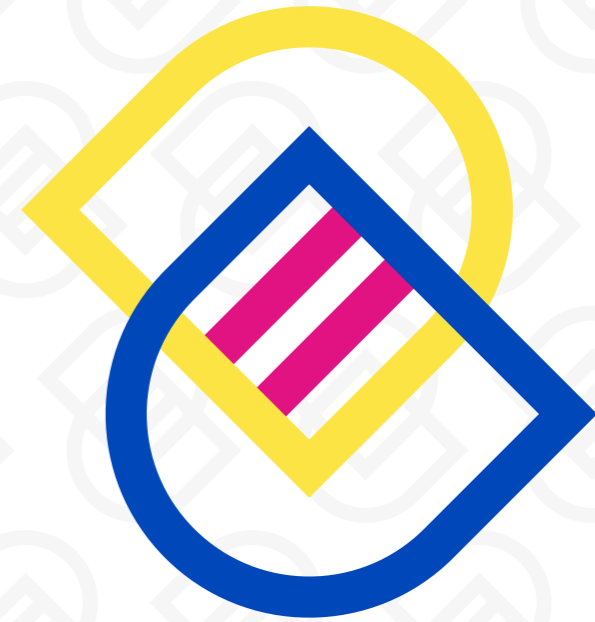


**ECRML'S CONTRIBUTION
TO THE RECOGNITION
OF LANGUAGE RIGHTS**

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Ferran Suay - Davyth Hicks



**Càtedra de
Drets Lingüístics**





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**E C R M L ' S
CONTRIBUTION TO
THE RECOGNITION
OF LANGUAGE
R I G H T S**

A U T O R S :

Ferran Suay - Davyth Hicks



First part

INTRODUCTION

Around 50 million EU citizens, 10% of the EU's population, speak a minoritised (RML) European language. Some of these languages have around ten million speakers, while others have just a few hundred. All of them, however, experience very similar problems ranging from overt discrimination and abuse to a general lack of funding, lack of provision in education and public administration, and an overall unequal status.

Since language is probably the most distinctive feature of the human species, it may appear as obvious that rights related to the use of all the languages that belong to -and have evolved in- any human community are fully-fledged human rights and should be respected and enforced as such. Moreover, since most of the social activities performed by humans use language as their main vehicle, it is difficult to think about any single human right that is not closely related to using a language. Just reviewing some of the most widely known human rights such as freedom of expression, or access to healthcare, justice or education, should be enough for us to realise that virtually nothing can be done without resorting to the use of a language. How is it possible for a human being to exert their right to an education if they don't speak the language through which the classes are taught? What happens when some children are forced to learn a different language if they want to get an education? Or if the doctors do not speak their patients' tongue? How could they provide healthcare if they are unable to understand their patients' complaints? The following is therefore bi-directional: on the one hand, language rights are and can only be human rights, and on the other, human rights can only be exercised through the use of language.

Hence, it is not surprising that, as we will see, the Office of the United Nations High Commissioner for Human Rights (UN OHCHR) considers that language rights derived from the international treaties, have a focus on: (1) Dignity: the first Article of the Universal Declaration of Human Rights states that all human beings are born free and equal in dignity and rights which is a fundamental principle and rule of international law, especially important in issues surrounding the protection and promotion of minority identity; (2) Liberty: in private activities, language preferences are protected by basic human rights such as the freedom of expression, the right to a private life, the right of minorities to use their own

language, or the prohibition of discrimination. Any private endeavour, whether commercial, artistic, religious, or political, may be protected; (3) Equality and non-discrimination: the prohibition of discrimination prevents states from unreasonably disadvantaging or excluding individuals through language preferences in any of their activities, services, support or privileges, and (4) Identity: the linguistic forms of identity, whether for individuals, communities or the state itself, can at times be protected by the right to freedom of expression, the right to private life, the right of minorities to use their own language, or the prohibition of discrimination¹.

Very specifically, the guidelines state that: "Linguistic human rights issues: (I) should be considered in any activity which involves state authorities and their language preferences; (II) are closely associated with issues of national, collective, and individual identity; (III) impact on the participation and inclusion of minorities; (IV) lead to sentiments of alienation or marginalisation and potential instability or conflict if not properly addressed in a balanced, reasonable way; and (V) occur in extremely diverse circumstances and conditions so there is no 'one-size-fits-all' approach to implementing language rights in all of the world's hugely diverse national contexts."

