

## A Rough Orientation Through a Delicate Relationship: The European Union's Endeavours for (its) Minorities

**Gabriel Toggenburg**

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### Keywords

Amsterdam Treaty, civil society, East-Central Europe, enlargement, EU-East-Central Europe, European identity, fundamental/human rights, immigration policy, minorities, nationality, national autonomy, non-discrimination, political representation, positive action, regions, reverse discrimination, subsidiarity, law

### Abstract

The relationship between EC law and minority protection is ambiguous. EU law remains, at least prima facie, and in contrast to international law, silent on this topic. This is interesting as there exists a (supposed) tension between the restricting character of some minority protecting measures and the liberalising effect of the fundamental freedoms of the EC treaty. The topic seems even more remarkable given the background of the upcoming Eastern enlargement.

This contribution therefore examines, whether EU law contains commitments regarding (its) minorities, which could point at the possible establishment of a common principle of law in the area of minority protection (a latter would diminish the mentioned tension).

### Kurzfassung

Das Verhältnis zwischen Europarecht und Minderheitenschutz ist ungeklärt, da das Europarecht auf ersten Blick zum Minderheitenschutz (im Gegensatz zum Völkerrecht) schweigt. Dies ist angesichts der nahenden Osterweiterung umso interessanter als ein gewisses Spannungsverhältnis zwischen der liberalisierenden Stosswirkung etwa der Grundfreiheiten und der (potentiell) abschottenden Wirkung von Minderheitenschutz-Normen vermutet werden kann.

Vor diesem Hintergrund untersucht diese Arbeit, ob der Bestand des Europarechtes Äusserungen zu Minderheiten enthält, die einen Allgemeinen Rechtsgrundsatz zum Minderheitenschutz indizieren könnten (welcher in weiterer Folge dem potentiellen Spannungsverhältnis seine Tragweite nehmen würde).

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## 1. Introduction: Is Minority Protection an Issue in the European Integration Process? <sup>↑</sup>

International organisations such as the OSCE, UN and in particular the Council of Europe have developed intensive activities concerning the issue of minorities. The European Union (EU), on the contrary, seems to be much less engaged in this field.(1) There are several interdependent reasons for this, the majority of them resulting from the fact that the integration process has primarily been an economic project (despite the fact that it always had political aspects).(2) For this reason, the need to transfer powers to the European Community in order to intervene in political or cultural affairs by harmonising the public behaviour of the Member States towards their linguistic or ethnic minorities, has never been felt.

In addition to this (historical) explanation, it is difficult to find a common denominator on the issue of

minority protection in the EU framework. The fact that the EC is not a classic international but a supranational organisation implies that within European integration it is more difficult to escape to watered down solutions which stand somewhere between political and quasi-legal instruments.<sup>(3)</sup> Contrary to traditional international organisations, and apart from the requirement that every single EC act needs to be founded on a particular article in the EC Treaty (due to the so-called principle of enumerated powers), EC law also defines the legal forms and effects of the acts which may be adopted on the basis of an eventually introduced provision in Primary law.<sup>(4)</sup> Things might seem even more difficult for the Member States if one considers that the European Court of Justice, acting as the engine-room of the integration process, may grant the provision agreed upon a meaning or a strength which was not expected by the States. Hence it may be said that in a supranational agglomeration, still equipped with the openness of a 'moving target',<sup>(5)</sup> an initial commitment to minority issues seems to be, politically speaking, more difficult than in a traditional international context.

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In fact, the situation concerning minority issues is somewhat sobering: until the Amsterdam Treaty (signed on 2 October 1997 and entered into force on 1 May 1999), there had not been a single treaty provision dealing with the protection of minorities (apart from some indication in the Accession Treaties of the UK and Austria, Sweden, Finland, Norway).<sup>(6)</sup> This despite the fact that with the completion of the Single Market (1993) and the creation of the European Union (Treaty of Maastricht, 1992) the beginning of the last decade stands for a de-economisation of European integration. However, notwithstanding this development, there remains an evident lack of competence, i.e. a mandate provided by the Treaty's High Contracting Parties, regarding ethnic or linguistic minorities.

Looking at the interaction between the European integration process and the protection of minorities, it would be possible to make a division between the active behaviour of EC organs towards minorities on the one hand (let's call it 'positive approach') and the relation between EC law and national measures of minority protection on the other (let's call it 'negative approach'). This article attempts to exclusively analyse the development of activities in the field of minorities in the EC and EU ambit. Hence it will not speculate on the negative approach of this topic, i.e. on the issue whether in one way or another existing EC law and EC-principles hinder the national laws from protecting minorities. For the examination of the latter question it might be helpful to consider the recent judgements of the European Court of Justice in the cases *Bickel/ Franz* (25.11.1998)<sup>(7)</sup> and *Angonese* (06.06.2000)<sup>(8)</sup>: There the Court checked regional provisions aiming at the protection of the German minority living in the Autonomous Province of Bozen (South Tyrol in Northern Italy) against Community law. Furthermore, in this context, it is essential to examine the attitude of Community Law regarding linguistic restraints and to have a look at the concept of EU citizenship (especially regarding the so called third country nationals who are predominantly members of so called new minorities)<sup>(9)</sup>. But, as said above, there is no space for this sort of reflections in this paper.

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As already mentioned, the activities of the EC relating to minorities are rather scarce. Measures which have been taken to date can be divided into four groups: (a) measures of a mainly political character, developed by the European Parliament and characterised by a normative approach; (b) measures undertaken by the European Commission, the Council (and the Parliament), characterised by a functional, i.e. financial approach; (c) measures taken within the framework of the EC/EU's foreign relations, which differ from the already mentioned two groups as they are not directed at the internal sphere of the EU (which does not, however, mean that they could not also have internal implications); and (d) not minority orientated policies and programme-type measures (not treated here), which still are relevant to minority issues. These include areas such as human rights policy, anti-racism policy, asylum policy, refugee policy, the attitude towards third-State nationals, the role of the regions in the EU, etc.

## 2. The European Parliament's Minority Related Resolutions <sup>↑</sup>

In conformity with its value-orientated role the European Parliament can be identified as the organ which has revealed the most intensive interest in minority issues. In fact the Parliament says, that it *'attaches great importance to the participation of cultural, racial and ethnic minorities in both social and political decision making processes'* and that Parliament itself should *'represent the cultural diversity of Europe'*.<sup>(10)</sup> To date several motions for resolutions dealing with the situation of minorities have been initiated within the European Parliament, though only a few of them have succeeded in being considered for further discussion. One has to bear in mind that the resolutions described in the following are of non-binding nature (due to this fact it was possible to legislate without referring to a specific competence basis) and therefore lack real practical effect.

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### 2.1. The 1981 Resolution <sup>↑</sup>

The 1981 European Parliament Resolution on a Community Charter of Regional Languages and Cultures and on a Charter of Rights of Ethnic Minorities,<sup>(11)</sup> requested national, regional and local authorities to allow and promote the instruction of regional languages and cultures in official curricula from nursery school up to university level; to allow and to ensure sufficient access to local radio and television; and to ensure that individuals are allowed to use their own language in the field of public life and social affairs in their dealings with official bodies and in the courts (para. 1). The Resolution recommended, furthermore, that the regional funds should provide assistance for projects designed to support regional and folk cultures and regional economic projects (paras. 4 and 6). Finally, Parliament called on the Commission to review all Community legislation or practices which discriminate against minority languages (para. 5).

### 2.2 The 1983 Resolution <sup>↑</sup>

In 1983 Parliament passed a *'Resolution on Measures in Favour of Linguistic and Cultural Minorities'*.<sup>(12)</sup> Considering that some 30 million EU citizens have as their mother tongue a regional or a little spoken language, Parliament underlined the importance of the above-mentioned resolution of 1981, and again called upon the Commission to continue and intensify its efforts in this area; the Commission was asked to report the practical measures taken or due to be taken in the future to the Parliament. The resolution furthermore called upon the Council to ensure that the principles laid down are respected in practice.

