quo between the majority and the minority.

The 'prohibition of different treatment' is similarly the strength of formal equality as well as its weakness. In situations where people are 'alike', equal treatment is often seen as 'most equal.' Nevertheless, in situations in which people are 'unlike' it might be more equal to treat individuals or groups differently in order to overcome the inequality their characteristics or disadvantages bring them. To bridge this very restrictive 'equal treatment gap' in the non-discrimination principle, the notion of substantive equality has been developed.

Substantive equality gives a solution to the above inflexibility of the 'prohibition of different treatment', since it works with the presumption that 'likes should be treated alike, but that unlike should be treated unlike'.[13] From this starting point substantive equality recognises that there is sometimes a need to treat people differently because they have different needs.

Substantive equality by means of positive action 'reflects a deliberate attempt of social engineering towards underrepresented interest groups,[14] like (some) national minorities.

Substantive equality[15] focuses on *group characteristics* and *disadvantages, group impact, actual results, material equality* and *desired outcome.*[16] Substantive equality addresses many of the formal equality weaknesses, and especially stresses current national minority protection mechanisms: by not requiring a comparator, focusing on the outcome and, very important in this case, by addressing group dimensions.[17] However, substantive equality runs the risk of giving too little attention to individual inequalities. [18] Most importantly, when it comes to substantive equality in cases of national minorities, it opens the door for different treatment or positive discrimination through positive action.[19]

Although there is no common agreement on the definition of *equality of opportunities*, this is the third equality notion we want to discuss. Fortunately, there is however more or less an agreement about the idea that equality of opportunities is based on the thought that all people should be treated identical, unimpeded by artificial barriers like ancestry or wealth. Equality of opportunities is therefore the opposite of nepotism.[20] The general idea of how to achieve equality of opportunities is to remove arbitrariness from selection procedures. This form of equality is therefore restricted to selection procedures only, and it is under discussion in how far equality of opportunities says something about the result or outcome of this procedure.[21] To make it even more complicated, there are two different kinds of *equality of opportunities* to distinguish. The notion could be interpreted in a formal equality way and in a substantive one.[22] The main difference between the two interpretations is, however, not *if* but *when* in the procedure the unfair arbitrariness should be removed. In *formal equality of opportunities* persons are assessed on their merits. For example, in the competition for resources like jobs, houses etc., 'the applicant deemed most qualified according to appropriate criteria is offered the position.'[23] Formal equality of opportunities requires 'that applicants be assessed by appropriate criteria relevant to perform on the post and that the most qualified candidate be offered the post.'[24] During a selection procedure arbitrary preferences are excluded as far as possible. So in short, S*ubstantial equality of opportunities* goes further by correcting unequal arbitrariness already *before* the selection procedure. Substantive equality of opportunities could be therefore a strong method to gain social mobility for socially disfavoured or vulnerable (national minority) groups. Some multiculturalists however argue that equality of opportunities should stress the identity of the individual' (minority member) more.[25]

Equality of results and the strongly related concept of *Equality of outcome* are the fourth equality concepts of this paper and clearly also the farthest going. Both concepts go beyond the equalization of the starting point, which they consider as insufficient and ineffective to obtain real substantive equality for minorities since they focus only on the outcome and actual equality of results. [26] Some scholars argue that 'equality of opportunities is in fact the measurement by which equality of outcome should be established'.[27]

Non-discrimination mechanisms are at least in theory strongly connected to equality, with non-discrimination forming an important part of the equality mechanism.[28] Non-discrimination mechanisms give minimum protection

through formal equality or against unjustified discrimination and extra protection through substantial equality in the form of positive action or justified discrimination. It is nevertheless the question if formal and substantive non-discrimination mechanisms have the same protection or effect of equality for the majority as for minorities. In the following chapter we will examine what revised non-discrimination mechanisms can do for enlarging national minority protection.

III. NON-DISCRIMINATION AND NATIONAL MINORITIOES

Just as there is no definition of equality, there is also no comprehensive and simultaneously overall-accepted definition of the term 'non-discrimination'.[29] The smallest common denominator in all variants is the core that 'likes should be treated alike, unless there is an adequate justification'.[30] As the European Commission phrases it, 'the non-discrimination principle requires the equal treatment of an individual or group irrespective of a certain personal characteristic.'[31] All other details of specific non-discrimination legislation depend on the respective equality approach underpinning it.[32]

Non-discrimination is considered to be the main feature of a formal approach to equality.[33] It also plays a major role in any legal framework or legislation specifically designed for national minorities.[34] However, the non-discrimination mechanisms of such special frameworks often differ in their character from *general* non-discrimination that can be found in a legal framework that goes beyond protection of a particular social group. It shall suffice here to say that the latter mechanism is broader and less specific in its detail, just because its scope extends, in comparison, to a more specific social group.[35]

To consider the details of this idea, one has to bear in mind that the term non-discrimination can be interpreted rather broadly. Given this fact, there has been a recent development within these possible interpretations of non-discrimination, namely the idea of phrasing these general non-discrimination mechanisms in a way that accommodates claims from minorities.[36] If this would indeed be the case, non-discrimination has to change its character from being fundamentally connected to formal equality towards a non-discrimination that also reflects a substantive equality approach.[37]

Non-discrimination can – and should - be designed to feature in a particular minority protection framework.[38] That aside, there has been an increasing recognition of the role that *general* non-discrimination mechanisms can play in supporting (national) minority rights.[39] Pentassuglia labelled it the 'fourth movement' of minority protection, that of a 'jurisprudential assessment of minority claims within the human rights canon.'[40] Such general non-discrimination mechanisms have the valuable advantage that they do not depend on the minority being recognized by the respective state and bearing a certain 'official status.'[41]

Before we look for evidence of this 'fourth movement', it is useful to think about how exactly such non-discrimination mechanisms look. Given the broad variety of different interpretations and specific tailoring, we will first consider those aspects of such a mechanism that are relevant in this context. Subsequently, we will design an ideal type[42] of a general non-discrimination mechanism that in its composition would be suited best to accommodate and cater for

national minorities, to test the principles behind the discrimination mechanism of the fourth movement.

From all the categories and aspects that can shape a non-discrimination mechanism, four are of relevance in this context. First, the scope of the mechanism is of interest. It is divided into the scope concerning persons, *ratione personae*, and the scope concerning the context, *ratione materiae*.[43] The former lists the possible grounds of discrimination covered, e. g. gender, race or ethnicity. It also gives information as to whether multiple discrimination[44] is covered. The latter explains which contexts the mechanism can cover, e. g. employment or education. It also shows if the present mechanism is 'accessory' or not, meaning if it can only be invoked in combination with other specific codified rights.[45]

Second, the mechanism can (theoretically) be restricted to cover direct discrimination only, which in European law 'is when one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of his or her protected characteristic.'[46] Direct discrimination is therefore defined by the ECRI as 'any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized'.[47] This is in contrast to indirect discrimination, which covers treatment or actions that are neutral at face value, but which eventually have a discriminatory *result*.[48]

Third, it is important to distinguish between discrimination mechanisms that allow room for interpretation to accommodate positive action and special measures, and those that do not.

Finally, the fourth important aspect is the jurisdiction's approach to the burden of proof or the decision of the judge, and which party needs to prove an alleged discrimination. In a substantive equality discrimination case, there are two stages. In the first stage, the claimant establishes facts to prove the alleged unlawful discrimination or, in other words, the claimant must make out a *prima facie case*. If the judge is convinced that there is a discrimination case, the burden of proof shifts to the accused party, i.e. it is their task to prove that the different treatment was justified. However, if the accused party does not succeed in this, he or she could be charged with discriminatory behaviour. In national minority cases, it is in the interest of the minorities that the justification stages shift to the accused party, since it is often very difficult to prove this latter stage.

