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Abstract

The European Union's equality and anti-discrimination law and policies have seen a remarkable proliferation over the last decade. Anti-discrimination principles have also been increasingly incorporated into the external dimension of EU politics and policies. The article focuses on the work of the European External Action Service (EEAS) in the field of anti-discrimination and argues that the implementation of anti-discrimination policies by the EEAS is closely linked with the building-up of the EEAS as an institution and the consolidation of the EEAS as an EU body. However, scrutinising the content of EEAS's anti-discrimination instruments it becomes apparent that definitions and concepts used are ill-defined and flawed and might even reinforce sexist, heteronormative, racist and islamophobic stereotypes. Furthermore, the myth of a 'tolerant' and 'unique' EU based on the values of fundamental and human rights is dismantled when exploring vertical, horizontal and especially internal-external incoherencies in the field of anti-discrimination.

Keywords: *European Union, European External Action Service, anti-discrimination, human rights guidelines, coherence*

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Introduction

The European Union's (EU) equality and anti-discrimination law and policies are key components of EU human rights law. Equality and anti-discrimination clauses in primary law can be traced back to the *Treaty establishing the European Coal and Steel Community* signed in Paris on 18 April 1951, which contained a stipulation to remove limitations on employment with regard to nationality. The 1957 *Treaty establishing the European Economic Community* introduced the principle of equal remuneration for equal work between male and female workers. Since then, provisions on equality and anti-discrimination have proliferated in primary law and, subsequently, also in secondary law. In addition, a broad range of EU policies promoting equality and combating discrimination have been developed, adopted and implemented. Principles of equality and non-discrimination have also increasingly been incorporated into the external dimension of EU politics and policies. Especially the *Treaty of Lisbon* represents a significant milestone concerning the enhancement of human rights by further anchoring human rights, including equality and anti-discrimination, in the EU legal framework[1].

The *Treaty of Lisbon* also paved the way for setting up the European External Action Service (EEAS) on 1 January 2011, which was established as 'a functionally autonomous body' of the EU by Art. 27 (3) of the *Treaty on European Union* (TEU) and by Council Decision 2010/427/EU. The EEAS is headed by the High Representative of the Union for Foreign Affairs and Security Policy/Vice-President of the European Commission (HR/VP). The HR/VP's mandate is spelled out in the TEU and comprises a multitude of functions, most importantly, she is entrusted with contributing to the development of and conducting the EU's common foreign and security policy. The EEAS supports the HR/VP in fulfilling her mandate and assists 'the President of the European Council, the President of the Commission, and the Commission in the exercise of their respective functions in the area of external relations' (Council of the European Union 2010, Art. 2 (2)). The EEAS is managed by an Executive Secretary-General, who is assisted by Deputy Secretaries-General. The body is divided into six geographical departments. The EEAS's staff consists of 'officials and other servants of the EU, including personnel from the diplomatic services of the Member States appointed as temporary agents' (Council of the European Union 2010, Art. 6 (2)). The HR/VP in agreement with the Council of the EU and the European Commission decides on the setting-up or closing of delegations. Union delegations are placed under the authority of a Head of Delegation, who

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[1] See, for example, Art. 2, 6 and 21 of the *Treaty on European Union.*

receives instructions from the HR/VP and the EEAS and who is responsible for their execution (Council of the European Union 2010, Art. 5).

The EEAS has been very committed to the issues of equality and non-discrimination so far. Enhancing equality and combating discrimination belong to its core human rights priorities. This article focuses on the work of the EEAS in the field of anti-discrimination. It will argue that the implementation of anti-discrimination policies by the EEAS is closely linked with the building-up of the EEAS as an institution and the consolidation of the EEAS as an EU body. According to March and Olsen an institution 'is a relatively enduring collection of rules and organized practices, embedded in structures of meaning and resources that are relatively invariant in the face of turnover of individuals' (March and Olsen 2006, 3). Institutions enable and at the same time constrain political actors and translate structures into political action. Furthermore, institutions are based on 'norms, cognitive frames, and meaning systems that guide human action' (March and Olsen 2006, 4-5). Thus, the institutionalisation of equality and anti-discrimination policies in this article refers to the establishment of common rules, procedures and practices that are increasingly based on specific norms, values and meanings of which equality and anti-discrimination principles constitute a crucial element.

The following section of this article will shortly outline the key points concerning the setting of the EEAS anti-discrimination agenda. The second section will look at the process of implementing anti-discrimination principles into the work of the EEAS, it will elaborate on the dynamics and identify specific features of the EEAS institutionalisation process in this context and also highlight opportunities and gaps in this regard. The section will furthermore scrutinize the substance of anti-discrimination instruments applied by the EEAS. It will analyse the concepts of sexual orientation, gender and religion used in three of the so-called Human Rights Guidelines, which 'provide EU representatives in the field with operational goals and tools to intensify initiatives in multilateral fora and in bilateral contacts, resulting in some intensive lobbying campaigns to promote specific human rights goals' (Keukeleire and Delreux 2014, 136). The three Guidelines examined have an explicit reference to anti-discrimination. I will argue that the categories of gender, sexual orientation and religion used in the guidelines are very often fuzzy, ill-defined and flawed and even might reinforce sexist, heteronormative, racist and islamophobic stereotypes which conflicts the 'myth' of a 'unique' and tolerant EU based on the values of fundamental and human rights (Smismans 2010, 45). In a third section, the article elaborates on the issue of incoherence, which is a particularly salient problem in the field of anti-discrimination. It reveals not only the

application of double standards with regard to third countries but also the fact that anti-discrimination is inconsistently implemented throughout different policy fields and that there is considerable variance with regard to scope and grounds of protection against discrimination. In conclusion, it will be argued that despite these contradicting and problematic aspects the implementation of anti-discrimination policies in the work of the EEAS was an inherent part of the institutionalisation process of the EEAS.