¹ https://www.ohchr.org/Documents/Issues/Minorities/SR/LanguageRightsLinguisticMinorities_EN.pdf



Second part
**LINGUISTIC RIGHTS AS A
INDIVIDUAL AS WELL AS
COLLECTIVE RIGHTS**

As previously mentioned, the new UN OHCHR Guidelines on the language rights of linguistic minorities² state that: “Language rights and linguistic human rights are human rights which have a bearing on the language preferences of, or use by, state authorities, individuals and other entities. As language is central to human nature and culture, and is an expression of identity, issues surrounding language are particularly important to linguistic minority communities seeking to maintain their distinct group and cultural identity, sometimes under conditions of marginalization, exclusion and discrimination.”

Although the statement is quite clear, specific and straightforward, it is widely known that minoritised language rights (LRs) continue to be disrespected in nearly all European states. Moreover, there are many laws, rules and norms designed and oriented to protect the so-called “minority” languages (RMLs), which in some cases are not at all ‘minority’ (having a low number of speakers) but simply ‘minoritised’ (subjected to restrictive political conditions in their own territories). This is the case of the Catalan language. It is spoken in territories under different State and autonomous government jurisdictions, it has over 10 million speakers, more than some of the official European languages, and enjoys a robust linguistic vitality in most of its territories. In comparison Ireland has a considerable body of legislation aimed to protect the Irish language yet, in spite of that, and that Irish is the first official language of the Republic of Ireland, the number of speakers in the Gaeltacht continues to decrease annually. It is virtually impossible to live in Ireland if someone only speaks Irish, while monolingual English speakers do not experience any disadvantage.

Therefore, when dealing with LRs the focus can not exclusively be on the availability of protective or promoting legislation but also on other aspects of language use which are, at least, relatively independent of the legal aspects.

Even if laws and norms are obviously important, most interpersonal interactions are not directly regulated by official prescriptions. As it is well-known, when a

² *ibid.*


dominant language becomes established in a territory that previously had a different one, most of the official, prestigious or high-status related functions become associated with the imposed language, which then becomes legally established as the only one to be used officially. Together with the efforts to teach the imposed language to the local population (which have become really effective with the universalisation of schooling as well as with radio and TV broadcasting), the association with prestige and officiality contributes to leading the speakers of the original language (now converted into minoritised speakers) to abandon the use of their own language in favour of the dominant one. That is why, even when the initial legislation designed to impose a language is substituted by a different one that tolerates or even is formally intended to “protect and promote” the original language, the language-substitution process continues, and many of the native speakers of the original language of the territory end up acting as active collaborators in this process (Suay & Sanginés, 2004).

Knowing a second language (different from the one learned as a first language) is not at all a problem or an obstacle to full normalisation, i.e. the restitution of the social functions to a language which has been deprived of all or some of them. European countries with small or medium-sized languages, such as Denmark, the Netherlands or Norway, do encourage language learning and most of their citizens are fully fluent in English or some other European languages, without diminishing in the least their ability to perform all kinds of social interactions through their own language. In fact, only states with dominant languages, which have often been forcefully imposed onto other communities, tend to harbour and even encourage monolingualism and a monolingual mindset as well as a quite generalised lack of interest in knowing or understanding other languages, particularly the ones that reside within their own borders.

If the frequently stated willingness of the European institutions to preserve and promote our cultural heritage is true and sincere, the current state of affairs makes it really urgent to address the problems that minoritised languages' speakers are facing all over the world. It can be done by means of a variety of approaches, which may be summarised as 'top-down' and 'bottom-up'

approaches (Suay, 2018). While the bottom-up approach should mostly focus on the speakers' behaviour and the kind of actions that may be undertaken individually or collectively, the top-down approaches are concerned with all aspects of institutional activity aimed at managing the linguistic diversity of a given geographical area, including the legislation that affects their use. This would, of course, include legislation but would not be restricted to it. Laws do need a clear willingness from States to be enforced in order to make a difference. And that is not what can be seen when looking at language rights in many cases.