Considering these four particularly relevant aspects or dimensions of a general non-discrimination mechanism, what then would be the ideal type for the cause of minority rights' claims, which we could use then as a research hypothesis to examine in contrast to our empirical findings? Regarding the first aspect, the scope of the mechanism, the provision should in general be as broad and comprehensive as possible, and enumerate all grounds and contexts that are open to an interpretation for minority right's causes. That means grounds such as race, ethnicity, religion, language etc., and multiple discrimination claims should be possible.[49] The *rationae materiae* should also be undifferentiated, meaning that the mechanism does not differ whether economic or civil and political rights are

concerned.[50] Preferably, it should also be non-accessory.

Second, the ideal, general non-discrimination mechanism for national minorities should cover both direct and indirect discrimination. Regarding the third dimension named above, it should include positive action and special measures, and finally, it should display a reversed burden of proof for vulnerable groups such as national or ethnic minorities.[51]

This ideal type has been used for the empirical research on the relevance of general non-discrimination mechanisms for national minorities. If evidence of this ideal type exist, is this more development from the top, i.e. is it an interpretation fostered by states in their legislation, and by jurisdiction in their ruling? Or can relevant proof be found that this is more the result of a bottom-up development, meaning that national minority members and activists on their behalf (NGO's and ombudspersons) pushed the interpretation of non-discrimination more towards the ideal type?

The most systematic and comprehensive research that was possible given the constraint on time and the character of the resources were the publications of the European network of legal experts, the Anti-Discrimination Law Review and the databases of the European Court of Justice (ECJ) and European Court of Human Rights (ECtHR). Due to time constraints we covered the available data of the last ten years. The results and findings from the national courts and academic publications are far from comprehensive, but do at least give some indication.

First, concerning the evidence of this ideal type mechanism, we found eight significant cases of the ECtHR within the last ten years.[52] The non-discrimination Article of the ECHR, Article 14, was mostly invoked with the provisions on the freedom of religion and the right to life that are set down in the Charta in Articles 2, 9 and 11 respectively. From our design of the ideal non-discrimination mechanism, those cases showed that the interpretation of non-discrimination by the Court provided room for positive action and indirect discrimination; several cases used a reverse burden of proof[53], and undifferentiated scope and even an explicit commitment to a more substantive equality approach.[54]

What is more, one has to bear in mind the expansion of non-discrimination legislation in the EU since the Race Equality Directive, ED 2000/43 in 2000. Race as a ground of discrimination is particularly relevant and useful for national minorities due to the possibility to interpret the term 'race' in very broad sense.[55] According to reviews, the implementation of both Directives is slow and with interruptions, but is nevertheless considered an improvement.[56] So far, there is no case concerning national minorities referring to the provisions of the EDs at the ECJ level.[57]

Evidence against such a development of non-discrimination mechanisms is the fact that Article 14 is still subsidiary. Also, no case on discrimination brought forward by a national minority member and concerning that characteristic (directly or indirectly) was brought before the Court of Justice of the European Union (CJEU) within the last 10 years. However, it should be pointed out that there is one, yet unpublished case from 12th May 2011 (from the small available information, it does in all likelihood concern a national minority member's language right), which is certainly worth following up on.[58]

The European Network of legal experts in the non-discrimination field expressed an opinion on this ruling that '[g]iven that the law complained of indirectly but intentionally excluded Turkish

Cypriots from its scope, this should have led the Court to the conclusion that the said law contained indirect discrimination prohibited by law.'[59]

More clarity on the interpretation of *indirect* discrimination and the shift of the *burden of proof* is given by the CJEU in the *Tyrolean Airline Case*, the *Coleman* and *Meister Cases*. [60]

The only other positive demonstration of general non-discrimination for national minorities was the reference in some NGO's reports about the increasingly blurred lines between national minorities and other vulnerable social groups, such as migrants and refugees. Often noted was the issue of discrimination against second-generation immigrants occurring when a group stops being considered immigrants and becomes a 'recognized' national or ethnic minority – or should be recognized as such.[61] This link to the debate of 'old' vs. 'new' minorities[62] is the most solid one found in NGO's statements on general non-discrimination mechanisms and national minorities. Other than that, the issue of non-discrimination refers to the special legal frameworks for national minorities, with the FCNM and the ECRML as the most prominent examples. No statement on the increased use of non-discrimination provisions or the demand for a different (i.e. reflecting more the ideal type) interpretation of these mechanisms could be found. Also, very few discrimination cases concerning national minorities were brought to the attention of equality ombudspersons.[63]

When it comes to the use of general non-discrimination mechanisms by minorities and thereby one aspect of a development from a formal to a more substantive equality approach, the empirical result is rather disappointing thus far. The 'fourth movement' of minority rights protection in Europe is mostly the result of a top-down process, meaning it is predominantly furthered by national or supranational legislatives and by Court's jurisdictions. It is less the result of a bottom-up process from minorities themselves, or activists on their behalf.[64]

In brief, it seems that non-discrimination has been extended in its meaning. Nevertheless, the move from formal to substantive equality does exist, however critical one may see this progress. The next section will take a closer look at what this development means for national minorities and if these developments in non-discrimination law are a way to gain genuine equality for national minorities or if more interventions such as positive action are needed.

IV. NATIONAL MINORITIES AND SPECIAL MEASURES

In the area of non-discrimination and equality minority, equality is a specific domain. An important but often overlooked tension in the field of equality is the tension between equality and the freedom for a minority to remain different. [65] Minorities are in other words looking for an acceptance of their differences while also seeking equality.[66] 'Standard conceptions of equality tend to mean assimilation to a pre-existing and problematic male or white or middle - class norm'[67] and do not provide that because of real equality to minorities. Another important but still ongoing debate in the field of minority equality is the question of what kind of equality claim minorities have. Two kinds of equality claims could be distinguished; the claim of *recognition* and the claim of *distribution*. [68] In contrast, the claim of distribution is mostly associated with the (re)distribution of wealth and resources and with socio-

economic discrimination.[69] Also, the claim of recognition has been related to (legal) questions of identity and group belonging and to forms of cultural discrimination.[70] Another important question underlying this debate is how to define a concept of genuine equality for minorities that provides equality with the majority and at the same time protection and promotion of the separate identity of minorities.[71] Landmark cases like the Albanian Minority Schools Case already addressed as early as in 1935 the modern understanding of what *genuine* equality for minorities contains, including the possibility for differential treatment of minorities in international law. However, the advisory opinion of the Permanent Court of International Justice (P.C.I.J.) at that time was not precise in how this aim should be reached. Even today the question of how to reach genuine equality for national minorities is more than liveable. It becomes however clearer and clearer that to reach more equality for national minorities it is at least sometimes needed, in addition to general non-discrimination protection, to give national minorities special rights to protect their distinctive culture and special characteristics. To be clear, these special minority rights should be (when allowed by a state) in addition to general citizens' rights like anti-discrimination protection.

One way to secure national minorities' special equality rights is through positive action, special measures or affirmative action. Three words that are often interchangeable, associated with substantive equality, and used for measures that generate positive discrimination, but which could be defined slightly differently.[72]

'*Positive action'* is a European generic notion of positive action, where '*special measures'* are mostly a European notion for positive action often used in the specific context of national minorities. Some European sources also make temporal differences between positive action and special measures. Whereas special measures have often been used (with the exception of some UN documents) as *temporarily* special measures, positive action is generally not.[73] Temporary measures address the idea that there will be at certain moment 'equality' between the minority and the majority. Coming back from this theory, it is the question if in reality the divisions between minority and majority ever will vanish. More relevant is the question of whether this path leads to assimilation, which is certainly not the goal of minority protection.