The research mainly draws from qualitative interviews conducted with representatives from the EEAS[2] and the European Commission[3]. The research is supplemented by a review of literature and an analysis of available policy documents. However, as academic literature on the topic of the implementation of anti-discrimination policies by the EEAS is scarce, the research was rather *explorative*, following a qualitative design which places the main focus of the analysis on the account and the interpretation of the persons involved and how they make sense of their lived experiences (Bloor and Wood 2006, 104). In total, eleven qualitative interviews were conducted. Issues covered in the interviews included, for example, the role of anti-discrimination in EEAS policies, evaluation of the effectiveness, impact, implementation and significance of the Guidelines, the collaboration with other EU bodies as well as Member States and other stakeholders (such as NGOs) and questions concerning gaps and challenges as well as potential room for improvement of the anti-discrimination policies and instruments of the EEAS. The interviewees were guaranteed confidentiality, thus, there will be no direct reference to any persons interviewed. Direct references and quotes are not necessary anyway as the analysis presented below aims at filtering out condensed insights that are observable across several interviews[4].

1. Setting the EEAS Anti-Discrimination Agenda

Human rights play a key role in the EU's external relations, especially since the adoption of the *Treaty of Lisbon*. The TEU states in Art. 21 that the 'Union's action on the international scene shall be guided by the principles

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[2] The interview partners (policy and legal officers) were sampled purposively, that means they are officers in charge of human rights policies in general and anti-discrimination and equality issues in particular and could give the best insight into the issues. The interview partners were all senior officers. Two interviewees were also former EEAS officers that are now working for another EU body.

[3] Interview partners were officers (Head of Unit, (Human Rights) Policy and Legal Officers, Programme Manager) from DG DEVCO, DG JUST and DG ECHO.

[4] The analysis follows the evaluation procedure by Meuser and Nagel (2005, 71-93).

which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity'. Supplementing the principle of equality, the concept of non-discrimination is laid down in Article 2 of the TEU, saying that the 'Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'. In addition, Article 3 of the TEU lays down that the EU 'shall combat social exclusion and discrimination and shall promote social justice and protection'. A clear request to consider these principles in external relations can be found in Article 3(5), which states that '[i]n its relations with the wider world, the Union shall uphold and promote its values'.

The 2012 *EU Strategic Framework and Action Plan on Human Rights and Democracy* adopted by the Council of the European Union represents an important milestone in translating these human rights commitments into political action. The Strategic Framework defines key areas and priorities of EU's external human rights policies including the fight against discrimination in all its forms. The Action Plan contains a broad range of intended outcomes and respective actions and, thus, represents a concrete implementation plan to put the EU Strategic Framework into practice. On 20 July 2015, the Council adopted a new Action Plan on Human Rights and Democracy for the period 2015-2019.

The EEAS can resort to a broad range of different instruments when it comes to integrating human rights dimensions into its work, the most important of which are the eight so-called 'Guidelines'.

> They form the backbone of EU human rights policy. Though they are not legally binding, they are adopted unanimously by the Council of the EU, and therefore represent a strong political expression of the EU's priorities. They also provide practical tools to help EU representatives around the world advance our human rights policy. Thus the Guidelines reinforce the coherence and consistency of EU human rights policy (EEAS 2012, 15).

There are three Guidelines, focussing on anti-discrimination or containing a passage on anti-discrimination:
- Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons;

- EU Guidelines on the promotion and protection of freedom of religion or belief;
- EU Guidelines on violence against women and girls and combating all forms of discrimination against them.

Although there has been made a considerable effort to accommodate principles of anti-discrimination in external relations and, specifically, within the EEAS, 'the policies on non-discrimination have been developed in a somewhat piecemeal way, depending on the priorities of successive presidencies or external events and pressures' (Lensu 2011, 256). Undoubtedly, there is not only a broad variety of different strategies, tools and instruments available for EEAS officers, the respective policy process as well as the interaction with and between different units and stakeholders are rather complex. COHOM, the Council of the European Union Working Party on Human Rights, that is entrusted with the task 'to promote the development, and to oversee the worldwide implementation, of the EU's policy in the field of human rights and democracy, including EU human rights Guidelines and human rights dialogues and consultations with third countries' (Mandate of COHOM 2014, 3) plays a key role in this process. It coordinates the deliberation and consultation process on the main important policy strategies and respective documents relevant for the work of the EEAS.