### 2.3. The 1987 Resolution <sup>↑</sup>

A new *'Resolution on the Languages and Cultures of the Regional and Ethnic in the European Community'* (the so-called Kujpers Resolution) was adopted by the Parliament in 1987.<sup>(13)</sup> After regretting the lack of any progress in this matter, in this Resolution the Parliament provided different recommendations to the Member States in the field of education, the mass media, cultural infrastructure, economic and social life as well as in the field of State administration and jurisdiction. In this last area the Parliament recommended in particular:

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- to provide 'a direct legal basis for the use of regional and minority languages, in the first instance in the local authorities of areas where a minority group does exist',
- to review 'national provisions and practices that discriminate against minority languages',
- to require 'decentralised and central government services also to use national, regional and minority languages in the areas concerned' (para. 6).

It also officially recommended the recognition of surnames and place names expressed in a regional or minority language as well as the acceptance of place names and indications on electoral lists. Furthermore the measures should include:

‘providing for the use of the regional and minority languages in postal concerns (postal services, etc.), . . . providing for consumer information and product labelling in regional and minority languages, providing for the use of regional languages for road and other public signs and street names’ (para. 9).

The Parliament furthermore underlined the need for economic support and stressed its determination to ensure that at least e 1,000,000 would be provided by the 1988 budget in favour of minority languages. It also stated that the Intergroup on Lesser Used Languages would be granted full status as an official Intergroup of the European Parliament.(14)

Further developments led to a report establishing a Charter of Rights for Ethnic Groups in 1988. Parliament never took a decision on this so-called ‘Stauffenberg report’,(15) as its term of office was running out. After the elections, the Parliament’s Law Committee resumed work on a revised version of the Stauffenberg report and Count Stauffenberg’s successor, Siegbert Alber presented the so-called ‘Alber report’ in 1993. This report incorporated much of the contents of the draft of the Federal Union of European Nationalities (FUEN).(16) As the Parliament wanted to observe which position the developments inside the Council of Europe (regarding a Charter on Regional and Minority Languages)(17) would take, it did not reach a decision on this revised report.

## 2.4. The 1994 Resolution [↑](#)

As a follow up the Parliament adopted, in 1994, a ‘*Resolution on Linguistic Minorities in the European Community*’ on the basis of the so-called ‘Killilea report’,(18) which again referred to the Arfé resolutions and pointed out that the Member States should recognise their linguistic minorities and create the basic conditions for the preservation and development of these languages. The legal acts should

‘at least cover the use and encouragement of such languages and cultures in the spheres of education, justice and public administration, the media, toponomics and other sectors of public and cultural life’ (para. 4).

The Parliament, furthermore, called upon national governments and parliaments to sign and ratify the Council of Europe’s Charter on Regional Languages, and recommended further financial support for the national Committees of the ‘European Bureau for Lesser Used Languages’ (EBLUL). It also called upon the European Commission to take account of the lesser used languages and their attendant cultures when elaborating various areas of Community policy. The Parliament desired the European Council and the Commission to

‘ensure that adequate budgetary provision is made for the Community’s programmes in favour of lesser used languages...and propose a multi-annual action programme in this field’ (para. 11(b)).

The European Regional Development Fund should allocate for such purposes, and EC programmes for economic and social reconstruction should take due account of speakers of lesser used languages spoken in Central and Eastern European countries. Finally, the European Parliament specified that all these recommendations should also be applied to non-territorial autochthonous minorities (expressly mentioning the Roma and Sinti) which as such do not jeopardise the territorial integrity or public order of the Member



States.

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## 2.5. The EP's mainstreaming approach <sup>↑</sup>

In documents treating human rights policy, cross-border co-operation, treaty revision or racism the Parliament usually mentions minority consciousness as an important aim. This goes also for the resolutions of the EP, in which the political situation of specific countries is commented.

In its *”Resolution on human rights in the world in 1997 and 1998 and European Union human rights policy”* the Parliament

’notes that many of the most violent conflicts around the world in recent years have involved problems related to minorities... Will draw up a definition of minority rights in order to lend greater weight to its policy... Calls for a redoubling of international efforts to end large scale discrimination against religious, national, linguistic or ethnic minorities and to help resolve inter-ethnic conflicts... Calls for greater recognition and protection of communal rights, and in particular of the rights of indigenous people... Calls for the strengthening of international monitoring mechanisms in relation to minority rights...Stresses the importance of EU support for the just treatment of minorities in Central and Eastern European countries, in strict observance of fundamental rights and freedoms and the principles of equality and citizenship and without undermining their identities, particularly in candidate countries’.(19)

In this context the Parliament uses a wide concept of minority as it says in its *’Resolution on respect for human rights in the European Union’* 1997 that an accession to the European Union is out of question for states

’which do not respect fundamental human rights, and calls on the Commission and Council to lay particular stress on the rights of minorities (ethnic, linguistic, religious, homosexual etc.) at the time of enlargement negotiations’ (20).

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Another example of this mainstreaming approach is the *’Resolution on racism, xenophobia and anti-Semitism and on further steps to combat racial discrimination’* where the Parliament states that combating discrimination against immigrants and religious minorities is *’integral to any comprehensive policy against racism and xenophobia’*. Indeed there the Parliament says very clearly that it attaches great importance to *’the participation of cultural, racial and ethnic minorities in both social and political decision-making processes’*.(21) In its *’Resolution on the role of public service television in a multi-media society’* the Parliament calls on public service broadcasters *’to enact real equal opportunities to improve the representation of women and ethnic minorities in all television employment’*.(22) And in the Parliament’s *’Resolution on poor conditions in prisons in the European Union’* special reference is made to *”particular groups requiring specific treatment: women, immigrants, homosexuals, and members of ethnic and religious minorities’*.(23)

In Resolutions on specific countries the Parliament stresses the importance of equal access for all sections of society to training and education (*’Resolution on the political situation in South America’*)(24), underlines the importance to guarantee equal rights to religious minorities (*’Resolution on the violation of political and human rights in the Islamic Republic of Iran’*)(25) and states that the only path to recognition of the international community and to a solution of a deep internal crisis is a meaningful political dialogue between

the (Burma-) authorities and representatives of ethnic minorities (*Resolution on Burma*, 1999)(26).

## 2.6. Resolutions regarding specific minorities [↑](#)

Last but not least one has to mention those EP-Resolutions which are treating one specific minority. Whereas the *Resolution on the situation of human rights and indigenous minorities in Argentina* (protesting against land allocation)(27), the *Resolution on the political rights of minorities in Albania* or the *Resolution on the protection of minority rights and human rights in Romania* (the latter being very detailed and aiming at the removal of specific national provisions which restrict the use of minority languages at school)(28) have mere external character, the *Resolution on discrimination on Roma* refers to an (also) EU-internal situation. In the latter the Parliament recognises the special Roma-culture and announces a special report *as a matter of urgency* and calls on the Commission to increase its efforts to help the Roma people *to integrate in the societies in which they live and to contribute to that culture*.(29)

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## 3. Other EC Measures Sustaining Minorities and Minority Languages [↑](#)

The second group of measures taken within the EU includes measures adopted by or in collaboration with other EC organs. Due to the lack of normative competence in the field of minority protection, it was not possible to create binding normative acts such as directives or regulations. Hence the approach was more of a mainstreaming one. This implies that the measures are of a technical nature (for example, providing for a budget sustaining minority-favouring institutions and/or activities) and it is thus only possible to provide an idea as to what has been done in this context.

### 3.1. Financial support favouring minority protection [↑](#)

Calls by the Parliament in the first Arfé Resolution soon produced results. In 1982 a non-profit organisation, the European Bureau for Lesser Used Languages (EBLUL), was founded. This Organization considers itself to be representative of the 50 million EU citizens who speak more than thirty different autochthonous languages. It seeks to promote and defend these regional or minority languages and the linguistic rights of those who speak them. The Bureau is independent, its members are volunteer associations and official institutions active in the promotion of minority languages throughout the EU. The members' associations are organised within 13 Member State Committees (Portugal and Greece are excepted). EBLUL is mainly funded by the European Commission.