Temporary measures have however the danger that the majority claims that measures are satisfied because of equality improvements without reaching genuine equality between both groups. More positive is the fact that there is application of the principle of substantive equality. [74] Lastly, the definition of *'affirmative action'* is mostly used for a general notion of a temporary measure aimed at redressing historical disadvantages of a particular group (often women and ethnical or other minorities), mostly used in the US and Canada.[75]

There is not only less uniformity in the definition of special rights for minorities, but, as we will see, there are also a lot of problems with its implementation. This makes it difficult for national minorities to enjoy special rights. In some cases the situation is even worse and states even discriminate national minorities under the name of such a special measure. To understand these problems, it is however needed to give an overview of the current most important European legislation in regard to equality mechanisms for national minorities.

From the legal national minority protection perspective, Article 4.1 of the

Framework Convention for the Protection of National Minorities (in the following, FCNM) is the most important legal provision when it comes to formal equality.[76] Article 4.1 makes clear that formal equality or the right 'of equality before the law and equal protection before the law' applies for persons belonging to national minorities. More concrete for the situation of national minorities, the latter could be interpreted as meaning that members of a minority should be treated before the court in exactly the same way as members of the majority, but also that a state has the duty to treat its citizens equally. More general but nevertheless important are the explicit words given for the protection against discrimination based on membership of a national minority in Article 21 of the charter for fundamental rights of the European Union.[77]

From the legal perspective of national minority protection, the fundamental provisions that guarantee substantive equality are Article 4.2 and 4.3 of the Framework Convention for the Protection of National Minorities (FCNM). Article 4.2 of the FCNM guarantees substantive equality through 'the adoption of special measures', but only of course where necessary and when its aim is justified.

As the adoption of special measures, used for different treatment between groups, is discriminatory in character, and since discriminatory treatment is prohibited by many international covenants, there was a need for a special Article inside the FCNM to address this problem. This Article makes clear that 'special measures' of Article 4.2 of the FCNM not shall be considered to be an act of discrimination.'[78] The explanatory report on the FCNM states on top of this paragraph 4.2 that its purpose is to make clear that special measures 'shall not to be considered as contravening the principles of equality and non-discrimination.'[79] Article 4.3 according to the FCNM Explanatory Report aims in addition to Article 4.2 to 'ensure persons belonging to national minority's effective equality along with persons belonging to the majority.'[80] Through a close reading of the Articles 4.2 and 4.3 we could see this aim as substantive equality or literally as Full and Effective Equality. Here, Article 4.2 states that 'the parties undertake to adopt, where necessary, measures in order to promote, in all areas of economic social, political and cultural life, *full and effective equality* between persons belonging to a national minority and those belonging to the majority.'[81] Nevertheless, it is somewhat unclear why the authors of the Explanatory Report use the terms 'full and effective equality' (in paragraph 39 pertinent to Article 4.2) and 'effective equality' (in paragraph 41 pertinent to Article 4.3) interchangeably.

The same goes for provision 5 of the 2000 Race Directive (RED).[82] In this Article, positive action has 'full equality' as its practical aim. Another similarity becomes visible by the fact that the directives do not oblige states to take positive action, since the Articles only *require* states to implement positive action. According to the European Commission, 'positive action' under Article 5 indicates 'the purpose of positive actions but it does not render it compulsory.'[83] Which implies that a state could not be obliged through this Article to implement positive action for the protection of (national) minorities? The explicit notions of the words 'prevent or compensate' for group disadvantages, in Article 5, however, allows for 'proactive and corrective policies.'[84]

Although Article 5 of the 2000 Race Directive and Article 4.2 of the FCNM have large similarities it is good to distinguish the application scope of both legal instruments. The FCNM covers only national minorities,

whereas the race directive addresses mainly protection against race and ethnic discrimination in employment, social protection and access to goods and services.[85]

This section concluded with a closer look at the different forms of positive action; the next section provides the aim of these actions: 'full and effective equality' (FEE). We will not only discuss the notion, but we will also see if FEE paves the way for more equality of national minorities.

Enough evidence, which special measures allow for a compensation for the 'natural' distinction to the majority - now and in the future. Especially because this natural distance to a majority is exactly what a minority represents. Through special measures, disadvantages in the distance to the majority could be reduced without hurting the minority identity. This however shows that, ideally, special measures for minorities need to be of a permanent character, and also this implies that special measures should not be qualified as an exception to the equality principle, but as a permanent action.

V. FULL AND EFFECTIVE EQUALITY & GENUINE EQUALITY

Full and Effective Equality for minorities implies genuine equality between minorities and the majority. That this notion of 'complete', 'genuine' or 'absolute' equality is self-contradictory becomes clear when looking to the explanation of equality given by the Stanford encyclopaedia of philosophy.[86] It states that '*two non-identical objects are never completely equal; they are different at least in their spatiotemporal location. If things do not differ they should not be called 'equal,' but rather, more precisely, 'identical.*'[87] From this point of view, *genuine equality* between minorities and the majority would often imply (forced) assimilation - an unwanted situation when speaking about national minorities.[88] However, even if 'identical equality' is unwanted in most areas when speaking about minorities, an improvement of minority rights is very wanted. Therefore we wanted to know what "Full and Effective Equality" implies in practice. For this, we looked how the idea of Full and Effective Equality is used, in its more restricted governmental context but also as a broader ideal model. To differentiate between both meanings, we will write the governmental notion with capitals and the ideal model notion without. We also analysed how these equality notions (formal equality, substantive equality, Full and Effective Equality) were defined and used by its authors, and we searched for the inter-relation and connection of the particular equality concepts. This latter is of special importance, since the actual level of protection of an equality notion depends largely on the interpretation of a notion.

Full and Effective Equality seems at first glance to be a very progressive and promising term when associated with minorities; unfortunately this term is not clearly defined. Article 4.2 of the FCNM, however, provides a starting point to a more concrete definition of FEE. The central thought of Article 4.2 of the FCNM says that it is the duty of states to promote FEE through special measures. Also, the preamble of Protocol No.12 of the ECHR reaffirms, 'that the principle of non-discrimination does not prevent State Parties from taking measures in order to promote *full and effective equality*, provided that there is an objective and reasonable justification for those measures.'[89] Unfortunately, neither the Framework Convention nor the Explanatory Report to

the FCNM gives an explanation of how FEE should be interpreted. Neither does the Advisory Committee on the FCNM (ACFC) give an explanation for how it defines 'effectiveness' or 'full' in the explanatory report. Nonetheless, ACFC presents in its *Commentary on Participation* two interpretations of their understanding of FEE.[90] In these interpretations FEE is, on the one hand, described as a 'result' of *Effective Participation* and, on the other hand, is defined, as a 'package' of the different aspects of formal equality and substantive equality, complete with some aspects of the equal opportunities principle is highly wanted.[91] This means that states should respect 'the right for a minority to have a different identity', one separate from the collective identity.[92]

In the first interpretation, ACFC describes FEE as the satisfied situation of effective participation, which could be interpreted as an 'end stadium or ideal stage of effective participation'. The second interpretation also describes a high ideal of minority protection at both the individual and group level. Compared to the first definition, this package notion of FEE defines more specifically a sort of ideal stage, although hard or even unlikely to reach. Also, this model is unclear about when this ideal or end stage of FEE has been reached, which makes the notion less precise or even useless.