One example is that of Spanish legislation in some autonomous communities which state that citizens have the right to speak their own languages during the judicial process. However, such a right is devoid of any meaning in real terms when we see how citizens are asked by officers and judges to use the State language. While citizens may make an appeal for their rights to be recognised and ask for a translation service, this is not the most common behaviour or one that can be expected from individuals who find themselves in a vulnerable situation in which an important matter will depend on the decision of the very same person who is asking them to switch into a language that (a) they are fluent in, and (2) the judge is perfectly aware that this is the case.



Third part

**FOCUSING ON EUROPE:
THE EUROPEAN CHARTER FOR
REGIONAL OR MINORITY LANGUAGES**

The Council of Europe's European Charter for Regional or Minority Languages (ECRML) is a binding Treaty for the protection and promotion of European autochthonous languages. The ECRML was adopted in 1992 by the Committee of Ministers of the Council of Europe, and entered into force in 1998. It covers two main types of languages: (a) RMLs, defined as languages traditionally used within a given territory of a state by nationals of that state who form a group numerically smaller than the rest of the state's population. This category does not apply to dialects of the official language of the state or to languages spoken by migrants. (b) The "non-territorial languages" are languages used by nationals of the state which differ from the language used by the rest of the state's population but which, although traditionally used within the state's territory, cannot be identified with a particular area. A complete list of the languages covered by the Charter may be found at: <https://rm.coe.int/states-parties-to-the-european-charter-for-regional-or-minority-langua/168077098c>

The ECRML is an innovative binding treaty aimed to protect and promote regional and minority languages and uses a menu system allowing for states to incrementally improve standards of provision for their RMLs. It celebrated its 25th anniversary last year, yet that celebration comes at a time where human rights are under threat everywhere and where language rights, if they are recognized at all, continue to be seen as the latecomer to the human rights party.

In this article we discuss the ECRML from the perspective of users of the instrument and as an organisation which works with speakers of lesser-used languages, many of which face endangerment usually because of State policies designed to eradicate them.

From the outset the ECRML took the cultural rights approach to language protection as opposed to the human rights approach, or the minority rights approach as seen in the Framework Convention for National Minorities. The Charter is designed to protect languages but not the people who speak those languages. When the Charter was originally drafted this was considered as the best approach so as to encourage States to ratify it. Jean-Marie Woehrling, one of the Charter's authors, and ELEN's first President, noted in 2011 that:

“This [cultural] approach treats regional languages as a common asset shared by all citizens. It also facilitates protection of linguistic diversity, which is characterised by the fact that it avoids opposing the national language to the minority languages. It opts for a clear plurilingual approach, with an eye to cultural pluralism: the defence of regional or minority languages is not organised against the national language but rather aspires to the rational and positive cohabitation of all the languages involved. Languages are seen as mutually reinforcing rather than competing with each other. It is not enough for the states to refrain from linguistic repression in order to ensure the efficacy of such direct protection of languages. The public authorities must evince positive involvement and conduct an active policy of supporting and promoting these languages”³.

This is the approach adopted by the ECRML is of the direct protection of languages and linguistic diversity as a cultural heritage^[1]. Under this approach, protecting a minority language (e.g. Breton or Romansch) is a matter not just for the speakers of this language (Bretons or Romansch-speakers) but for all citizens, because this regional language is a common asset. Moreover, regional or minority languages are a vital component of European culture, that is to say its linguistic diversity, which justifies Council of Europe action to promote them.”

However, while the cultural approach may have appeared appealing at the time of drafting, 25 years later, and in terms of ensuring that languages are protected, it is evident that such a cultural approach on its own is not enough and that the speakers themselves need to be protected collectively in terms of actual language rights in order to work. The cultural approach would appear to be attractive to unitary ‘one nation, one language’ states such as France and Italy in order to encourage them to ratify. However, 25 years later they still have not and it is doubtful that ECRML ratification on its own would be enough to stem the decline of their respective ‘regional’ languages. It means that if we are to see any progress in protecting the ‘regional’ languages within those states we will need to see them achieve

³ WOEHRLING, Jean-Marie; in NOGUEIRA LÓPEZ, Alba; RUIZ RUIZ VIEYTEZ, Eduardo Javier; URRUTIA LIBARONA, Iñigo (eds.) *Shaping Language Rights, Commentary on the ECRML*. Council of Europe, 2012.

co-official status in their own areas and legislation that ensures rights to use the language in every sociolinguistic domain so as to underpin their revitalization efforts. If a language is to be protected it is the speakers rights what have to be ensured.