In 1982 the European Parliament established the B3-1006 budget line which provides funds for financing measures supporting lesser used regional or minority languages. This position has been renewed yearly(30) and the amount has been steadily increased, from 100,000 ECU in 1983 up to 4 million ECU in 1995-1996).(31) The 1999 *support from the European Commission for measures to promote and safeguard regional or minority languages* provides 2,250,000 ECU (OJ 1999 No. C 125, pp. 14-18). This support will be used for co-financing (up to 50%) of projects aimed at improving the quality of learning and the instruction of regional and/or minority languages as well as at preparing a future dissemination of information, experience and expertise in the field of regional/minority languages. The languages which may benefit from this budget are the indigenous languages traditionally spoken by part of the population in an EU Member State. Dialects, migrant languages and artificially created languages are excluded. 75-90 projects are expected to be co-financed by the 1999 budget.(32) In the quoted Communication the Commission seems to encounter possible reservations concerning competencies or political implications when stating that *'In consideration of member States' own powers and the principle of subsidiarity, any activity with a political or legislative impact is excluded'* (see end of page 14 of the quoted OJ).

There has been criticism(33) that there is no multi-annual action programme providing long-term financial support. The Commission is currently examining the feasibility of proposing such a programme.(34) For such a budget position the Commission will have to find an appropriate legal basis.(35) A last example for the Commissions interest in minority issues serves a call for proposals for a "study on linguistic minorities in the European Union – strategic analysis of options for Community action".(36)

### 3.2. Various studies on minority issues cofinanced by the EC ↑

Following Parliament's Kuypers Resolution, the European Commission and EBLUL started the establishment of the MERCATOR programme.(37) The MERCATOR network consists of four research institutions(38) which deal with general issues (interdisciplinary studies, seminars on the status of ethno-linguistic minorities), formation (studies on bilingualism and bilingual instruction), media and minority languages (establishment of a database and a MERCATOR media guide), and legislation (overall collection of language-related legal sources). Until 1994, the network was co-ordinated by EBLUL, since then by the European Commission.

In addition, a number of studies have been published by the EC: in 1984 the Commission published a study on the situation of the lesser used languages in the European Community,(39) in 1990 a study on the situation of linguistic minorities in Greece, Spain and Portugal,(40) and in 1992 the Commission (DG XXII) put a new study on the minority languages out to tender, highlighting the growing value of diversity for economic deployment and European integration. A network of researchers from important research institutions was established,(41) charged with elaborating a project aimed at providing a methodologically sound study permitting a comparative understanding of the current situation of the various language groups.(42) This project – known as EUROMOSAIC – in 1996 led to the publication of the EUROMOSAIC report on 'The production and reproduction of the minority language groups in the European Union'.(43)

Especially the EU's eastern enlargement provided an impetus to look beyond the linguistic dimension of minorities in Europe, giving the minority question a clear political (and legal) dimension. This new approach, however seems to be limited to the minorities in Central and Eastern Europe. The European Commission (within the PHARE Programme) co-financed a Joint Programme entitled 'Minorities in Central European Countries' together with the Council of Europe, which included seminars(44) on 'minorities and media', 'minorities and education', 'minorities and participation in decision-making processes'.(45)

### 3.3. The cultural dimension of EU as access road for minority favouring measures ↑

The Treaty of Maastricht gave the process of European integration a clear trans-economic dimension by establishing a political Union. Within the context of minority rights, of special interest is Title IX-Culture (Article 128 TEC)(46), as it clearly emphasises the cultural dimension of the European integration and at the same time indirectly recognises that not a single Member State is culturally homogenous(47): The EC is asked to contribute to the flowering of the 'cultures of the member States, while respecting their national and regional(48) diversity'.(49) Very recently the importance of diversity has been reaffirmed by the introduction of a new Art 22 in the Draft Charter of Fundamental Rights of the EU, which states that "The Union shall respect cultural, religious and linguistic diversity".(50)

The cultural approach of the Community is designed to be a multi-political one as it shall 'take cultural aspects into account in its action under other provisions of the Treaty ...' (Article 151 para. 4 EC, ex Article 128 para. 4 TEC). This kind of 'cultural impact assessment clause' establishes culture as an aspect which



has to be respected by the Community *semper et ubique* thus providing a major role to this competence provision. It is interesting to note that this latter clause was then functionally specified as Amsterdam added ‘... *in particular in order to respect and to promote the diversity of its cultures*’.

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Furthermore, one ought to draw attention to the changes inserted in the subvention provisions which allow, to a certain degree, the financial assistance to cultures by stating that ‘*aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest*’ can be considered compatible with the internal market.(51) Culture and other new Community competencies such as education(52) opened up new legislative possibilities, or better still, gave them a solid basis, as one has to state that cultural measures had already been taken in times in which the integration process was formally limited to the economic dimension.(53)

A striking example of the fact that already during the pre-Maastricht period some cultural, and in this case minority protective measures were offered is the Council Directive dated back as far as 1977, referring to the education of the children of migrant workers (EU citizens) in their own mother tongue as well as studies on their home regions.(54) The exclusive legal basis for this Directive was Article 49 of the EC Treaty.(55) This act seems *prima facie* to be only remotely linked to the free movement of workers. It furthermore suggests that Articles 48 and 49 TEC not only push the Member States into abolishing existing forms of discrimination which jeopardise the mobility of workers, but seems to function also as a basis for adopting affirmative actions on behalf of migrant workers in order to enhance the mobility. The Directive appears to express the view that the free movement of workers should not threaten the cultural identity of persons concerned (although on the other hand, linguistic variety existing within the Community may not impede this free movement).(56)

In the field of culture different programmes (some of them already in existence before Maastricht) provide financial support also for minority-relevant situations such as, for example, the translation and dissemination of works of contemporary literature in lesser used languages,(57) the conservation of regional culture,(58) its promotion(59) or research on minority languages.

This changing legal background and political statements as e.g. the following made by President Prodi

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”...we must never forget that Europe is all about diversity. Therefor it needs us to respect and reap the rewards of diversity. European integration has always been about diverse peoples with varied cultures.....Diversity is one of Europe’s greatest treasures...”.(60)

show that diversity is perceived more and more as something which has to be protected and something, Europe has to be based upon. The political commitment to the concept of cultural diversity and its correlation with the protection of minorities results also from the following declaration of the entire Council:

‘Europe, characterised by solidarity and a rich cultural mix, is founded on respect for diversity and on tolerance. All Member States ... are continuously striving to build and maintain a Europe based on ... the diversity of its cultures and languages, a Europe where ... rights of Minorities are protected’.(61)

### 3.4. A hint at the regional dimension of both EU and minority issues

Regarding the regional dimension of the integration process, which has been enhanced in the Maastricht

Treaty and which is often considered to be of significant importance for minorities(62), one should not be too optimistic. The establishment of the Committee of the Regions and Local Authorities (CoR) indicates a specific commitment to the constantly growing role of the regions in Europe.(63) But COR holds a purely advisory status. It consists of both regional and local level representatives, which are appointed by the Council upon the recommendation of national governments and must be consulted by the Council and Commission only in a restricted range of policy areas (including education, culture, economic and social cohesion). Nevertheless, one has to say that strong legislative and administrative powers of the regions in Europe (guaranteed through an effective insertion of regional interests in the legislative processes at the European level) as well as a widening of the subsidiarity principle established in Maastricht (which up to now only regulates the relationship between the national and the communitarian level - see Article 5 TEC), the flowering of regional cultures (through different EC financial programmes) and strong regional economies (through an effective EC regional policy)(64) tendentiously (!) favour minorities. The realisation of the Autonomy, Welfare and Culture-Protection triangle (AWCP conditions) in a given region may produce a situation in which the legal protection of minorities becomes less urgent. This, however, is valid above all for those minorities who build a majority in a geographical region which coincides with the administrative region gaining advantages from the above mentioned Community policies and institutions.(65) Anyway, there is no doubt that trans-regional co-operation favours minorities living in border areas. In fact the Parliament states in its *'Resolution on cross-border and inter-regional co-operation'* that *'co-operation between border regions can improve the opportunities for many European linguistic minorities to preserve and develop their culture, by helping to build structures which support the minority'*.(66)