Besides this, the second notion entails the risk of fulfilling the given requirements without reaching a genuine equality situation between the minority and majority. Despite the given uncertainties regarding the definition, the second notion of FEE provides its most precise working. For this reason, we will use the second definition of FEE in this working paper.

In addition to the above, the Explanatory Report of the FCNM makes clear that the convention itself does not include a separate provision dealing with the *principle of equal opportunities*. The reason given for this was - according to the Report's authors - that 'such an inclusion was considered unnecessary as the principle is already applied in paragraph 4.2 of the convention.'[93] This quote is interesting for this research, since it could mean that the CoE Committee drafting FCNM (CAHMIN) did not make (at least not everywhere in their commentaries) a clear difference between *equal opportunities* and *FEE*. Following CAHMIN's chosen line, it seems strange that ACFC did not choose to write a commentary about FEE, but one about 'effective participation', a notion, which although very needed for the accommodation of national minorities, according to ACFC was not even worth a provision in the FCNM.

One of the questions we tried to answer during our research was: Who employs the notion of FEE? In a nutshell, this question can be answered as follows: There are very few organisations outside the Council of Europe (ACFC particularly) that use the notion of FEE. This seems to be obvious since the term FEE is the major aim in the fulfilling of the FCNM. In a few cases, other organisations, such as the European Fundamental Rights agency, refer to the notion of FEE in direct relation to the FCNM. Other found sources for the use of FEE were the *Ahtisaari Plan* for Kosovo or officially the *Comprehensive Proposal For the Kosovo Status Settlement 2007* (Article 2, para 2.4). FEE has also been included in the Constitution of Kosovo (Article 58, Para 4) and the Law No. 03/L-047 on the Protection and Promotion of the Rights of

Communities and Their Members in Kosovo, (Article 1).[94]

Our search for positive demonstrations of FEE in the non-governmental field was nevertheless quite disappointing. Only in very rare situations did we find that organisations or scholars, for example Jabareen[95] make use of the notion of Full and Effective Equality. In these cases it was remarkable that FEE most of the time was not used in relation to the FCNM, but used to describe an 'ideal situation of minority protection'. Unfortunately, the organisations did not always make clear how they interpret FEE. Sometimes it is not even clear if organisations distinguish between Full and Effective Equality, Full Equality, Genuine Equality, and Effective Equality.

With these outcomes, we can make a first preliminary conclusion, in which Full and Effective Equality in its meaning of a package of formal, substantive and equal opportunities is particularly a top down approach, whereas FEE as a genuine and ideal situation of minority protection is more often used as a bottom-up approach.

VI. DISCRIMINATION AND EQUALITY CONFIRMATION

A move towards equality by the European Commission that should not be forgotten in this paper and that needs extra explanation is the 'renewed' manifestation of non-discrimination and equality used by the European Commission. In general, this manifestation could possibly best be described as the tendency to use substantive equality in addition to formal equality more often in international non-discrimination and equality law.

The 'renewed manifestation of non-discrimination and equality' is most comprehensively described by the already mentioned communication of the European Commission.[96] In this 2008 Note the Commission addresses a 'renewed commitment to non-discrimination and equal opportunities'. Besides this, the Commission makes an important statement: 'Identical treatment may result in formal equality, but it cannot suffice to bring about equality in practice.'[97] With this quote, a reason is given why there might be a 'rapidly growing appreciation of the role positive action can play to redress the lack of substantive equality in societies.'[98] Through a precise reading of this quote, the European Commission seems to decline the use of formal equality, since 'formal equality cannot bring equality in practice'. The statement of the European Commission is not, however, very clear about this: two possible interpretations for this development could be given. First, the European Commissions' 'renewed manifestation of non-discrimination and equality' replaces formal equality with substantive equality. Secondly, and more likely, the commission still sees a role for formal equality in addition to substantive equality, but possibly smaller than before.

Nevertheless, in both cases the Commission shifts their attention from formal equality to substantive equality, which could have large implications for general non-discrimination law, especially since formal equality is still the only way to address individual justice, because it gives at least a minimum standard of non-discrimination protection. By shifting the attention to only substantive equality or to a lesser extent to formal equality, there is the danger that current non-discrimination protection mechanisms lose effectiveness. On the other side this shift opens the door to new forms of non-discrimination protection that could possibly break-up the status quo

between the majority and the minority (realizing that formal non discrimination procedures often are especially less accessible for groups that are vulnerable for discrimination). This brings attention to the question to what extent formal equality still plays a role in the current non-discrimination and equality policies of the European Commission. This occurs because substantive equality can only give a high standard of protection against discrimination and disfavours in connection or conjunction with formal equality. Both systems of equality and non-discrimination complement each other in giving a higher level of protection.

However, to us, it seems from the perspective of national minorities that the renewed manifestation of non-discrimination and equality from the perspective of national minorities is more a confirmation of old EU equality trends, rather than a new notion of equality. This is especially so because, after the introduction of the manifestation, no structural special measures or positive action policies have been taken to make substantive equality for national minorities effectively.

VII. EXISTING IMPLEMENTATION PROBLEMS FOR SUBSTANTIVE EQUALITY

In the following part of this working paper, we attempt to point out a few of the still existing problems we came across during our research in relation to the practical use of 'substantive equality.' First, we will provide details to that question, specifically why and how substantive and formal equality are interrelated and connected. Moreover, we will discuss difficulties for courts in distinguishing positive action from unjustified discrimination.

As Henrard explains, full equality mechanisms for national minorities contain in its most ideal situation two pillars.[99] Pillar one includes non-discrimination mechanisms and individual human rights that are of special relevance for national minorities, while pillar two contains minority specific standards aimed at protecting and promoting the right to identity of minorities.[100] From this description of genuine minority protection by Henrard, one can see that individual justice and general non-discrimination mechanisms are major parts of the protection mechanism of national minorities.[101] Although individual justice and general non-discrimination mechanisms are not working effectively enough in cases of national minorities - as shown by the EU-MIDI-surveys – this does not alter the fact that these mechanisms still form the most important tool for national minorities to bring a discrimination case before a court.

Therefore, keeping in mind that formal equality is the only way to address individual justice, it is important to clarify whether formal equality plays a role in the new attention for substantive equality' of the European Commission. So if substantive equality would not be implemented in addition to formal equality, this could even worsen the already not very effective non-discrimination policies for minorities for two reasons.

First, as Henrard argued, formal equality forms the basis of minority protection where substantive equality is only subsidiary, and when formal equality is insufficient. Secondly, by shifting the attention within European equality law from formal equality to positive action, there might be less attention paid to the fact that there is still a major need for the

development of a broader scope of formal equality inside community non-discrimination law. Currently the scope of community non-discrimination law only covers education, housing, and a broad definition of workplace. Also one should not forget that both equality directives can only `reach as far as the field of the EU competences.[102]A widening of this scope would be very welcome for the protection of vulnerable national minorities.

Another current problem with the use of substantive equality is that it seems to be difficult for courts to distinguish justified discrimination or positive action from unjustified or prohibited discrimination. Andreea Grgic showed this very well by analysing the example of the ECtHR Orsus case.[103]

In the Orsus case,[104] segregation in education of Roma children was accepted, under the name of a positive measure, not only by the Croatian Constitutional Court but also by the lower chamber of the ECtHR. Only the Grand Chamber of the ECtHR was able to distinguish positive action from prohibited discrimination by requiring a justification for the positive action in combination with a tailored aim for the action. According to the ECtHR court in the Orsus case, segregation as a special measure can only be allowed if it is objectively justified by a legitimate aim and that the means of achieving that aim were appropriate, necessary and proportionate.[105] In this particular case Roma children were split up in separated classroom for language reasons, without giving them the justifying language improvement education. This latter proved to the Grand Chamber that the separation was discriminatory in character instead of being a positive measure. As the Orsus case made clear, even for the ECtHR it is not always easy to distinguish positive action or special measures from discriminatory conduct. This is a serious barrier to implement positive action on a larger scale for disadvantaged national minority groups.