The fact that languages existing in the same territory generally play a sort of zero-sum game in which the activities that are performed through one of them are not done by means of using any other one. This fact cannot be overshadowed by any kind of politically correct discourse aimed to depict an ideal situation in which the rights of some speakers are perfectly compatible with the privileges acquired by others. Where we have seen some moderate successes, for example in Wales and the Basque Country, it is usually because there is language legislation in place that ensures the right to use the RML in a given sociolinguistic domain. The goal, though, if the commitment to protect and promote cultural diversity is more than an empty statement, should be to restore to every language its original functions in every sociolinguistic domain.

3.1. Reporting mechanism, the value of the Reports

The State Reports have numerous benefits for RMLs and their speakers. Firstly, simply by compiling the Reports State parties make themselves more aware of the situation of the RMLs spoken on their territory and their obligations under the Charter, and on how to start to meet those obligations. Because the Reports are public the speakers of RMLs and other interested parties gain an insight in to the country’s position and policies. Some states use the preparation of the Reports as an opportunity to establish contacts and work with RML speakers and their civil society organisations. During the monitoring process, COMEX ensures that it meets RML speakers and their organisations. Because this is often followed by

[1] BLAIR, Philip. “La protection du patrimoine linguistique européen” in GIORDAN, Henri; LOUARN, Tangi (eds), *Les langues régionales ou minoritaires dans la république*. Toulouse: IEO Publications, 2003, p. 5.

The Value of the ECRML. Overall the ECRML is a useful instrument and has increased the level of protection and visibility for many European RMLs.

the media, the visit in turn raises the profile of the Charter and helps to create a broader public interest in the RMLs spoken in a State.

The Reporting process itself is relatively intense and in itself helps to create a permanent dialogue between State parties and the Committee, as well as between the State and its RML speakers. In its reports COMEX makes observations and recommendations identifying problems and suggesting improvements. The reports propose recommendations that the Committee of Ministers may address to the state party, highlighting the most problematic area where substantial measures are needed to ensure proper implementation of the Charter. In subsequent reports COMEX looks for feedback and examines how the state party in question has reacted to these recommendations.

Therefore, by looking at 25 years of COMEX reports and State party reports, these reports in themselves act as the unit whereby we are able to measure progress with effective implementation as they indicate where there has been progress and where there are gaps in implementation.

3.2. Ratification encourages recognition

Simply ratifying the Charter does have an effect on RMLs spoken in a ratifying state. For some languages the ratification instrument is the first official recognition of their language in a state. This was the case for example with Low German in Germany, Cornish in the UK, and Limburgish in the Netherlands.

In many states Romani has been recognised as a non-territorial minority language. In some countries Charter ratification led to demands for recognition of a hitherto unrecognised language, for example, the Kven language in Norway and the Cypriot Maronite language in Cyprus.

(One objective of the ECRML is to be ratified by all Council of Europe member states, although this looks like a quite objective nowadays, with powerful states such as France and Italy which have not signed the Charters, and many others that, having done so, do not fully respect it.)

3.3. Changes in legislation

Several states have seen ratification as a natural conclusion of their accomplishments in protecting their RMLs and that no further action was necessary. Something that COMEX sometimes disagreed with. States have varied in their response, some have changed problematic legislation as suggested by COMEX, while others simply maintained that no changes were necessary and did not implement any.

Out of all the specific obligations under the Charter the domain of language use in the judiciary is often in need of legislative changes. For example, as we have seen with the example of the Spanish judicial system, the right of RML speakers to use their language in court is often restricted to the interpretation covered by Article 6 of the ECHR on the right to use one's language when one does not understand the official language. In contrast Article 9 (II) of the Charter guarantees that right regardless of knowledge of the official language. Hungary was one of the countries that accepted a recommendation and changed its legislation to guarantee this right in accordance with the Charter.

Nevertheless, two important aspects have to be considered here: (1) Whenever a country does not accept the COMEX recommendations, nothing will happen, since there is not any kind of executive power attached to the ECRML, and (2), virtually all RML speakers are also fluent in the official dominant language. Since judicial situations are quite stressful and difficult for the citizens involved, when officials insist on using the dominant language, it is understandably difficult for them to keep insisting on their linguistic rights even if they are officially recognised.