### 3.5. Economic aspects

EU-politicians have realised that social exclusion, attendant problems and discrimination produce economic costs as these factors lead to unemployment, inadequate access to public and private services and wasted talents. On the other side surveys show that inclusion practised in companies fosters productivity.(67) In fact minorities seem to be perceived ever more as economic potential. A Commissioner stated that *"immigrants and ethnic minorities play an important role in Europe's economic development. Europe needs skill, talent, innovation and diversity. Immigrant and ethnic minority groups help provide these crucial qualities"*.(68)

Anyway, the will to integrate minorities in the European economies is not limited to mere political statements. The Commission's Communication concerning the Structural Funds stresses that *'special attention should be given to the needs of ... ethnic minorities ... and to the development of appropriate preventive and active policies to promote their integration into the labour market'*.(69) Furthermore, there are efforts to *'raise awareness and capability'* in particular in minority groups for the opportunities offered by information society. Also the multi-annual programme to promote the linguistic diversity of the Community in the information society (MLIS) aims (also) at promoting a multilingual Europe and partly funds MELIN (Minority European Languages Information Network).(70)

Another example of the economic area can serve the initiative Ethnic Minority Business Network (EMBNET)(71) which is co-financed by the Commission and basically designed to augment the contribution of ethnic minority businesses (EMB) to local and national economies and to identify and transfer the best practices in the development and expansion of ethnic minority enterprises among EU Member States.

## 4. Minority Protection in the European Community's Foreign Relations

### 4.1. Minority Protection becoming part of EU's external habits

The impetus for using EC Foreign Trade to promote human rights in third States emerged quite immediately after the entry into force of LOMÉ I, when the European Parliament urged the Council – after the killing of several hundreds thousands people in Uganda – to suspend the flow of money directed towards this country. LOMÉ IV (1989) contained the first proper human rights clause in an EC agreement with third states. Since then different types of human rights clauses, varying in content as well as in enforcement, have been developed. Accordingly, in the period following May 1995, the agreements have contained reference either to the Universal Declaration of Human Rights or, when the partner State is an OSCE State, to the OSCE principles.

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The treatment of the Kurdish minority was, *inter alia*, the reason for which the European Parliament questioned Turkey's application for membership. An even more striking commitment regarding minorities was taken after the collapse of former Yugoslavia. The then twelve Member States convened an international peace conference in The Hague, where they established the so-called Badinter Commission which was responsible for delivering expert opinions on legal questions arising from the dissolution of SFRY.(72) As a follow up to an expert opinion by this Commission, the EC Member States agreed on a common position concerning the condition for the recognition of statehood: On 16 December 1991 the Foreign Ministers issued, within the framework of European Political Co-operation, a Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union and the Declaration on Yugoslavia. This recognition was made conditional upon amongst other things:

‘guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE’.(73)

The EC thereby introduced(74) minority protection as a new element within the spectre of conditions for the recognition of statehood.(75)

The EC/EU has been subjected to criticism because the emphasis given to the minority issue in external relations presents a kind of double standard as the Community still ignores, at least formally, the issue of minority protection within its own borders.(76) Concern for minorities seems to be ‘*primarily an export article and not one for domestic consumption*’.(77)

In fact minority protection is to be found in resolutions issued by the Joint Assembly of the Convention concluded between the African, Caribbean and Pacific States and the Community, in Agreements on partnership and co-operation, in Council regulations on assistance to and co-operation with developing countries in Asia and Latin America. Furthermore, minority protection is a general element of reports on third countries. The ‘*Guidelines for joint reports on third countries*’ state that the ‘*situation of minorities*’ is a point which has to be specified. These reports have to contain ‘*specific information on persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion*’.(78)

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## 4.2. The Pact on Stability in Europe

It was already in March 1992 that Balladur, the then French Prime Minister, proposed a sort of stability pact, which was to guarantee good neighbourliness and hence security in Central and Eastern Europe.(79) The French initiative was taken up in December of the same year by the Council of the Community which decided to convene a conference. The scope of this initiative was to improve neighbourly relations by avoiding the issues of borders and by establishing minority rights, with the prospect of accession to the

European Union as an incentive.(80) The ‘Pact on Stability’ was adopted at the conference held in Paris on 20-21 March 1995 by the representatives(81) of 52 Member States of the OSCE. It consists of a mere Declaration and a list of 130 bilateral agreements, almost all of them already concluded before the signing of the Pact.(82) The role of the Union was that of initiator,(83) moderator(84) and finally that of sponsor for the Central and Eastern European States,(85) but it had no direct impact whatsoever on EU law and the Communities. After the Pact was signed, the OSCE became responsible for its implementation. The Pact showed that minority issues are of crucial importance for European politics and that in the view of the European Council the ‘*action in these areas [was] timely and appropriate*’.(86) The European Council saw in the Pact, despite its geographically open character, a means by which to exercise some influence on the candidate countries in the political sphere.(87)

### 4.3. Minority rights as accession criteria

At the meeting held in Copenhagen in June 1993, the European Council decided ‘*that the associated countries in Central and Eastern Europe that so desire shall become members of the European Union*’ and established conditions to be fulfilled before accession. These conditions present an important element in the Union’s Accession Strategy and form the basis for the first Opinions of the Commission on the candidate countries, for the Accession Partnerships as well as for the regular reports of the Commission on the progress of the candidates towards EU membership. Recent developments reveal that the criteria for minority protection are also becoming a crucial element of the EU’s new policy towards South-Eastern Europe.(88)

One of the political criteria of Copenhagen (beside democracy, rule of law and human rights) is that the candidate country demonstrates ‘*respect for and protection of minorities*’.(89) When, in July 1997, the Commission presented its Opinions(90) as to whether and to what degree the applicant States fulfilled the conditions for being admitted to accession negotiations, it discussed the respective minority situations in detail, using a broad definition of both minority groups as well as of minority protection.(91) In November 1998 the Commission issued its first regular report in which it analysed whether, in the light of the Copenhagen criteria, the reforms announced or indicated have in fact been implemented since July 1997. A so-called ‘composite paper’ contains a synthesis of this as well as further recommendations. In its part concerning minorities the Commission welcomes the developments in Latvia and regrets the situation in Estonia. The Commission underlines the discrimination against Roma taking place in Hungary, Slovakia, Bulgaria and the Czech Republic. The situation of the Hungarian minority in Romania is seen in a positive light, but some concerns are expressed about the Hungarians in Slovakia. The Commission concludes that ‘*overall, the problem of minorities continues to raise concerns in the perspective of enlargement*’.(92) On 13 October 1999 the Commission issued the second and on 8 November 2000 the third round of their regular reports for each candidate country.(93)

Finally, the Accession Partnerships (APs) adopted in 1998 indicated certain short-term and medium-term priorities including also minority items for each candidate state. Slovakia is requested to adopt legislation on the use of minority languages and Latvia and Estonia should facilitate the conditions for the naturalisation of non-citizens. In the medium term it is recommended that the Czech Republic, Hungary, Bulgaria and Romania improve the integration of the Roma population.(94) The new APs were issued on 13 October 1999.(95) Apart from the above mentioned instruments, further mechanisms and *fora* of the enlargement process such as the ‘*structured relationship*’ may be instrumentalised in order to exert delicate pressure on the candidate countries so that they fulfil the criteria defined in Copenhagen.(96)

According to these preliminaries one may conclude that the criteria of Copenhagen turned out to be a kind of ‘structural principle’ of the enlargement process. The Amsterdam Treaty transposed all the Copenhagen-criteria -except the one concerning minority protection- into Primary law. By doing so, the Treaty gave the criteria a clear legal quality and defined them as founding principles of the EU which are



common to all the Member States (internal dimension, Article 6 (1) TEC) and which are to be respected by any State applying for membership (external dimension, Article 49 TEC).(97) The fact that the minority clause was kept separate appears to indicate that its inclusion – whereby it would have assumed a clear binding force and an internal dimension – was not desired. Hence it is necessary to examine the expressiveness and the nature of a Copenhagen criterion which was not elevated to the nobility of Primary law.