What else can we learn about positive action from the Orsus case? Moreover the case confirmed that a positive measure should always, 'in accordance with the principle of proportionality, […] [serve] a legitimate aim and remain within the limits of what is appropriate and necessary in order to achieve that aim, reconciling the principle of equal treatment as far as possible with the requirement of the aim pursued.' This means that the aim of positive action always must be directly related to the justification of the positive action. As we saw e.g. in the Orsus case, these two features of positive action make a crucial difference in the way a measure could violate the non-discrimination principle. And this is why special attention needs to be taken when distinguishing between positive action measures and discriminatory measures. This is particularly important since positive action measures could be used as a way to treat groups or individuals differently *without* justification and in the same could be (mis)used as a form of intended or unintended prohibited discrimination.

VIII. SUBSTANTIVE EQUALITY IN PRACTICE

During our research we saw an emerging, albeit slow, change, in the way that institutions and even courts in the EU are using or allow (sometimes) for a shift of the burden of proof, statistical evidence and positive action or special measures to guarantee or to promote substantive equality. Where ECtHR jurisprudence on equality was for most of its time based on a formal conception of equality, it has begun

to give equality a more substantive approach.[106]

In the recent cases Orsus and others v. Croatia[107], Sampanis and others v. Greece[108] and particularly, the D. H. and others v. Czech Republic case[109] a 'breakthrough for a more substantive model of equality in the ECtHR' and 'clear rules on indirect discrimination under Article 14 became clear.'[110] This development showed that Article 14 of the ECtHR has evolved from a strictly formal to a more substantive model of equality.

Some caution with this statement is, however, needed. The above cases only show that a few Roma were able to find remedy in cases of discrimination, which was not the case for other minorities. Also the little amount of Roma cases we found compared to the huge discrimination problems Roma face in the EU is making this development less common than we might have hoped.

However, according to O'Connell, the European Human Rights Court is more and more 'open to adopt a substantive equality perspective that stresses the need to protect vulnerable and disadvantaged minorities.'[111] In this context it is also worth mentioning the case of Thlimmenos v. Greece on 6 April 2000.[112] This case made clear, according to Henrard, that the prohibition of discrimination can entail an obligation for states to treat persons differently whose situations are significantly different.[113] Other authors such as Dimitry Kochenov claim that a substantive component in EU community Law is entirely missing at the moment.[114] He says that the 'European Union suffers from an empty formalistic reading of the principle of equality'.[115] Although Kochenov certainly has a point, we found little evidence for a trend in a different direction.

New developments for the possible use of positive action in employment should be found through CJEU case-law or the implementation of Article 5 of the Race Directive. Where the CJEU had jurisprudence about gender discrimination already before the implementing of the 2000 Directives, it has developed less jurisprudence since 2000 in respect to most grounds of the directives, except for 'age'. It remains, however, unclear how Article 5 of the Race Directive will be applied by member states. Several publications show examples of countries that implemented positive action and national courts allowing positive action[116], nevertheless, the implemented positive measures seem less structured and mostly have a voluntary character. This has the possible result of states choosing to implement certain positive measures and others not, or being able to implement positive measures only for certain groups. It is certainly not without coincidence that positive action mostly developed in gender cases, disability cases and less for ethnic or language minorities.

Nevertheless, research of the Migration Policy Group showed that the CJEU - although it uses primarily a formal equality approach - is occasionally willing to allow for positive action at least as a possible justification for indirect *gender* discrimination.[117] Some authors see this as a positive development for national minorities. Recently, there is a large discussion about the implementation scope of judgements in regard to the 2000 Equality Directives. This became especially important since CJEU's case-law established that the 2000 Directives should be interpreted as a given expression to the general *principle of equal treatment*. This discussion expresses the question of how far judgements of one ground (gender or age, which are the most developed anti-

discrimination grounds so far at the CJEU) of the 2000 Directives are applicable to the other directives' grounds like racial or ethnic origin.[118] This is especially important for the protection of national minorities and ethnic minorities since it could give jurisprudence to the CJEU over the RED in regard to the discrimination ground of racial and ethnical origin, where there is none at the moment. Some first indication for a possible interdependence between the different grounds of the directives is seen in the UK. Although it was an exception, national courts did refer to gender discrimination jurisprudence in their judgements in respect of other grounds covered by the 2000 Directives. [119]

Less positive is the fact that, to date, States are only obliged to *promote* or *allow* positive action but not obliged by the FCNM or the RED to *implement* positive action or special measures. This again makes both legal instruments only particular to the party member states, which then can still opt whether they want to implement special measures or not. This latter would be the founding for a legal base of substantive equality and with this means the 'renewed manifestation of non-discrimination and equality' is rather a confirmation of old EU equality trends because, since the implementation of the manifestation, no effective measures have been taken to make substantive equality structural.

IX. EXCURSUS: THE VADILITY OF FEE

Despite the introduction of 'the new commitment to equality and non-discrimination' and 'full and effective equality' major discrimination and inequality problems in Europe still exist. These two concepts seem at first glance to contain a very hopeful and high ideal of equality, but in practice these concepts have little standing at the local level. Two reasons could explain this. First, the concepts seem to be imprecise in how the ideal situation of equality should be implemented and reached. A probable second reason is that these concepts do not reflect social reality.

By researching the 'renewed manifestation of non-discrimination and equality' and the whole issue of FEE, we got the impression that both concepts are more or less empty. Both give the impression that in Europe, 'everyone is equal and that in Europe everyone has the same opportunities.' In practice it is not likely that this equality ideal becomes reality via the use of these equality manifestations. Neither concepts seem to be formulated to widen the definition of equality for all people living in the European Union. Additionally, none of the manifestations oblige states to implement positive action, nor do they oblige any European state to enlarge or boost the manifestation of formal equality.

Another reason could be that the concepts of FEE and probably even more the 'renewed commitment to non-discrimination and equality' sustain, as Makkonen well explains, 'the utopia that governments effectively can prevent people from engaging in discrimination and thereby eliminate all forms of discrimination'.[120] Following his ideas, it seems more likely that the two new equality concepts disprove the ideal of genuine equality by providing citizens of the European Union - and especially members of majority communities – an identity based on the idea of 'self-representation of belonging to an equal Europe'. This is occurring, importantly, without the needed change of structures between the majority and the minority, through which a diversity solution that truly provides genuine equality to

minorities could be reached. According to Youssef T. Jabareen, 'full and effective equality' can be reached through 'participatory equality.'[121] This claim entails for most states a drastic and fundamental change of state's legal system, public spaces, social and economic structures and funding and space provided for ethnic, cultural and religious institutions. Yet this is not enough to reach FEE, according to Jabareen. It also requires a full and equal sharing by states of resources in the public, internal, and historical domain.[122] Although Jabareen does not give a further explanation of the latter, one can view this in the very least tangibly: preservation and access to cultural heritage of minorities and history lessons at schools about the history of the minorities in a particular region.