3.4. Proposals for the ECRML to become a more effective instrument

The current situation can be described as one in which minoritised language rights, even in countries which have signed and ratified the ECRML are second-rate rights, and nothing happens when they are not properly enforced or even flagrantly violated. Thus, even acknowledging that the ECRML was written and

applied with the best of intentions and that it may be a useful instrument for the necessary protection and promotion of the European linguistic heritage, some changes should be implemented, if the goal is to do that in a meaningful and effective way.

Following the 2016 hearing in the European Parliament on minoritised language discrimination in the EU⁴, ELEN made a series of recommendations that, if implemented, would act to make the Charter much more effective, primarily by linking ECRML ratification and proper implementation to the existing EU infringement procedures. These recommendations include:

3.4.1. EU-wide framework to protect and promote RMLs using existing mechanisms.

1. Including the proper implementation of the ECRML and FCNM where it has been ratified accompanied with sanctions (e.g. infringement proceedings) from the EU for lack of implementation.

2. That the EU ensure that France, Italy and Greece ratify the ECRML and FCNM, both of which form part of the Copenhagen criteria for accession states.

3. That the EU puts a mechanism in place so as to ensure that access to justice is easily available to all RML speakers. This could be similar to Viviane Reding's 2014 one-stop-shop proposals regarding data protection^[1].

4. Ensure greater usage of the EU impact assessment mechanism for EU projects that affect RML speakers.

⁴ See Hicks, Davyth. *Respecting linguistic diversity? Language Discrimination in the EU*. EuroLang, 2016. <https://elen.ngo/wp-content/uploads/2018/01/LanguageDiscrimination-PDF-for-online.pdf>

3.4.2. Language discrimination is a form of racism, recognition of RML rights as a fundamental right.

The Council of Europe European Commission against Racism and Intolerance (ECRI) Recommendation 7 stipulates that language discrimination is a form of both direct and indirect racism^[2]. The EU should ensure that the scope of discrimination covered by the EU under Article 10 of the TFEU, currently including discrimination on the grounds of race, includes language discrimination, and that this is included as a fundamental rights issue. The EU should also ensure that the Fundamental Rights Agency adopts this approach and mainstreams it into its work.

3.4.3. EU Infringement proceedings for contravening Charter Fundamental Rights (CFRTs)

Ensure that the EU is both empowered and motivated to take infringement proceedings^[3] against states in cases of language discrimination, using Article 21. of the Charter of Fundamental Rights, the Race Equality Directive, and precedents set by Rule of Law.

In 2015, for example, the EU opened infringement proceedings against Slovakia regarding Roma education (2015)^[4], and the Czech Republic in 2014^[5]. In the proceeding it invoked Article 21 of the Charter of Fundamental Rights and the Race Equality Directive (2000/43/EC (RED)) Articles 2.2a, 2.2b, 2.3, 3.1.g). This precedent opens up the possibility for the EU to use the existing infringement mechanism to protect RML speaker rights.

^[1] http://europa.eu/rapid/press-release_MEMO-14-60_en.htm

^[2] http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/default_en.asp

^[3] http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/index_en.htm

^[4] <https://www.opensocietyfoundations.org/press-releases/european-commission-targets-slovakia-over-roma-school-discrimination>

^[5] <https://www.opensocietyfoundations.org/press-releases/brussels-takes-action-against-czech-republic-over-roma-school-discrimination>

Infringement proceedings are established by Article 258 of the Treaty on the Functioning of the European Union (TFEU). They provide the Commission with an effective legislative tool to ensure compliance with EU law. If the Commission believes a Member State to be in breach of EU law and considers the measures taken by the Member-States to address the Commission's concerns as insufficient, the Commission may bring the matter to the Court of Justice for the European Union.

If the Court finds a Member State has failed to fulfil an obligation under the Treaties, it will require the state to take the necessary measures to comply. ELEN has proposed that infringement of the ECRML (and FCNM) acts to trigger EU infringement proceedings against a Member State.

3.4.4. Language discrimination must be included as one of the grounds of discrimination in Article 10 of the TFEU.

Apart from unjustifiably excluding European citizens from language rights, not including language in Article 10 makes the TFEU inconsistent with the Charter of Fundamental Rights which does include languages as a ground for discrimination.

3.4.5. EU Languages Commissioner.

In order to oversee the proper and effective implementation of minoritised language rights ELEN have proposed that the EU establish the post of European Languages Commissioner or Ombudsperson. Such a Commissioner would be empowered to act over infringements of the ECRML, for example.