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It was, indeed, the first time that the Community established criteria for the accession of new Member States by adopting Presidency Conclusions. In general, the regular conditions for accession are found in Primary Law (Article 49, formerly Article O TEU) and in the Accession Treaties which are to be signed by the Member States and the acceding State (see Article 49 TEU). Furthermore, also the *aquis communautaire* is considered to be a condition for accession as the new Member States have to comply with it. The reason for establishing ‘additional’ conditions for accession in Copenhagen was probably to give originally internal obligations (*aquis*) a more visible external direction (as they are directed towards the applicant States) without limiting the Community organs and Member States too much in their freedom to regulate accession to the Union: The Copenhagen criteria are not legally binding; they are merely of a political nature, being adopted in the conclusions of the European Council. Nevertheless, in an indirect sense they might be seen as legally binding in as far as they reflect already existing law.(98) Hence the question whether ‘*respect for and protection of minorities*’ is part of the *aquis* or not, should indeed be raised. If no legal Community standard is identified, the standard applied in the course of eastern enlargement has to be of (more or less) political nature.(99)

## 5. Establishing *Nolens Volens* Minority Protection as Internal Common Principle of Law? <sup>↑</sup>

Whereas various examples reveal that there are strong EC expressions of respect for minorities *inside* the Communitarian system, the measures undertaken are still limited to the non-legally binding resolutions and financial support for concrete measures and projects. Also in their *external* relations, the European Community, the Union (indeed, the CSFP provisions involve a programmatic indirect hint at the protection of minorities)(100) and individual Member States (for example, within the framework of the Council of Europe) have revealed a substantial interest in the issue of minority protection. Since in international relations there is no duty of formal reciprocity which would prevent States from formulating rules of behaviour for other states without being prepared to follow such rules themselves, these activities (being mainly of a political character) have no direct impact on the EU internal legal system.

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All this does not mean that EC law is not developing a non-written ‘*principle common to the laws of the Member States*’ as ‘*general principles of Community law*’.(101) Quite to the contrary, referring to the international treaties for the protection of human rights, the European Court of Justice never excluded the possibility of minority rights being declared general principles of Community law.(102) In the *Bickel/Franz* case the Court upheld that ‘*of course, the protection of such a minority may constitute a legitimate aim*’ for State behaviour.(103) Furthermore the Court seemed to consider the possibility of accepting the protection of minorities as a ground for the justification of an infringement of the principle of non-discrimination on the grounds of nationality (which is, after all, one of the ‘*holy cows*’ of Community law). In any case, it should be pointed out that these judicial remarks are very far from a clear commitment on minority protection as a general principle of EC law. In addition, it should be kept in mind that legally minority protection is not clearly defined and it is not equally provided by all the Member States.(104) This could constitute an argument against the establishment of EU/EC customary law,(105) but is not necessarily a



compelling argument against the establishment of minority protection as a general principle of EC law: The exclusive competence of the Court to establish general principles of Community law in a process of comparing national laws does not require that the principles on the basis of which the Court defines the Communitarian principles must exist in all EU Member States.(106) Until now the Court has not established such a principle relating to minority protection.(107)

Despite single commitments and activities it would be possible to conclude that minority protection is not yet a part of the *aquis*, even if developments are currently moving in this direction. As a consequence, the EU has not been legally bound to establish minority protection as a criteria for accession and minority protection (which has always been considered as not completely covered by concepts such as democracy, rule of law, protection of human rights and fundamental freedoms) is no legal condition for accession or membership. The role given to the criterion of minority protection will primarily depend on the political constellation dominating the respective phase of Eastern enlargement. Still, in political terms it seems quite impossible that in the future the EC will take essential retrograde steps as it has already devoted significant attention to its new approach towards minorities.

## 6. New Perspectives <sup>↑</sup>

### 6.1. Amsterdam's new Article 13 TEC: limits and perspectives

The Intergovernmental Conference working on the latest revision of the Treaties was subjected to subtle pressure to introduce a firmer foundation for social rights within the EU. The pressure deriving from the European Parliament was also directed at giving special attention to minorities.(108) Other proponents were independent EU Advisory Committees, different NGOs,(109) the European Trades Union Confederation and the Economic and Social Committee. The result of all this political input is Article 13 TEC whose possible scope is not yet easy to grasp. It reads as follows:

‘Without prejudice to the other provisions of this Treaty and within its limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’

In addition to discrimination based on nationality, forbidden already by the old anti-discrimination clause in Article 12 TEC, the Amsterdam Treaty introduced in the new Article 13 TEC a provision for combating discrimination on the basis of eight further listed grounds. The main difference between Articles 12 and 13 TEC is that the latter has no direct effect, since without additional EC instruments based on Article 13 TEC the spirit of this Article would remain without any practical results.

Other differences between Articles 12 and 13 are less evident, but nevertheless puzzling. Especially the formulation in the first part of Article 13 gave rise to some insecurities as Article 12 TEC(110) uses, despite a similar content, a different formulation:(111) Concerning the field of application, Article 13 TEC uses the formula ‘*within the limits of the powers conferred by it*’. whereas Article 12 TEC uses ‘*within the scope of application of this Treaty*’. The difference in these two wordings suggests that the field of application of these two provisions must be different. Still, looking at the two phrases, it seems difficult to define where this difference should lie, as the limits of the single organs’ powers (competencies) are defined by the Treaty itself.(112) On the other hand, the jurisdiction of Article 12 TEC has been very expansive as far as the applicability of this article is concerned. Even situations not immediately linked to Community law have been viewed as ‘*governed by Community law*’.(113) It seems that only those issues which do not have a link to facts regulated by Community law and whose effects are limited to internal matters of the state remain outside the scope of Article 12 TEC. Such an interpretation leads to a scope which clearly exceeds the

*'limits of powers conferred'* on the single organs. Indeed, once the Court has already drawn a distinction between the two concepts of 'competencies' and 'scope' suggesting that the latter is the wider one. So, it would be possible to conclude that the scope of Article 13 TEC is less broad than the one of Article 12 TEC. Measures embodied in Article 13 should be expressions of a competence which is expressly (even if only partly) delegated to the EC.(114)

The limitation on areas in which the Community has competence is crucial for the question whether legislation based on Article 13 TEC may also refer to non-EU citizens. Due to the fact that in practice it is non-EU nationals who are the main victims of ethnic discrimination, this topic has great political impact. In general the Community is not seen as having the competence to rule over third-state nationals; also, non-EU citizens do not possess rights under Community Law and are reduced to an ignored 'Community minority'.(115) On the other hand, there are provisions which have been regarded as applying to third-state nationals (for example, Article 141 TEC and related secondary legislation) and arguments pleading for such a Community competence such as, for example, the internal market, if it is understood as implying such a power.(116) However, the fact that the Council did not insert an explicit reference to third-country nationals in Article 13 TEC as it had done in some other articles (for example in Article 137(3) TEC) could be interpreted as lack of political will to base legislation concerning third country nationals on Article 13 TEC. The Presidency conclusions of Tampere (European Council, 15 and 16 October 1999) show, quite on the contrary, that now there is a strong will to "*enhance non-discrimination in economic, social and cultural life*" in the treatment of third country nationals, to grant the latter "*rights and obligations comparable to those of EU citizens*" and to approximate their legal status to that of Member State's nationals.(117) Anyway, the first legislation issued on the basis of Article 13 EC (the so called Race Directive, see below) refers explicitly to third country nationals.