'Full and effective equality' as defined by ACFC does not entail any kind of recourse or redistribution, and does not even mention a first attempt in this direction. This leads to the precautionary conclusion that ideal equality frames, which do not change structural powers between minorities and majorities, often are built up with the goal of maintaining the majority position instead of improving the state of minorities. Genuine equality is seen by some authors as closed or even identical to equality of opportunities. John Rawls states that equality of opportunities is satisfied at the point of *equality of fair opportunity*.[123] Equality of fair opportunity is reached in a society at the point where `individuals who have the same native talent and the same ambition will have the same prospects of success in competitions that determine who gets positions that generate superior benefits for their occupants. `[124] Henrard however claims that in order to reach effective equality, one needs acknowledgement of differences in starting positions which might necessitate differential treatment.[125] Equality of fair opportunities and full and effective equality might be helpful in forming ideas of how equal opportunities or genuine equality should be generated in competitive and private situations. Daily practice in Europe for vulnerable ethnic and national minorities, however, is still dominated by far reaching discrimination, a situation far from equality in fair opportunities. It is questionable if directives such as the RED structurally will change any of this.

X. CONCLUSION

Genuine Equality or full and effective equality is not easy to achieve due to the fact that individuals and groups often have different understandings of most equality notions. The main issue is that most of all the various equality protections can be reached at different levels and could include or exclude individuals and groups, depending on the used form of equality. Equality notions like FEE do not always provide improvement for vulnerable groups. Even when this idea contains a high standard of minority protection, it is still possible that the mechanism excludes particular groups.

The evidence for general non-discrimination mechanisms as used by national and ethnic minorities is overall rather limited. The most significant development in this regard concerns the top-down impact by case law of supra-national courts. This is even more valid when cases of Roma claims are included in the data, which were left out in the first part of this project. Regarding the bottom-up development of non-discrimination, the findings are the most limited. Developments in non-discrimination legislation can therefore not claim to be at the forefront of the movement from formal to substantive equality of national minorities. Merely the

link to the 'new minorities' of migrants and refugees and their respective protection mechanisms might be an avenue for national minorities to promote their cause, but one has to monitor whether that development will progress.

We saw that, ideally, special measures for minorities need to be of a permanent character to overcome the natural distance to the majority. The acceptance of this permanent character would create an application of the principle of substantive equality through special measures.

However, we conclude that positive action and special measures are still uncommon and certainly not for national minorities, but are a 'derogation' within the non-discrimination principle.[126] Being aware of the fact that special measures and positive action often are only allowed when formal equality mechanisms are insufficient to guarantee full equality and optimal minority protection, we see that currently formal equality mechanisms are, despite improvements, still too weak to guarantee genuine equality for national minorities. Also, substantive equality mechanisms still don't seem strong enough to cover this gap and do not realize genuine equality. However, substantive equality seems, for the moment, the only way to overcome past and current mechanisms of discrimination. It could be dangerous in case the current attention to substantive equality shifts the attention away from the building of a strong(er) formal non-discrimination protection mechanism. This all feeds into the concluding realisation that, by guaranteeing Full and Effective Equality, formal equality still plays a major role while positive action only comes into play when formal equality seems to be ineffective or insufficient. The lack of clarity on the differences between discriminatory policies and positive measures also do not help in this respect. Looking at the current situation, states are still not obliged by any convention or court judgement to implement positive action. More positive is that states are at least *allowed* to implement positive action (for example by the Race Equality Directive) and that it seems to become more and more common for states to also use positive measures. In some exceptional cases States could even be held responsible to treat persons differently whose situation is significantly different.[127] It remains to be seen whether the proliferation of new protected grounds will inspire the CJEU to tailor its level of scrutiny of positive action to racial or ethnic groups.[128] It also remains to be seen if the use of positive measures for certain group guarantees more equality between all groups, with the danger that states can give a preference to create positive measures only for more 'inner circle' vulnerable groups such as elderly people, the disabled, and women, instead of ethnic and racial minorities.

This study makes clear that notions like equality and non-discrimination are subject to time periods and political ideas, which raises the question of what we mean by equality for minorities and how we expect substantive equality to change over the years. It is, however, clear that reaching substantive equality for national minorities, let alone genuine equality, will still take time.

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Notes

[1] European Commission (2008): Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 52008DC0420, Brussels, 02.07.2008, at: < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0420:EN:HTML>, *op.cit.* note 1, para. 3.1.
[2] 2000 Race Directive, 2000/43/ EC, at: >http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:180:0022:0026:EN:PDF>
[3] The outcome of the Fundamental Rights Agency, EU-Midis in general and especially the outcome of the last EU-MIDI about 'Multiple Discrimination' shows that 'the majority population in EU Member States felt discriminated against less often across a range of grounds than ethnic minority and immigrant persons.' Fundamental Rights Agency, 2010, *EU-MIDIS 05 European Minorities and discrimination Surveys, Multiple Discrimination*, 4.
[4] European Commission (2008)
[5] De Vos, European Commission, *Beyond Formal Equality, Positive Action under Directive 2000/43/EC and 2000/78/EC,* Luxembourg, 2007, at <http://ec.europa.eu/social/BlobServlet?docId=1679&langId=e, 5.>
[6] Gosepath, Stefan, 'Equality', The Stanford Encyclopaedia of Philosophy (Spring 2011 Edition), Edward N. Zalta (ed.), at: <http://plato.stanford.edu/archives/spr2011/entries/equality/ chap. 1>.
[7] *Ibid.*
[8] Christopher McCrudden, *The New Concept of Equality. Fight against Discrimination: The Race and Framework Employment Directives* (Academy of European Law, Trier, 2003), 11.
[9] McCrudden, *op.cit.* note 4, 17.
[10] *Ibid.*, 11.
[11] De Vos, *op.cit.* note 38, 10-11, 14.
[12] Catherine Barnard, *EC Employment Law* (Oxford University Press, Oxford, 3rd edition, 2006), 334-335; Klaartje Wentholt, 'Formal and Substantive Equal Treatment: the Limitations and the Potential of the Legal Concept of Equality', in Titia Loenen and Peter Rodrigues (eds.) *Non-Discrimination Law: Comparative Perspectives* (Kluwer Law International, The Hague, 1999), 53-64, at 56-58, quoted from De Vos, *op.cit.* note 38, 10.
[13] McCrudden, *op.cit.* note 4, 1-24, 15 and De Vos, *op.cit.* note 38, 10.
[14] *Ibid.*, 31.
[15] *asymmetrical equality* and *equality of results* or *outcome* are all equality notions that refer to a different aspect of equality, substantive equality refers to the content of equality, asymmetrical equality to its scope and the latter: equality of results to its outcome, two other equality notions are equality of recourses and equality of capabilities.
[16] McCrudden, *op.cit.* note 4, 1-24, 17-18.
[17] De Vos, *op.cit.* note 38, 10-11, 13.
[18] *Ibid.*, 10-11.
[19] To get a good overview of the differences between 'positive action' 'special measures' 'affirmative action' we recommend Henrard, *op. cit.* note 3, 77.
[20] Arneson, Richard, 'Equality of Opportunity', The Stanford Encyclopaedia of Philosophy (Fall 2008 Edition), Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/fall2008/entries/equal-opportunity/, chap.1
[21] *Ibid*, chap.2
[22] *Ibid.,* chap.1
[23] *Ibid.,* chap.1
[24] *Ibid.,* chap.1
[25] *Tove H. Malloy,* 'Conceptualizing Democratic Diversity Management for Multicultural Societies: Theories of Society and Law', EYMI, Vol.6, 291-292
, 269
[26] Kristin Henrard, 'Non-Discrimination and Full and Effective Equality', in Marc Weller (ed.), *Universal Minority Rights. A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford University Press, Oxford, 2007), 75-148, at 87
[27] Philips, op cit. note 39, 13 in Malloy, 269