Not only the EU Strategic Framework on Human Rights and Democracy defines the fight against discrimination as an EU priority, also the interviewed officers rank the significance of anti-discrimination issues high on the human rights agenda of the EEAS. They are declared as being a key priority. There is a multitude of factors and actors influencing why and how a discrimination issue or category becomes an item on the EEAS agenda or not. The main actors in this regard are the following:

Firstly, the Council has – also legally – a very important voice since the major part of EEAS policies and tasks is under the heading of Common Foreign and Security Policy, which is bound to the inter-governmental mode of decision-making. Thus, the Council shapes the policies and work of the EEAS. The Member States represented in the Council may block or enhance certain anti-discrimination topics that are controversial or which they hold to be important. Secondly and as mentioned above, the EEAS is placed under the authority of the HR/VP and, thus, she exercises considerable influence on the agenda and on setting priorities when it comes to human rights issues, including the selection of anti-discrimination policies. However, also the HR/VP is dependent on the Council's mandate, which limits her room for manoeuvre in this field. Thirdly, the European Parliament (EP) exerts an influence on the EEAS agenda. Especially, the *EP Committee on External*

Affairs and its *Subcommittee on Human Rights* as well as the *Committee on Civil Liberties, Justice and Home Affairs* have a decisive role in this regard and frequently call on the EEAS to take into consideration anti-discrimination issues by means of reports or statements, e.g. the *Report on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity.* Fourthly, the European Commission, and in this context especially the Directorate-General for International Cooperation and Development (DG DEVCO), is a crucial partner and collaborator in terms of EEAS's human rights policies in general and anti-discrimination policies in particular. DG DEVCO is more involved in working on the procedural-operational level by financing projects, such as projects under the *European Instrument for Democracy and Human Rights*, while the EEAS is the political counterpart. In general, the collaboration with DG DEVCO on anti-discrimination policies was characterised – as one interviewee phrased it – as 'strong but not without sparks'. DG DEVCO was involved in drafting the Guidelines and, although there is no formal institutionalised bridge between the two bodies, the cooperation in this policy field is close and, according to the interviewees, seems to work rather smoothly. Fifthly, the role of the involved officers is another crucial factor. Committed officers who push the subject are said to have a decisive role when it comes to putting a topic on the agenda. Sixthly, also interest groups play a role not only concerning the fact whether an anti-discrimination issue is given more importance to become a priority issue but also in defining the issue at stake and in developing the concepts and the drafts of policy documents.

Besides these actor-related factors there are also other dimensions that have an influence on whether and how anti-discrimination is included in external relation policies: On the one hand, there is the question of how controversial and/or sensitive is the specific anti-discrimination issue at stake. This refers to the fact that especially anti-discrimination issues are often quite contentious which influences the way these issues are dealt with as well as their place on the agenda. On the other hand, external events are quite decisive in putting a specific anti-discrimination topic on the EEAS agenda and defining EEAS anti-discrimination policy priorities.

2. Dynamics of Implementing EEAS Anti-discrimination Policies and their Opportunities and Challenges

Against this background, the following paragraphs elaborate on some of the most important dynamics concerning the institutionalisation of the EEAS as an EU body that become manifest in the process of implementing anti-

discrimination principles and policies in the work of the EEAS. In doing so, they will concentrate on the implementation process but also on the impact anti-discrimination policies have on the EEAS as an institution.

2.1. Institutionalising Anti-discrimination and Equality Policies

The implementation of the *EU Strategic Framework and Action Plan on Human Rights and Democracy* had an impact on the working mode of the EEAS in general. The EEAS – especially when taking into consideration a more historical perspective and also including the working mode of the EEAS's predecessor DG RELEX, the former Directorate-General for External Relations – tended to follow a rather reactive approach. It responded to external issues and pressure exerted by other institutions, such as the EP, rather than on its own initiative. According to the interviewees, the *EU Strategic Framework and Action Plan on Human Rights and Democracy* has given the EEAS a more forward-looking, pro-active agenda and led to the development of new Guidelines, which reinforced the pro-active focus of the EEAS with regard to anti-discrimination policies.

Human rights in general and anti-discrimination issues in particular can be quite controversial, especially when it comes to issues such as rights of LGBTI persons, gender aspects, and protection of minorities which are very often 'hard to sell'. Prior to the adoption of the *EU Strategic Framework and Action Plan on Human Rights and Democracy* and the Guidelines, it was according to the interviewees to a large extent up to the officers, and particularly up to the respective Head of Missions working in the EU delegations, as well as the so-called geographical desks to implement human rights and anti-discrimination policies which were often regarded as the 'unpleasant part' of the relationship to third countries. Implementing anti-discrimination issues was to a large extent dependent on the individual commitment of the officers in charge, and personal prejudices and critical voices within the delegations could hamper the implementation especially of the more contentious issues. Not least because of the *EU Strategic Framework and Action Plan on Human Rights and Democracy* as well as the adoption of the Guidelines, anti-discrimination issues became more de-personalised. The adoption of these instruments saw an increasing institutionalisation of human rights policies that means the formalisation of rules and practices based on agreed (human rights) norms and values. This included, for example, trainings provided for all officers as well as establishing human rights focal points in all EU delegations. However, the personal and individual commitment of officers is still reported to be an important factor in implementing these policies.

The Guidelines are important instruments for the work of the EEAS in several ways: They are perceived to be a commitment by the highest political level and contain clear instructions on how to proceed, which actions to take and which arguments to use[5]. The Guidelines are an agreed language on how to talk about and handle anti-discrimination issues and, although not legally binding, they were described as being 'politically-morally binding' by an interviewee. The Guidelines, thus, constitute a considerable step towards a political-institutional commitment of the EEAS. However, the dissemination of the Guidelines involves a deliberative process, which requires a great deal of persuasion of and the provision of information on implementation to the heads of delegations. The Guidelines were also evaluated by the interviewees as making common EU standards available to all EEAS units and ensuring a consistent and uniform approach to third countries as well as other international and regional bodies and, thus, preventing double standards.