Despite the probably not so broad scope of Article 13 TEC and the lack of direct effect, the possibilities in both content and nature of the measures offered by Article 13 TEC should not be underestimated since they seem to exceed those offered by Article 12 TEC. Article 13 TEC reads that '*... the Council ... may take appropriate action to combat discrimination*'. The word '*to combat*' has a broader meaning compared to the expression 'to prohibit' embodied in Article 12 TEC and thereby allows a plenty of actions directed against discrimination (such as action programmes for creating public awareness but probably even far-reaching ones such as pre-emptive measures). The presumption that Article 13 TEC could also be the legal basis for measures of positive discrimination(118) favouring ethnic minorities (as well as other groups which are subject to discrimination on the basis of grounds that are mentioned in Article 13 TEC) seems to go beyond the Article.(119) The latter merely wishes to combat discrimination (obviously without creating positive discrimination) and does not state as its aim the removal of the *de facto* differences. If the High Contracting Parties had other perspectives they could have used formulations similar to those which they have used in the context of gender discrimination.(120)

The term 'action' in Article 13 TEC is broader than the term 'rules' in Article 12 TEC, since actions may cover all the (also non-binding) legal instruments listed in Article 254 TEC as well as *sui generis* instruments which the EC regularly uses. Of course the fact that the actions have to be 'appropriate' may put considerable limits on both the content and form of such actions. Another hurdle will be the requirement of Council unanimity, which might be difficult to achieve in an area which is not undisputed. A current Commission proposal aims at amending Article 13 TEC during the current IGC so that measures to fight discrimination can be decided upon qualified majority.(121) A possible limitation could derive from the exclusively consultative role given to the European Parliament which is known to combat discrimination.

## 6.2. The Commission's Article 13-package <sup>↑</sup>

The future importance of Article 13 TEC has been announced early by the Commission as Padraig Flynn, the then Commissioner for Employment and Social Affairs, envisaged an anti-discrimination package based on Article 13 TEC.(122) On 30 November 1999 Ms Anna Diamantopoulou, new Commissioner for Employment and Social Affairs presented the definitive Commission proposal to the European Parliament. After the adoption of the proposal by the Commission Ms Diamantopoulou spoke of a *'milestone in the construction of a Social Europe'*. The Commission's package aims at creating a common level of protection against discrimination right across the EU hereby focusing on key areas in which discrimination occurs.

The package-proposal consists of a *'Council Directive establishing a general framework for equal treatment in employment'*, a *'Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin'* and a *'Council decision establishing a Community Action Programme to combat discrimination 2001-2006'*. Whereas the Framework Directive (or Employment Directive as it is called by the Commission) refers to all grounds of discrimination listed in Article 13 TEC (leaving apart only gender-discrimination), the Race Directive focus on discrimination based on racial or ethnic differences. This is to explain by the fact that to the Commission it seemed politically possible to go further on racial discrimination than on other grounds of discrimination. (123)

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Independent of the possible legislative outcome of the Commission's initiative, the impact of Article 13 TEC should be seen also from the perspective of law policy. As shown in previous chapters, the EC provides for the inclusion of measures favouring ethnic or linguistic minorities through instruments such as, for example, action programmes. This approach could intensify in the near future since now there is a specific reference in the Treaty. Given this new relevant reference in Primary Law, even the already mentioned possible establishment of a 'general principle of minority protection' in the jurisdiction of the European Court of Justice seems to become more likely.(124)

## 6.3. The Race Directive (June 2000) <sup>↑</sup>

This is not the right place to describe the entire Commission's 'package', but a few remarks regarding the so-called Race Directive should be made as the Council has already adopted the latter (in an amended form) at the end of June 2000.(125) The Race Directive applies a vast concept of discrimination as within the latter fall not only direct and indirect discriminations, but also 'harassment'. Harassment shall be deemed to be a discrimination, when *'an unwanted conduct related to racial or ethnic origin takes place with purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment'* (see Article 2 para. 3). Also the scope of the Directive turned out to be a very wide one. Firstly the Directive applies to *'all persons'*, hence also to legal persons and third country nationals (the directive emphasises that this is without prejudice to national provisions relating to the entry into and the residence of third country nationals and stateless persons on the territory of Member States – see Article 3). Secondly the Directive goes far beyond the mere area of employment (contrary to the proposed Framework Directive), including also the access to all types and levels of vocational guidance and training, social protection (including social security and healthcare), education and furthermore the *'access to and supply of goods and services which are available to the public, including housing'* (see Article 3 para. 1). This is very important as decisions in loans, access to different sorts of services, scholarships and so on are areas where a marginalisation of individuals from ethnic minorities often occurs. Thirdly the Directive refers not only to national laws, regulations or administrative practice, but also to any provision contained in individual or collective contracts, agreements, internal rules of undertakings or non-profit associations (see Article 14).

Possible exceptions from this broad prohibition of ethnic and racial discrimination are reduced to *'genuine and determining occupational requirements'* which are necessary because of the special nature of a particular occupational activity. The Commission states in its Explanatory Memorandum that this *'genuine occupational qualification should be construed narrowly'* and that such cases will be *'highly exceptional'*.<sup>(126)</sup> The Directive states that the principle of equal treatment *'shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin'* (see Article 5). Hence the Directive itself may not be used as an argument against positive actions on the national level. Quite on the contrary the Directive is perceived as a set of *'minimum requirements'* (see Article 6). In order to assure an effective enforcement of the aims of the Directive, Article 7 obliges the Member States to ensure that judicial, administrative and conciliation procedures are available to all persons who consider themselves victims of ethnic or racial discrimination, even after the relationship in which the discrimination is alleged to have occurred has ended. Also legal entities as e.g. associations, which have a legitimate interest in ensuring the enforcement of the Directive, may engage in any such procedure. Furthermore the Directive provides for a shift back of the burden of proof to the respondent (in proceedings in which it is for plaintiff – and not the Court - to investigate the facts of the case). The Member States are bound to designate a body or bodies *'for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin'* (see Article 13). The competence of the latter authorities have to include at least: providing independent assistance to victims of discrimination in pursuing their complaints, conducting independent surveys, publishing independent reports and making recommendations.

The Race Directive is already in force and has to be complied with by 19 July 2003. Member States have to communicate to the Commission by 19 July 2005, and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of the Race Directive (the report may also contain proposals to revise the latter).

#### 6.4. An open end

On the basis of the evidence given I may conclude by stating that the issue of minority protection inside the EU-system is characterised by contradictions but also by a considerable potential of development. The last twenty years clearly show that the interest of the EC-organs in this topic has been considerably growing. Whereas the Pre-Maastricht period was dominated by documented interest of the European Parliament in the linguistic heritage of minorities, the arising prospect of Eastern enlargement has brought at stage the political dimension of minority protection. Maastricht gave birth to the concept of cultural diversity opening hereby new realms for minority-topics inside the EU. Still minority protection strictu sensu is reduced to the external sphere of the EU. It is only the Post-Amsterdam development that seems to foster the *'internalisation'* of minority related topics. Article 13 TEC not only established the prohibition of minority-essential forms of discrimination, also the nearly immediate political use of this new legal competence basis is significant. Of course it has been argued that the latter fact is due to the Austrian crisis, but this crisis itself is (formally)<sup>(127)</sup> also an expression of an increasing *'internalisation'* of minority protection in the EU-system. On the other hand a further formalisation of this internalisation process seems to be doomed to fail. This is the impression one may gain, looking at the failure of those efforts which aimed at the introduction of a minority-paragraph in the Charter of Fundamental Rights.<sup>(128)</sup>

However, an overall view favours the conclusion that the arguments for a recognition of an EU-wide common principle of law in the area of minority are increasing. Besides the question how the law is developing it seems important to stress that minority question is also and mainly about the political willingness of using legal bases and possibilities which are already today at disposal. In this context it seems adequate to draw the reader's attention to a "package" of proposals which was presented to the Commission



two years ago.<sup>(129)</sup> The bundle of measures focuses on a series of measures which are based on existing EU powers and principles in the areas of Human rights, non-discrimination and minority rights, European cultural diversity as well as Economic and social cohesion by means of intercultural co-operation. To which degree EU policies will take up these or similar proposals depends on the the game of political forces. But, however, under the surface of daily policy the law is mushroom-like pathing its own way – time will show the outcome of this process.