[28] Henrard, 76
[29] *Ibid;* Ann Dummett, 'Implementing European Anti-Discrimination Law: A Critical Analysis', in Jan Niessen and Isabelle Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Nijhoff, Leiden, 2004), 235-254, at 239.
[30] McCrudden, *op. cit.*, 11.
[31] Lilla Farkas, *How to Present a Discrimination Claim, Handbook on seeking remedies under the new EU Non-discrimination Directives* (Network of Legal Experts in the non-discrimination field, Publications Office of the European Union, Luxembourg, 2011), at: <http://ec.europa.eu/justice/discrimination/files/present_a_discrimination_claim_handbook_en.pdf>, 32.
[32] McCrudden, *op.cit.* note 4,11 ff.; Kristin Henrard, 'Equality Considerations and their Relation to Minority Protection, Constitutional Law, and Federalism', in Alan G. Tarr, Robert F. Williams and Josef Marko (eds.), *Federalism, Subnational Constitutions, and Minority Rights* (Praeger Publishers, Westport, 2004), 25-39, at 29.
[33] McCrudden, *op.cit.* note 4, 11.
[34] Francesco Capotorti**,** 'Are Minorities Entitled to Collective International Rights?' in: Yoram Dinstein (ed.), *The Protection of Minorities and Human Rights (*Kluwer Academic Publishers, Dordrecht, 1992), 505-512, at 508.
[35] Henrard, *op.cit.* note 3, 77; Hurst Hannum, 'The Concept and Definition of Minorities', in Marc Weller (ed.), *Universal Minority Rights* (Oxford University Press, New York, 2007) 49-74, at 73.
[36] Examples and more details will be given in the following paragraphs.
[37] Also, if one considers the approach that non-discrimination is one of the two pillars of minority protection (with identity preservation as the second) then the lines between these two pillars become blurred. Cf. Capotorti, *op.cit.* note 8*,* 508. Also, see below for more details.
[38] *Ibid.,* 508.
[39] See alone the eight cases on non-discrimination regarding national minorities at the ECtHR in the last ten years, cf. endnote 51.
[40] Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law. A Comparative Perspective* (Nijhoff, Leiden, 2009), 11; Kristin Henrard, *Equal Rights versus Special Rights? Minority Protection and the Prohibition of Discrimination.* (Thematic report, Office for official Publications of the European Communities, Luxembourg, 2007), at: <http://ec.europa.eu/social/BlobServlet?docId=1684&langId=en>, 17.
[41] European Union Agency for Fundamental Rights, *Respect for and protection of persons belonging to minorities 2008-2010* (Publications Office of the European Union, Luxembourg, 2001), at: <http://fra.europa.eu/fraWebsite/attachments/FRA-Report-Respect-protection-minorities-2011_EN.pdf>, 18; Claudia Tavani, 'The Protection of the Cultural Identity of Minorities in International Law: Individual versus Collective Rights', 9 *European Yearbook of Minority Issues*, (2010), 53-87 at 58; INTERRIGHTS, *Non-Discrimination in International Law. A Handbook for Practitioners,* (The International Centre for the Legal Protection of Human Rights, London, 2011), at: <http://www.interights.org/files/174/Non-Discrimination%20in%20International%20Law%20A%20Handbook%20for%20Practitioners%202011%20Edition.pdf>, 153.
[42] We will use the concept of an ideal type in Weber's sense. For details see Max Weber, 'Die 'Objektivität' sozialwissenschaftlicher und sozialpolitischer Erkenntnis' in *id*., *Gesammelte Aufsätze zur Wissenschaftslehre* (Johannes Winckelmann, Tübingen, 7th edition, 1988), 146-214, at 146ff.
[43] Henrard, *op.cit.* note 3, 77.
[44] Multiple discrimination can be either 'discrimination which is simultaneously based on several prohibited grounds' or 'discrimination in relation to several different rights' or 'discrimination as the result of actions by several different agents', Athanasia Spiliopoulou Åkermark, 'Minority Women: International Protection and the Problem of Multiple Discrimination' in Lauri Hannikainen und Eeva Nykänen (eds.), *New Trends in Discrimination Law - International Perspectives* (Turku Law School, Turku, 1999), 85-120, at 16f. and 105.
[45] Henrard, *op.cit.* note 12, 18.
[46] Farkas, *op.cit.* note 5, 34.
[47] ECRI, ECRI General Policy Recommendation No. 7, On national Legislation to Combat Racism and racial Discrimination, 13 December 2002.

[48] 'In European law the general definition of indirect discrimination is: where and apparently neutral provision, criterion, or practice would put people sharing a protected characteristic at a particular disadvantage compared with other people.' *Ibid.*, 36.
[49] Henrard, *op.cit.* note 12, 23 and 63; *id. op.cit.* note 3, 81.
[50] Obviously this is particularly relevant in EU primary law, since the origin of their non-discrimination legislation is rooted in the functional approach of supporting and facilitating the economic aspects of the Union and the proposed advantages from it. McCrudden, *op.cit.* note 4, 4f.; Åkermark, *op.cit.* note 16, 97.
[51] Anna Brown, 'Searching for the Aussie 'Fair Go': A Survey of the Legal Landscape and Road to Reform of Australian Anti-Discrimination Law', 8 *The Equal Rights Review* (2012), 11-31, at 22f.; Henrard, *op.cit.* note 12, 28, 38 and 65.
[52] According to the given framing of our research task, cases on Roma were left out. The said eight cases are ECtHR, Appl. No. 37586/04, *Umo Ilinden and Ivanov v. Bulgaria* (no. 2), judgement of 18 October 2011, para. 113, 116, 127f; ECtHR, Appl. No. 27138/04, *Ciubotaru v. Moldova***,** judgement of 27 April 2010, para. 49-51, 59f.; ECtHR, Appl. No. 21924/05, *Sinan Işik v. Turkey*, judgement of 2 February 2010, para. 41-45, 49, 51-52, 57; ECtHR, Appl. No. 55707/00, *Andrejeva v. Latvia*, judgement of 18 February 2009, para. 74, 88, 90f; ECtHR, Appl. No. 74651/01, *Citizens Radko & Paunkovski v. The Former Yugoslav Republic Of Macedonia*, judgement of 15 January 2009, para. 70, 72, 75f., 79f.; ECtHR, Appl. No. 1448/04, *Hasan And Eylem Zengin v. Turkey***,** judgement of 9 October 2007, para. 29, 49, 69, 75, 79, 84; ECtHR, Appl. Nos. 55762/00 and 55974/00, *Timishev v. Russia,* judgement of 13 December 2005, para. 49-59, 64, 66; ECtHR, Appl. No. 48321/99, *Slivenko v. Latvia,* judgement of 9 October 2003, para. 96, 105, 109, 114, 122f., 125, 127-129.
[53] See for example ECtHR, Appl. No. 57325/00, *D.H. and others v. Czech Republic*, 13 November 2007.
[54] *Ibid.*
[55] Henrard, *op.cit.* note 3, 81.
[56] Mark Bell, Isabelle Chopin and Fiona Palmer, *Developing Anti-Discrimination Law in Europe. The 25 EU Member States compared* (European Network of Independent Experts in the non-discrimination field, Publications Office of the European Union, Luxembourg, 2008), at: <http://www.migpolgroup.org/public/docs/6.DevelopingAntiDiscinEurope_Comparativeanalysis_III_EN_07.07.pdf >, 6.
[57] Consequently, it is the national courts that have to be checked on cases regarding the Equality Directives's. In the reviews on the implementation, effectiveness and efficiency of the Equality Directives in the EU member states, no particular focus on national minorities could be found. Therefore, specific details on the usefulness of the Directives as a non-discrimination mechanism for national minorities are still missing.
[58] ECJ, case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, judgment of 12 May 2011.
[59] *Ibid*.
[60] Colm O' Cinneide, ''The evolution and impact of Case-Law of the court of justice of the European Union on Directive 2000/43/EC and 2000/78/EC'', (Luxembourg,: Office for official publications of the European Union, 2012), 02-2013, at: <http://www.migpolgroup.com/publications_detail.php?id=371 > p. 55
[61] Barbara van Balen et al., *Synthesis report Part II - Ethnic Minorities, Migrants and Employment* (Network of socio-economic experts in the non-discrimination field, Publications Office of the European Union, Luxembourg, 2010), at: <http://ec.europa.eu/justice/discrimination/files/sen_synthesisreport2010partii_en.pdf>, 13.
[62] Arie Bloed, 'The OSCE and the Issue of National Minorities', in Alan Phillips and Allan Rosas (eds.): *Universal Minority Rights* (Åbo Akademi University Institute for Human Rights and MRG International, Turku/ Åbo, 1995), 113-134, at 112f.
[63] van Balen, *op.cit.* note 34, 30.
[64] Although cases on Roma were deliberately not covered by the first part of the research task, part two of this research shows, however, that several anti-discrimination actions were brought by Roma.
[65] Malloy, 297-298
[66] Ibid,
[67] *ibid,*
[68] *Ibid,* 285-286.
[69] *Ibid,*