Another issue that was repeatedly raised in the interviews was the high significance of procedures and processes to implement anti-discrimination policies into the work of the EEAS. There is a tendency to put considerable emphasis on procedural aspects. For example, the three guidelines that have an explicit focus on anti-discrimination list a broad variety of operational tools describing which procedures to follow regarding third countries or in different international and regional fora (such as United Nations, Organization for Security and Co-operation in Europe, etc.) (see Council of the European Union 2008, 2013a and 2013b). Regarding third-countries, the guidelines recommend the consideration of discrimination issues in human rights country strategies, when monitoring human rights of specific 'groups', in EU Heads of Mission reports or mentioning discrimination concerns in démarches and public statements. The latter can also include individual cases of discrimination in case the person concerned gives his or her informed consent. Also the attending and observing of court hearings in such cases is recommended. Other tools are the inclusion of discrimination issues in political dialogues as well as the support of efforts by civil society. In multilateral fora it is suggested to raise discrimination issues in UN bodies and in other institutional settings such as the *Organization of Security and Cooperation in Europe* or the *Council of Europe* (see Council of the European Union 2008, 2013a and 2013b).

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[5] According to the interviews, the Guidelines make a considerable difference when dealing with problematic topics. For example, the LGBTI Guidelines had the effect that this topic was transformed from an 'awkward' topic to an issue that is widely supported within the EEAS.

The interviewees evaluated the EEAS to be very good at these procedural aspects. Officers are said to raise non-discrimination and equality topics in many regional and international fora, they are part of human rights dialogues and these issues are discussed when meeting with Member States and other EU institutions. However, the officers also reported to focus too much on, or be overloaded with, bureaucratic work. Anti-discrimination is said to become a technical, bureaucratic exercise and there is too little space to consider conceptual and strategic issues. The interviewees indicated that there is no or only little room for critical reflection, especially with regard to the officers' own attitudes and the use of conceptual approaches. This is a result of the fact that the issues at stake are also very controversial among EU Member States. The policies and activities chosen are often the lowest common denominator and/or are focusing on procedures, which are less controversial compared to focussing on substance.

Although there was a huge effort to mainstream anti-discrimination and human rights issues in all EEAS procedures, the human rights unit is still reported to be a rather isolated unit. Although the setting-up of the EEAS saw a shift from a sole task of the former Human Rights Directorate in the Commission to become 'a normal business' of any geographic desk, the expertise is still concentrated in the Human Rights Directorate of the EEAS. However, the integration of anti-discrimination and human rights policies has also increasingly become the responsibility of officers in the local delegations and geographical desks. The mainstreaming of human rights and anti-discrimination policies has paradoxically led to a 'de-expertising' of the human rights and anti-discrimination field, which has the advantage that these issues become an integral part of all levels and dimensions of EEAS work, but also the danger of a lack of expertise and sensitivity that are necessary for ensuring sustainable and effective work and policies on anti-discrimination and human rights. Although quite a major part of the EEAS workforce is using anti-discrimination language, there seems to be a lack of more detailed and in-depth knowledge, which would be necessary to fill the policies and strategies with more substance. Thus, the question of human rights and anti-discrimination training for EEAS officers became, and still is, an important topic to ensure the quality of EEAS human rights work. It further remains unclear if trainings on human rights and anti-discrimination are reaching the officers who need training or only those who are already sensitive to the subject[6].

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[6] For example, the 2011 EU report on Human Rights and Democracy in the World mentions with regard to training on gender issues for EU Delegations' staff, that 'the responses indicate that it is mostly women who receive training on gender, indicating that gender is

2.2. Hidden Norms, Flawed Definitions of Anti-discrimination Policies

The preceding sections suggest that the procedures and approaches in place to implement anti-discrimination priorities and policies are quite extensive. Anti-discrimination principles are taken into consideration in a broad range of human-rights tools and instruments used in the EEAS. However, if one looks at the content and especially at the concepts used in EEAS anti-discrimination policies the picture is less favourable. While there is a broad range of tools and instruments available where anti-discrimination plays a role, the quality of concepts used are sometimes quite problematic. Looking at the Guidelines, it is striking that although the terms discrimination and non- or anti-discrimination are used, no in-depth explanation of the concept of discrimination or anti-discrimination can be found. There is a lack of clear-cut definitions laying down what (anti-)discrimination means in reference to gender, sexual orientation and freedom of religion or belief. This means that it is up to the officers in charge to have a profound knowledge on anti-discrimination issues in general and on the topics of discrimination on grounds of sexual orientation, gender and religion or belief in particular.

Yet, despite this poorly developed or even lack of definitions and concepts, there are implicit norms or hidden concepts, which the Guidelines are based on. There are two reasons why it is important to take a closer look on these norms and concepts: Firstly, there is a considerable debate on the role of the EU as a 'normative power' (Bickerton 2011; Manners 2002; Scheipers and Sicurelly 2007; Sjursen 2006). The concept of the EU as a normative power was coined to a large extent by Ian Manners who suggested

> that not only is the EU constructed on a normative basis, but importantly that this predisposes it to act in a normative way in world politics. (…) the EU can be conceptualized as a changer of norms in the international system; a positivist quantity to it – that the EU acts to change norms in the international system; and a normative quality to it – that the EU should act to extend its norms into the international system (Manners 2002, 252).