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**Thürer** Daniel, 'Region und Minderheitenschutz - Aufbauelemente einer europäischen Architektur?', in U. Beyerlin, M. Bothe, R. Hofmann and E.-U. Petersmann, *Recht zwischen Umbruch und Bewahrung, Festschrift für R. Bernhardt* (1995) p. 1337

**Toggenburg** Gabriel, 'Der EuGH und der Minderheitenschutz', in *European Law Reporter*, Heft 1, 1999, p.11

**Toggenburg** Gabriel, 'Horizontale Drittwirkung der Personenfreizügigkeit vor dem Hintergrund der Südtiroler Autonomie', in *European Law Reporter*, 7/8, 2000, pp. 242-247

**Waddington** Lisa, 'Testing the Limits of the EC Treaty Article on Non-Discrimination', *Industrial Law Journal*, Vol. 28 (June 1999) No. 2, p. 133

**Warbrick** C., 'Current Developments: Public International Law', *International and Comparative Law Quarterly* volume 41 (1992), p. 473

**Woelk** Jens, 'Das Mercator-Netzwerk ist geknüpft', in *Prognom*, (August/September 1995) p. 36

**Wynne** Carys / **Bray** Zoe, 'Compendium of projects promoting autochthonous minority languages in the European Union financed by the European Commission', 1995 and 1996

## Endnotes <sup>↑</sup>

(\*) An slightly earlier version of this article is published in the new Yearbook *Minority Rights in Europe: European Minorities and Languages, Vol 1 (2000, forthcoming)*

(1) Of special importance for this topic are: Bruno de Witte, 'Politics versus Law in the EU's Approach to Ethnic Minorities', EUI working paper, RSC No 2000/4; Adam Biscoe, 'The European Union and Minority Nations', in Peter Cumper and Steven Wheatley (Eds.), *Minority Rights in the 'New' Europe* (1999); M. A. Martín Estébanez, 'The protection of national or ethnic, religious and linguistic minorities', in N.A. Neuwahl/A. Rosas (eds.), *The European Union and Human Rights*, 1995; Bruno de Witte, 'The European Community and its Minorities', in C. Brölmann et al. (Eds.), *Peoples and Minorities in International Law* (1993), pp. 167-185; Bruno de Witte, 'Surviving in Babel? Language Rights and European Integration', in Yoram Dinstein and Mala Tabory (Eds.), *The Protection of Minorities and Human Rights* (1992), pp. 277-300.

Remarks on minority aspects of the EU/EC are further to be found e.g. in Holger Kremser, 'Die Rechtsprechung des Europäischen Gerichtshofs zur Niederlassungsfreiheit und die Bedeutung für nationale Minderheiten', in D. Blumenwitz, G.H. Gornig and D. Murswiek, *Fortschritte im Beitrittsprozess der Staaten Ostmittel-, Ost- und Südosteuropas zur Europäischen Union*, 1999, p. 51; Iván Gyurcsik, 'Basic Treaties, Minority Issues and the Enlargement of the European Union', *Regio 1999*; Franz Pan, *Der Minderheitenschutz im Neuen Europa und seine historische Entwicklung* (1998); Dietrich Murswiek, 'Der europäische Standard des Volksgruppen- und Minderheitenschutzes im Rahmen des Stabilitätspaktes von Paris. Voraussetzung für die Aufnahme ostmitteleuropäischer Staaten in die Europäische Union?', in D. Blumenwitz, G.H. Gornig and D. Murswiek (Eds.), *Der Beitritt der Staaten Ostmitteleuropas zur Europäischen Union und die Rechte der deutschen Volksgruppen und Minderheiten sowie der Vertriebenen* (1997), p. 145; Stefan Grigolli, 'Sprachliche Minderheiten in Italien, insbesondere Südtirol, und in Europa' (1997), p. 60; Christian Scherer-Leydecker, 'Minderheiten und sonstige ethnische Gruppen' (1997), p. 167; Rudolf Streinz, 'Minderheiten- und Volksgruppenrechte in der Europäischen Union', in D. Blumenwitz and G. Gornig, *Der Schutz von Minderheiten- und Volksgruppenrechten durch die Europäische Union* (1996), p. 11; Florence Benoit-Rohmer, 'La question minoritaire en Europe: vers un système cohérent de protection des minorités nationales' (1996); Andrew Geddes, 'Immigrant and Ethnic Minorities and the EU's

'Democratic Deficit', *Journal of Common Market* 33 (June 1995), No. 2, p. 197; Eckhard Klein, 'Überlegungen zum Schutz von Minderheiten und Volksgruppen im Rahmen der Europäischen Union', in *Festschrift für R. Bernhardt* (1995), p. 1211; Lucien Jacoby, 'Die Tätigkeit der Europäischen Gemeinschaft für die Sprach- und Kulturminderheiten 1983-1989' (1991). Others are quoted later on.

(2) The choice for economic and no political and cultural integration was most probably both of a strategic (it seemed politically more realistic to gradually create a political union through economic interdependencies) and a substantive (there was a fear of creating a sort of super-nation-state) nature. See De Witte, *The impact ...* 1991, p.165.

(3) This is what happens in the work of the traditional international organisations. See Hans-Joachim Heintze, 'Rechtliche oder politische Absicherung von Minderheitenrechten', in H.-J. Heintze (Ed.), *Moderner Minderheitenschutz* (1998).

(4) The 'primary law' embodies all the different treaties, the general principles of Community law and Customary law. 'Secondary law' comprises regulations, directives, decisions, procedural orders, programmes and so on.

(5) It was Walther Hallstein, President of the first "High Authority" of the ECSC (then the equivalent to the Commission of the EEC), who described the integration process as a cyclist who has to cycle in order not to fall.

(6) See amongst different statements the answer of Commissioner Van den Broek relating to the written question E-2773/93 stating that 'the status of minorities and autonomous regions as such do not fall within the competencies of the Community'. This was also expressed by Delor in his response to the written question No. 3264/92 (see OJ 1993 No C 280, p. 28). Note that the Commission surprisingly states (and, indeed, incorrectly) in its report (at least in its German version) on '*the lesser used languages in the European Union*' that rights of minorities '*were included*', next to cultural diversity and subsidiarity in the Maastricht Treaty (representing 'different facets of one stone') (KOM (94) 602, 15.12.94).

(7) The judgement in this case C-274/96 was issued on 24 November 1998 (see under <http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>). For comments see: Gabriel Toggenburg, *Der EuGH und der Minderheitenschutz*, in *European Law Reporter*, Heft 1, 1999, p.11; Arthur Frei/Wolfgang Bauer, 'Ein Beitrag zum Urteil des Europäischen Gerichtshofes vom 24.November 1998 in der Rechtssache RS C-274/96, Bickel und Franz', in *Informator*, Jänner 1999, S. 106; Meinhard Novak, 'EuGH: Gleichbehandlung bei der Gerichtssprache', in *Europäische Zeitschrift für Wirtschaftsrecht*, Heft 3/1999, p. 82; Bruno de Witte, 'Free movement of Persons and Language Legislation of the Member States of the EU', in *Academia*, no. 18, 1999, p. 1; Gabriel Toggenburg, 'Der Europäische Gerichtshof - unverhoffter Anwalt der Minderheiten Europas?', in *Academia*, no. 18, 1999, p. 7.; Andrea Gattini, 'La non discriminazione di cittadini comunitari nell'uso della lingua nel processo penale: il caso Bickel', in *Rivista di diritto internazionale*, vol. CXXXII, 1999, p. 106; Rudolf Streinz, Gleichbehandlung bei der Gerichtssprache, in *Europäische Zeitschrift für Wirtschaftsrecht*, Heft 10 (1999) 5, pp. 490 and 491; Elisabetta Palici di Suni Prat, 'L'uso della lingua materna tra tutela delle minoranze e parità di trattamento nel diritto comunitario', in *Diritto comparato ed Europeo*, 1999-I, p. 171; Barry Doherty, 'Bickel-Extending the Boundaries of European Citizenship?', *Irish Journal of European Law*, Vol. 8, 1999, numbers 1 and 2, pp. 70-83; Miele Bulterman, Case C-274/96, 'Criminal proceedings against Horst Otto Bickel and Ulrich Franz', in *Common Market Law Review* 36, 1999, p. 1325; Peter Hilpold, 'Unionsbürgerschaft und Sprachenrechte in der EU – Das Vorabentscheidungsverfahren Bickel und Franz', *Juristische Blätter*, Heft 2, February 2000, pp. 93-101.