[70] *Ibid,*
[71] Henrard, 123
[72] Many authors do not take these different definitions so strictly, which means that there are a lot of exceptions on the given rule.
[73] De Vos, *op.cit.* note 38, 28 and 31.
[74] Henrard, 130
[75] Henrard, *op.cit.* note 3, 77 and 129.
[76] Framework for the Protection of National Minorities, Council of Europe, CETS No. 157, Article 4.1
[77] Charter of Fundamental Rights of the European Union (2000/C 364/01)
[78] FCNM, CETS 157, Article 4.3
[79] FCNM, *Explanatory report*, CETS No. 157, para. 39 and 41.
[80] FCNM, *Explanatory report*, CETS No. 157, para. 41.
[81] FCNM, CETS 157, Article 4.2
[82] Council Directive 2000/43, Article 5 and Council Directive 2000/78, Article 7.
[83] It is however important to mention that most recent gender related case law, followed from the new gender directive, describes positive action as a 'narrowly constructed exception to formal equality, notwithstanding the identical textual references to full equality in practise.' Also it is important to mention that under Article 141(1) of the new Race Directives, positive measures are very restricted by the limited scope of employment. De Vos, *op.cit.* note 38, 28.
[84] Siobhan McInerney, 'Equal Treatment between Persons irrespective of Racial or Ethnic Origin: a Comment', 25(3) European Law Review (2000), 317-323, at 320, quoted from: De Vos, *op.cit.* note 38, and *ibid.*, 28.
[85] European Commission (2008), *op.cit.* note 1, para.2.1 and De Vos, *op.cit.* note 38, 30.
[86] Stefan Gosepath, 'Equality', *The Stanford Encyclopedia of Philosophy* (Spring 2011 Edition), Edward N. Zalta (ed.), at: < http://plato.stanford.edu/archives/spr2011/entries/equality >, chapter 1
[87] *Ibid.*, chap 1
[88] See for example: FCNM, CETS 157, Article 5
[89] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms. ETS No.177, 2000.
[90] FCNM Advisory Committee, *Thematic commentaries of the Advisory Committee, Commentary on Participation*, ACFC/31DOC(2008)001, 2008, at: <http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Thematic_Intro_en.asp>.
[91] The formal equality aspects of this FEE notion could be distinguished as follows: The right to equal protection of the law, the right to be protected against all forms of discrimination based on ethnic origin and other grounds. Substantive aspects of this FEE notion could be distinguished as follows: special measures in order to overcome past of structural inequalities. And the last aspect of this FEE notion: The assurance that persons belonging both to national minorities and to the majority have equal opportunities in various fields. FCNM Advisory Committee, 'Thematic commentaries of the advisory committee, Commentary on Participation', at: http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Thematic_Intro_en.asp, para.14.
[92] *Malloy*
[93] FCNM, Explanatory report, CETS No. 157, para. 40.
[94] Constitution of Kosovo, at: <https://www.rks-gov.net/en-US/Republika/Pages/Kushtetuta.aspx> and Law No. 03/L-047 on the Protection and Promotion of the Rights of Communities and Their Members in Kosovo [Serbia], No. 03/L-047, 13 March 2008, at: <http://www.unhcr.org/refworld/docid/4ae96cdc2.html>
[95] Youssef T. Jarabeen, *Towards Participatory Equality: Protecting Minority Rights under International Law,* (Isr. L. Rev. vol.41 No 3, 2008,) pp. 635-676.
[96] European Commission (2008), *op.cit.* note 1.
[97] *Ibid.,* Para. 3.1
[98] *Ibid.*
[99] Henrard, *op.cit.* note 3, 75.
[100] *Ibid.*, 75-76.
[101] *Ibid.*, 76.

[102] Henrard, 85
[103] Andrea Grgic, 'Recognizing Formal and Substantive Equality in the Orsus Case', 9 *European Yearbook of Minority Issues* (2010), 307-344, at 329-335.
[104] ECtHR, Appl. No. 15766/03, *Orsus and others v. Croatia*, judgment of 17 July 2008 and Grand Chamber judgment of 16 March 2010.
[105] Ibid., paragraph 155.
[106] Henrard, 112-113, and Rory O'Connell, 'Substantive Equality in the European court of human Rights?', 107 (129) *Michigan Law Review. First Impressions* (2009), 129-133 at 132.
[107] ECtHR, Appl. No. 15766/03, *Oršuš and others v. Croatia*, judgment of 16 March 2010.
[108] ECtHR, Appl. No. 32526/05, *Sampanis and others v. Greece*, judgment of 5 June 2008.
[109] ECtHR, Appl. No. 57325/00, *D.H. and others v. Czech Republic*, judgment of 13 November 2007.
[110] O'Connell, *op.cit.* note 75, 132.
[111] *Ibid*.
[112] EctHR, Appl. No. 34369/97, *Case of Thlimmenos v. Greece*, judgment of 6 April 2000
[113] Henrard, 124, ECtHR, *Case of Thimmenos v. Greece*, para 44
[114] Dimitry Kochenov, ''Citizenship without Respect: The EU's Troubled Equality Ideal'', *Jean Monnet Working Paper (NYU Law School) No. 08/10*, (March 23, 2011,)
[115] Colm O' Cinneide, 66
[116] O' Cinneide, 67
[117] De Vos, *op.cit.* note 38, 18.
[118] O' Cinneide, 66-69
[119] O'Cinneide, 66
[120] Timo Makkonen, *Equal in Law, Unequal in Fact, Racial and ethnic discrimination in the legal and the legal response thereto in Europe*, (Helsinki University printing house, Helsinki, 2010), 192.
[121] Jabareen, *op.cit*. note 66, 635 and 637.
[122] *Ibid*.
[123] Rawls 1999, section 12, and Rawls 2001, section 13, *op. cit.* in Richard Arneson, 'Equality of Opportunity', The Stanford Encyclopedia of Philosophy (Fall 2008 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2008/entries/equal-opportunity/>. chap.2
[124] Arneson, chap.2
[125] Henrard, 87
[126] De Vos, *op. cit.* note 38, 18.
[127] Henrard, 124
[128] De Vos, p.31

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