Assuming that values of anti-discrimination and equality are an important part of the norms, the EU is based on and is extending into the international system, it is crucial to scrutinize the hidden assumptions and implicit conceptions in order to be able to evaluate if the EU is in fact able to exert this role as a changer of norms or if it rather has an inward function to 'construct

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still perceived as a 'women's issue'' (External Action Service 2012, 15).

an identity of the EU against an image of others in the 'outside world'' (Diez 2005, 614). Secondly and as already indicated above, norms and ideas are also important when it comes to the EEAS as an institution (see Carstensen and Schmidt 2016; Hay 2006). 'In other words, it is not just institutions, but the very ideas on which they are predicated and which inform their design and development, that exert constraints on political autonomy. Institutions are built on ideational foundations (…)' (Hay 2006, 65). Norms and ideas are not only an important foundation of an institution they are also a crucial factor in the institutionalisation process. In the following, each of the three relevant guidelines will be discussed in detail and the gaps and weaknesses regarding the norms, ideas and concepts used will be highlighted.

a) Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons

The LGBTI Guidelines are a comprehensive document with an introduction, including the reason for action, the purpose and scope of the Guidelines as well as definitions and the legal framework. The major part of the Guidelines is dedicated to the operational Guidelines elaborating on priority areas of action, operational tools regarding third countries and multilateral fora and general measures.

In their introduction the LGBTI Guidelines contain a, however non-systematic, list of examples of infringement of human rights against LGBTI persons. Discrimination is mentioned as being one example of a human rights violation:

> The EU is gravely concerned that sexual orientation and gender identity continue to be used to justify serious human rights violations around the world. LGBTI persons constitute a vulnerable group, who continue to be victims of persecution, discrimination, bullying and gross ill-treatment, often involving extreme forms of violence, including torture and murder (Council of the European Union 2013a, para 2).

There are several problematic points: Firstly, although the LGBTI Guidelines describe some examples of discrimination on the grounds of sexual orientation or gender identity, they do not specify a definition of anti-discrimination and equality. The Guidelines state:

> Discrimination on grounds of sexual orientation or gender identity is the most common issue facing LGBTI persons. Discriminatory legislation, policies and practices can be found in the workplace and in the public sphere, specifically regarding access to health care and education. It can include issues of bullying and other forms of

> exclusion. Discrimination and inequality of treatment are also likely
> to be found in detention facilities (Council of the European Union
> 2013a, para 19).

Thus, the Guidelines leave it to each individual officer in charge to define (non-)discrimination, which is quite a demanding task as (non-)discrimination is a multi-layered and complex concept. The Guidelines also follow a specific strategic tactic that is apparent in many prominent international documents that aim at 'protecting' the rights of LGBT persons (for example, the Yogyakarta Principles). They outline specific 'abuses, exclusions and injustices that sexual minorities face, often in great detail' (Thoreson 2009, 330) and argue that these discriminations must be prohibited because it prevents sexual minorities from enjoying their basic rights and freedoms (see ibid, 328; Donnelly 2003, 226). They explicitly call on states to comply with their human rights obligations. In doing so, they 'leave space for elites to tentatively recognize sexual minorities as a population at risk without endorsing a full slate of rights that they might not support' (Thoreson 2009, 328; see also Otto 2015, 312; Otto 2018, 6-7). Secondly and closely connect with the first point, the EU Strategic Framework on Human Rights and Democracy claims to combat discrimination on grounds of sexual orientation (Council of the European Union 2012, 1), however, the Guidelines are explicitly focusing on LGBTI persons. There is a complete silence on heterosexual persons and norms; the concept of sexual orientation is restricted to those who differ from the heterosexual norms. 'The objective is not to incorporate sexual and gender diversity, but rather to acknowledge the existence of a minority with special needs.' (Cruells and Coll-Planas 2013, 130) This is, as repeatedly pointed out by gender and queer researchers, a problematic practice as it reduces sexual orientation to those, 'deviating' from the heterosexual norm and at the same time renders the (hetero-)normative structure of the society invisible. Heterosexuality is presumed, it 'becomes invisible as a structure' (Phelan 2001, 35; see also Mayrhofer 2012, 71-72). Thirdly, the Guidelines describe LGBTI person as a 'vulnerable group'. This classification in itself is a stereotyping act as it embraces a very diverse group (e.g. with regard to social origin, property, ethnic origin, gender, age, education, etc.) under a rather stigmatising umbrella term. The Guidelines do not state that it is society, which makes a group vulnerable, but rather indicate that it is the group that is vulnerable as such. Thus, it 'focuses more on the effects of inequality for this group than on the underlying causes' (Cruells and Coll-Planas 2013, 134). It has been pointed out that the 'protection from persecution and intelligibility of some sexual minorities through human rights is neither radical nor transformative, but regulatory. […] queering international human