3.4.6 EU European endangered and minoritized languages Regulation or Directive.

ELEN have been working towards the objective of the EU and its Member States adopting a regulation that would act to substantively protect and promote European minoritised and endangered languages.



Fourth part

FINAL REMARKS

4.1. We consider that the ECRML has been and still can be an appropriate tool to promote the protection of linguistic rights in Europe. Its scope, goals and orientation, as well as the actions that have been undertaken until now point in that direction.

4.2. The Charter's limitations are not exclusive for this treaty but can be extended to many other domains of the European legislation. Essentially, they can be boiled down to a lack of real executive power, which clearly shows up in two crucial aspects:

1. States can avoid recognising (signing up) and/or ratifying the ECRML and, if they decide to follow this pathway, there is no way to officially assess the state's commitment to the protection and promotion of all languages within its borders. Despite comprising part of the Copenhagen criteria for accession states there is no meaningful obligation or sanctions for 'old' member states to ratify the Charter.

2. While some States have opted for the highest levels of commitment they are still able to ignore COMEX recommendations. Again, there are no sanctions or any other kind of measures that can be applied in order to exert pressure on States.

4.3. Even in the best case scenarios, when linguistic rights are recognised and included under domestic legislation, they tend to be looked on as second-rate rights and do not get the necessary commitment and support from the authorities to be meaningfully respected and enforced at the local and national level. Again, neither the Council of Europe or any other European treaty or institution has the capacity to force the states to respect the rights they have officially recognised. The EU is unable to influence internal State language policy as this remains the sole competence of Member States.

4.4. Many European minoritised languages are in a difficult situation and most have been defined as endangered to varying degrees by UNESCO. Either they do not enjoy official status at all or, if they do, the term 'co-official' ends up meaning 'less official' where speakers' linguistic rights are effectively meaningless.

4.5. Without the kind of executive power addressed in the previous point, the COMEX recommendations to the states, although they tend to be based on a thorough multi-level analysis performed by prestigious experts, do not enjoy any opportunity to be accepted, applied and enforced. Oddly enough, this fact is liable to promote lack of confidence and even mistrust on the European institutions, by those involved in the protection and promotion of the minoritised languages, such as language activists and civil society cultural organisations. If there is an instance to which people are encouraged to address their complaints and, in the end, that instances proves to be useless, helplessness is being objectively promoted.





Fifth part

CONCLUSION

A real executive capacity has to be attached to the ECRML (or to any other institutional tool) to serve the purpose of actually protecting and promoting all European languages, and not just the powerful ones which are already fully official in their respective states. Without this kind of capacity organisations that work to improve the social health of their languages are rendered impotent to enforce their linguistic rights, even when these have been officially recognised by the state and are included into the national, autonomous or local legislation.

If the ECRML is to flourish and obtain ratification from other European countries, some changes will have to be implemented so that it can become a much more effective instrument. If the European Union has been able to protect fish, birds, flowers or other vegetable and animal species, why has protecting its own linguistic heritage become such an impossible task?



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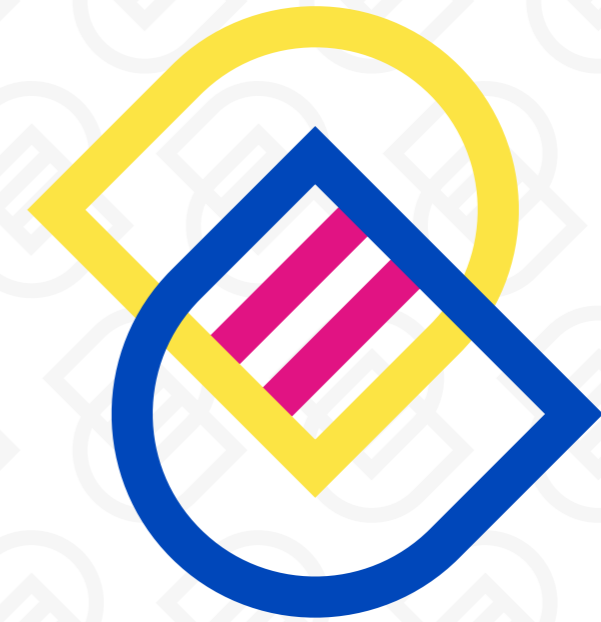
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