rights appears to involve nothing more than the wholesale pursuit of the aspirations sanctioned and valorised by the heterosexual regime, in order to prove their own humanity' (Kapur 2018, 142-143). Fourthly, although the Guidelines stipulate that 'LGBTI persons have the same rights as all other individuals – no new human rights are created for them and none should be denied to them' (Council of the European Union 2013a, para 1), the Guidelines do not mention marriage and reproductive rights as being a necessary part of the 'same' rights. They are not even included in Annex 2, which contains elements for analysis/checklist of the situation regarding the LGBTI human rights issue. However, the institutions of marriage and the definition of family are core issues when it comes to heteronormative practices coming into effect through human rights law (see, for example, Mayrhofer 2005; Otto 2015, 314; Thoreson 2009, 335). It not only leads to social stigmatisation but also excludes people deviating from the heterosexual norm from a broad range of rights and benefits linked to the institution of marriage and family rights. Through this normative bias and also through the confinement of policies in certain areas deeper roots of discrimination are not addressed.

b) EU Guidelines on Violence against Women and Girls and Combating All Forms of Discrimination against Them

The EU Guidelines on violence against women and girls and combating all forms of discrimination against them show similar problematic tendencies as the LGBTI Guidelines. On a general level, they are not very substantive regarding conceptual foundations and general information. They only contain a very short outline of the objective of the Guidelines, and a few lines with the title 'Definition' which contains a brief definition of the term violence against women while the remainder of the Guidelines is mainly dedicated to the operational part. In the annex, there is a longer introduction to the issue of violence against women, its forms, causes and consequences as well as a chapter on the international legal framework and obligations of States in combating violence against women.

There are several shortcomings in reference to the conceptualisation and covering of discrimination: First of all, although the title of the Guidelines suggests that the document is dealing with violence against women and girls as well as discrimination against them, the major part of the Guidelines is focusing exclusively on violence against women and girls. The issue of discrimination is covered only marginally in a simplified and superficial way. Secondly, apart from the paragraph laying down that 'the strategies of the Member States and of the EU in its external action must in particular focus on legislation and public policies which discriminate against woman and girls, and the lack of diligence in combating discrimination practised in the private

sphere and gender-stereotyping', there is no definition or clarification of the concept of discrimination against women and girls (Council of the European Union 2008, 2). Again, it is up to the officer to decide on the definition or concept of discrimination which is not only a demanding task but might also be a problematic when using stereotyping or stigmatising concepts. In general, these Guidelines lack of a presentation of a sound conceptual and content-related basis. Most of the Guidelines are dedicated to the so-called operational Guidelines comprising different strategies and tools for action in this field. Thirdly, the Guidelines also can be characterised by a discriminating approach by reducing discrimination on grounds of gender to women. Gender based violence against women is of course an important topic but there is again the risk of narrowing down the problem as a women's problem and, thus, reproducing stereotypes and failing to address the wider gendered context which implicates laying an increased focus on the role of men as well. It reinforces a stereotypical representation of women that is the image of women as victims of violence who are in need of protection. In doing so, they reinforce the image of the woman as a victim subject (Kapur 2002, 2; see also Scully 2009, 117). Fourthly, discrimination is a much broader topic than only being the cause for violence against women and girls as suggested by the Guidelines (Council of the European Union 2008, 15). Although indicated in the headlines the Guidelines do not take into account the different and complex dimensions of discrimination and in general fail to take into consideration the state of the art of gender research.

c) EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief

The EU Guidelines on the promotion and protection of freedom of religion or belief appear to be a quite substantive document with regard to structure, background information and conceptual basis. They reflect the same structure as the LGBTI Guidelines: The introduction contains a reflection on the reason for action, purpose and scope and definitions. Again, the major part focuses on the operational Guidelines, which lay down the basic principles of action, priority areas of action as well as a list of tools. A short final section deals with implementation and evaluation. According to these Guidelines, non-discrimination is laid down as a priority area of action in the section laying down the operational Guidelines. In Paragraph 35 the Guidelines state:

> States have the duty to protect all persons within their jurisdiction from direct and indirect discrimination on grounds of religion or belief, whatever the reasons advanced for such discrimination. This includes the duty to rescind discriminatory legislation that protects freedom of religion or belief, and halt official practices that cause

discrimination, as well as to protect people from discrimination by
state and other influential actors, whether religious or non-religious
(Council of the European Union 2013 b, para 35).

Although these Guidelines contain a reference to direct and indirect
discrimination, they do not provide a further explanation and elaboration on
how these two terms can be defined. The paragraph refers to rather explicit
dimensions of discriminations, such as discriminatory legal acts or practices
by state and other officials. A second paragraph lists a range of examples of
discrimination on grounds of religion or belief:

> Beliefs or practices that are, or allegedly are, traditional are often used
> to justify discrimination or coercion on the basis of religion or belief.
> Examples of this include denial of access to employment or education
> for women, bride kidnapping, early and forced marriage or female
> genital mutilation. Communities do not have the right to violate the
> rights of individual members of that community. All individuals,
> including women and girls, have the right to a religion or belief of
> their own individual choice, including not to have a religion or belief.
> (…)
>
> The EU will (…) pay particular attention to practices and legislation
> discriminating against women, children and migrants on grounds
> of religion or belief, including discrimination in and denial of access
> to education, coercion related to the wearing of religious symbols,
> employment, participation in public life (…) (Council of the European
> Union 2013 b, para 37).

There are several problematic points with regard to these paragraphs:
Firstly, the examples mentioned suggest that even if the drafters of the
Guidelines did not refer to any religion in particular, they had however a
specific religion in mind: the Islam. The examples are practices which are
very often associated with Islamic practices – such as 'the coercion related
to the wearing of religious symbols' or 'forced marriage and female genital
mutilation'; the examples are actually a collection of common 'Western'
stereotypes towards Muslims. Thus, the Guidelines define discrimination by
listing a range of islamophobic examples of discriminatory practices. Secondly
and closely related to the first point, they are about perceived discriminatory
practices carried out by 'others'. Again, the example of the wearing of
religious symbols is about the coercion of wearing such symbols and not
the coercion of not wearing such symbols which would be the practice of
some European countries, such as France or in some German federal states.
Thirdly, it is striking that many examples have a gender dimension as they
are about the discrimination of women. This is also quite a popular strategy,

as pointed out by various academics (Fernandez 2009, 269-286; Hasan 2012, 55-78). Islamophobia is very often expressed in a gendered way, the Islam is very often depicted as 'misogynistic and oppressive to women' by referring to examples such as veiling, forced marriages, honour killings, etc. (Hasan 2012, 55). This not only 'forces Muslim women in the category of victim' it is also, it may be argued, a racist practice which is 'hidden behind a face of concern for gender equality' (Fernandez 2009, 269-272).

To sum up, the concepts and definitions – very often implicitly – used in the Guidelines are problematic and might even reinforce sexist, heteronormative, racist and islamophobic stereotypes. The Guidelines either aim at integrating the deviant other into the dominant norm – this is about the inclusion of women into the dominant androcentric order or the inclusion of LGBTI persons into the dominant heteronormative order – or they aim at civilising and eradicating perceived discriminatory practices of others. Following Diez (2005, 613-636) and understanding anti-discrimination principles as part of the so-called 'normative power', implementing anti-discrimination principles into the work of the EEAS constitutes 'an important practice of European identity construction' (Diez 2005, 635). This became also apparent in the narratives of the interviews, where, for example, the anti-discrimination policy of the EEAS was described as 'we are unique' by one interviewee. The normative power has, as will be also argued later on, primarily an inward function, to construct and build the EEAS as an EU body, based on allegedly common European rights and values. It is, however, not necessarily a changer of norms as profound societal structures of discrimination are not addressed. The EEAS debate on anti-discrimination rather is an important part of the EU discourse on fundamental and human rights that is 'both an internal identification of the European polity, but also a positioning of the EU vis-à-vis the outside world. It presents the EU as the lighthouse of fundamental rights in the dark world of less civilized regimes' (Smismans 2010, 54). That this construction of a tolerant, unique and civilised EU is a myth which very often lacks substance becomes apparent when scrutinising issues of coherence in the field of anti-discrimination.

3. (In)Coherencies

The question of coherence, especially with regard to the external-internal dimension, was mentioned as being a key issue concerning anti-discrimination by EEAS officers and other EU officials during the interviews. EU institutions have urged for greater coherence for some time (see Portela and Raube 2012, 3). In doing so, they not only referred to the issue of external-

internal coherence (European Council 2010, 6) but also other dimensions, including *vertical* or *horizontal* coherence (Marangoni and Raube 2014, 475).

Vertical coherence, in this context referring to consistent policies in the area of anti-discrimination of the EU on the one hand and its Member States on the other hand, was mentioned several times by interviewees as being an issue that needs to be addressed. This, firstly, refers to different approaches and policies of EU delegations in comparison with national delegations in third countries. Interviewees reported that some Member States repeatedly dissociate from implementing human rights and anti-discrimination principles as laid down in EU documents such as the Action Plan or the Guidelines. Member State embassies do not feel to be constrained or bound by those instruments and tools and they do not pass on the information on these tools to their respective delegations. The reasons for this lack of support can, on the one hand, be found in economic reasons and cutbacks of resources of Member States' delegations. Thus, some Member States focus on those issues, which are of most significance to them and 'outsource' human rights topics to the EU, which they classify as being of minor importance. A second problem concerning vertical coherence in this context is the use of double standards. EU external action asks for anti-discrimination standards, which are not guaranteed at all by Member States for their own populations. In contrast, severe human rights violations are also frequently occurring in EU Member States especially against LGBTI persons, minorities (in particular Roma), women (e.g. violence against women) or in the field of religion or belief, but also topics such as racism and xenophobia are problematic issues in EU Member States. Interviewees repeatedly mentioned this as being an obstacle when it comes to promoting anti-discrimination issues in their collaboration with third countries. It seems to considerably weaken the credibility of EEAS-officers when promoting these standards in bilateral and multilateral cooperation.

Horizontal coherence, i.e. the question of consistently integrating anti-discrimination principles in different EU policy fields – in the present article with an external dimension – was also brought up as a relevant issue. Especially the lack of, or inadequate integration of, human rights and anti-discrimination policies in trade and other economic relations with third countries is a considerable point of concern. Although the *EU Strategic Framework and Action Plan on Human Rights and Democracy* stipulate to 'promote human rights in all areas of its external action without exception' and that 'it will integrate the promotion of human rights into trade (…)' (Council of the European Union 2012, 2), economic interests in general and trade interests in particular are reported to be given priority when it comes to a conflict of interest with regard to human rights principles. The problem

of trade-offs between human rights in general and non-discrimination and equality issues in particular was frequently mentioned by interviewees as a barrier to the integration of human rights and non-discrimination principles into external action (see also Beke et al., 2014). Another dimension of horizontal coherence with regard to anti-discrimination refers to the uneven implementation of different anti-discrimination aspects into EEAS policies. The EU Annual Reports on Human Rights and Democracy (European Commission 2010; EEAS 2012; Council of the European Union 2013c; 2014) reveal that, in general, anti-discrimination on grounds of gender and women rights are most extensively covered by respective action and programmes in external action. However, the emphasis is put mainly on civil rights of women (violence against women) and to a lesser extent on political, economic, social and cultural rights. The aspect of discrimination on grounds of religion is covered by the aspect of freedom of religion. The category of ethnicity is included in various aspects, either under the heading of racism and xenophobia, but also under the topic of rights of persons belonging to minorities as well as indigenous issues. Also disability is covered by the reports' thematic chapter. A main issue was the accession of the EU to the UN Convention on the Rights of Persons with Disabilities but also the enhancement of the rights of persons with disability by advocating the adoption of pertinent human rights law. Discrimination against LGBTI persons has become considerably important over the last years, firstly, due to the adoption of the Toolkit to Promote and protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People and secondly, because of the adoption of the LGBTI Guidelines. However, like in all anti-discrimination aspects the emphasis is on civil rights. Essentially, there is a huge variety as to how these issues are addressed and which approaches are taken. Some aspects such as age or social origin, property or birth are not mentioned.

The lack of coherence in EU non-discrimination policies concerning internal and external policies was classified by the interviewees as being quite severe. This not only applies to problems of discrimination and inequalities which are quite serious in some EU-Member States (see vertical coherence) but also very much to the legal and policy dimension. Especially concerning gender and sexual orientation the gap is striking. For example, the Guidelines on LGBTI persons call on third countries to promote equality and non-discrimination in the health sector and in education. However, the *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation* which was proposed by the Commission in 2008 has not been adopted yet due to the resistance of some Member States. Thus,

there is a considerable gap when it comes to scope but also with reference to the protected grounds. Concerning the internal dimension Article 19 of the *Treaty on the Functioning of the European Union* and the respective anti-discrimination directives based on this article contain a closed list of grounds (sex, sexual orientation, disability, age, racial and ethnic origin, religion or belief) – yet, with a varying scope – and *Charter of Fundamental Rights of the European Union* an open list explicitly mentioning an extended list of grounds, however, with a different scope (Tobler 2014, 521). The *European Instrument for Democracy and Human Rights* also contains an open list, essentially mentioning the same grounds as the Charter of Fundamental Rights of the European Union. The *EU Strategic Framework* explicitly includes only four grounds[7] in relation to anti-discrimination (race and ethnicity, age, gender, sexual orientation). Other grounds are listed within a slightly different formulation by stipulating that the EU aims at 'advocating for the rights of children, persons belonging to minorities, indigenous peoples, refugees, migrants and persons with disabilities' (Council of the European Union 2012, 2).

Conclusions

The implementation of anti-discrimination principles into the work of the EEAS has been a core element of the EU's external human rights policy. This article argued that this had an impact on the EEAS as an institution and contributed to the consolidation of the EEAS as an EU body by moving towards an institutionalisation of anti-discrimination principles. The implementation of the so-called Human Rights Guidelines signified the step from relying on the personal commitment of EEAS officers towards a political-structural commitment of the EEAS as an institution. However, scrutinising the anti-discrimination policies of the EEAS reveals that the focus is rather on process than on content. EEAS anti-discrimination policies have the tendency to become a technical, bureaucratic exercise and conceptual and substantial issues are neglected. The substance of the EEAS anti-discrimination policies which becomes apparent when analysing the concepts and definitions used in the respective instruments, *id est* Guidelines, are poorly developed and might even reinforce discriminating stereotypes. In addition, the incoherencies in EU's anti-discrimination laws and policies reveal that the discourse on anti-discrimination policies of the EEAS is part of a comprehensive fundamental and human rights myth of

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[7]   Although race and ethnicity are listed separately, they will be counted as one ground for the purpose of this paper, as it is normally done in the context of the internal dimension.

the EU (Smismans 2010), which invokes the assumed uniqueness of the EU in this field. Summarizing EEAS's anti-discrimination policies in terms of effectiveness it can be concluded that effectiveness concerning anti-discrimination is narrowed down to effectiveness in representation, which means that those speaking on behalf of the EU on anti-discrimination issues 'are able to aggregate the different demands into a unified position' (Elsig 2014, 328). Policies on anti-discrimination are perceived to be effective if they are evenly implemented in all EEAS units and if the EU is presenting a unified position towards external actors and in multilateral fora and bilateral relations. Effectiveness in impact, meaning to achieve EEAS anti-discrimination objectives, to have a positive and human rights promoting impact on the ground and to effectively combat structures that hamper the protection and respect of human rights, is rarely seen as an explicit objective and policies are seldom reflected according to this aspect. The myth of the pioneer role of the EU in the field of human rights in general and anti-discrimination in particular plays an important role in creating this unified position, in constructing a 'we' and the 'other' and is, thus, an integral part of the institution-building process of the EEAS.

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