(8) The judgement in this case C-281/98 was issued on 6 June 2000 (see under <http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>). For comments see: Gabriel Toggenburg, 'Horizontale Drittwirkung der Personenfreizügigkeit vor dem Hintergrund der Südtiroler Autonomie', in *European Law Reporter*, 7/8, 2000, pp. 242-247 and, more relevant here, Francesco Palermo, *Diritto comunitario e tutela delle minoranze: alla ricerca di un punto di equilibrio*, in *Diritto Pubblico Comparato ed Europeo*, 2000-III (forthcoming).



(9) For the exclusiveness of the concept of EU-citizenship see e.g. Jacqueline Bhaba, *Belonging in Europe: citizenship and postnational rights*, in *International Social Science Journal* 1999, pp. 11-23.

(10) See the resolution on '*racism, xenophobia and anti-semitism and on further steps to combat racial discrimination*' (OJ 1999 no. C 98, p. 488).

(11) Adopted by Parliament on 16 October 1981 on the basis of the so-called 'Arfé report' prepared by the Italian Rapporteur, Gaetano Arfé (OJ 1981 No. C 287, p. 106).

(12) Draft prepared by Gaetano Arfé and adopted by the European Parliament on 11 February 1983 (OJ 1983 No. C 68, p. 103).

(13) Draft prepared by Rapporteur Willy Kuyjpers and adopted by the European Parliament on 30 October 1987 (OJ 1987 No. C 318, p. 160).

(14) The Intergroup, consisting of MEPs and representing different minorities, was founded in 1980 with the task of spreading conscience on minority issues in all the political parties. From 1983 onwards it has been meeting on a regular basis. See the interview of its former president Joan Vallvé in *Academia* 18 (1999), p. 35 (see <http://www.eurac.edu/Academia/index.asp>). The current president is Eluned Morgan.

(15) PE 156.208.

(16) PE 204.838. The draft and a detailed collection of all the different sources of the Alber draft can be found in Christoph Pan, *Collection of Sources* (1994).

(17) See for this Convention: <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>

(18) See OJ 1994 No. C 61, p. 110.

(19) See OJ 1999 No. C 98, p. 270 (paras. 20-26)

(20) See OJ 1999 No. C 98, p. 279 (para. 10).

(21) See OJ 1999 No. C 98, p. 488 (reasoning N)

(22) See OJ 1996 No. C 320, p. 180 (para. 27).

(23) See OJ 1996 No. C 32, p. 102 (para. 4).

(24) See OJ 1989 No. C 47, p. 28 (para. 10).

(25) See OJ, 1996 No. C 96, p. 295 (reasoning point G and para. 4).

(26) See OJ 1999 No. C 219, p. 405 (para. 6).

(27) See OJ 1997 No. C 115, p. 171.

(28) See OJ 1995 No. C 249, p. 157.

(29) See OJ 1995 No. C 249, p. 156.

(30) The budget line is in contrast to a multiannual programme, an addendum which is annually appropriated by the European Parliament for a particular subject matter.

(31) Only the 1997 budget reduced the funds: only 3, 675 million ECU were distributed (see OJ 1997 No. C 178, p. 4).



(32) In 1995 and 1996 over 150 respective projects were co-financed. A description of the projects can be found in: Carys Wynne / Zoe Bray, *'Compendium of projects promoting autochthonous minority languages in the European Union financed by the European Commission'*, 1995 and 1996.

(33) See, for example, *Contact Bulletin* (Spring 1997) p. 6.

(34) The Commission's Communication in OJ 1999 No. C 125, p. 14.

(35) The budget line was not endowed with sufficient legal basis. Any Community expenditure requires a dual basis - the entry in the budget (which per se requires a Community competence in the respective field) and, as a general rule, the prior adoption of an act of secondary legislation authorising the expenditure in question. The only exception to the latter requirement concerns the funding of non-significant actions, namely pilot projects or preparatory actions. In that case, the legal basis lies in the Commission's power of initiative (see Art. 211 EC). In any other case the Commission would infringe Community Law (the principle of enumerated powers, Art. 7(1) EC). In fact, the 1998 Budget Line was suspended in May 1998 due to a ruling of the ECJ (Judgement of 12 May 1998 in Case C-106/96) underlining the mentioned legal situation and stating that the fact that projects are related to short-term activities, with a maximum duration of one year, which are not coordinated *inter se* and which entail considerably less expenditure than the pluri-annual programme does not automatically mean that they are 'non-significant' measures. The Commission must therefore clearly demonstrate that the planned measure is not significant.

(36) See OJ C 266 of 16.09.00, p. 15 or <http://europa.eu.int/comm/education/mercator/langmin.html>

(37) Named after a famous cartographer of the sixteenth century who in his maps used the respective regional languages. Jens Woelk, 'Das Mercator-Netzwerk ist geknüpft', in *Program*, (August/September 1995) p. 36.

(38) University of Paris X-Nanterre; Fryske Akademy in Ljouwert/Leeuwarden, Friesland, <http://www.fa.knaw.nl/mercator>; University Wales at Aberystwyth, <http://www.aber.ac.uk/~merwww>; CIEMEN in Barcelona, <http://www.troc.es/ciemen/mercator/index-gb.htm>.

(39) *'Linguistic Minorities in the EC-countries'* (summary published by the Office for Official Publications of the European Communities in 1990).

(40) *'Linguistic Minorities in the EEC: Spain, Portugal, Greece'*, Summary of the report by Miquel Siguan, Office for Official Publications (1990). See also the Working Paper of the Parliament on the 'Lesser used languages in Austria, Finland and Sweden', *Education and Culture Series W-5*, PE 167.009 (most of the working papers of the Parliament's Directorate-General for Research can be downloaded from the Parliament's web site).

(41) The Institut de Sociolinguística Catalana (Barcelona), the Centre de recherche sur le plurilinguisme (Brussels) and the Research Centre Wales (Bangor).

(42) Normand Labrie / Peter H. Nelde / Peter J. Weber, 'Projet d'étude sur les langues moins répandues dans l'UE', in *Europa Etnica* 2(1994).

(43) Published by the Office for Official Publications of the European Communities, ISBN 92-827-5512-6.

(44) Results of the seminar held in Brno (Slovenia) on 1-2 December 1997 were published by the Council of Europe in 1998 under the title *'Participation of national minorities in decision-making processes'*.

(45) Other financed projects were regular meetings of representatives of Governmental Offices for National Minorities (Project MIN I) or various study visits for representatives of Offices for National Minorities to similar institutions in other countries (Project MIN II). See the Council of Europe's Final Report to the European Commission on the implementation of the Joint Programme with the Council of Europe entitled

*'Minorities in Central European Countries'* (April 1998).

(46) It has been argued that an incentive for the inclusion of competence in the field of culture in the Treaty (being the first change of the 'constitutional' treaties after the end of the Cold War) was the fear of a 'Balkanization' of Western Europe (see Adam Biscoe, loc. cit., p. 93).

(47) For references and an overall view on the relationship between economic integration and cultural diversity see e.g. Bruno de Witte, *The Cultural Dimension of Community Law*, in *Collected Courses of the Academy of European Law*, 1995, Vol 4, Book 1, pp. 229-299.

(48) The term 'regional' diversity refers to cultures produced and cultivated by local groups, linguistic or ethnic minorities, having a regional importance, but it does not relate to an eventual linking to a sub-national administrative unit.

(49) Art. 151 para. 1 EC, (ex, i.e. before Amsterdam, Art. 128 para. 1 TEC).

(50) See Doc CHARTE 4487/2/00 (download from <http://db.consilium.eu.int/df/default.asp?lang=en>). According to the explanatory notes of the praesidium (see Doc CHARTER 4473/00, 11 October 2000), Art 22 is based (beside Article 151(1) and (4) of the EC Treaty) "on Article 6 of the Treaty on European Union" which indicates that the drafters of the Charter seem to identify diversity as a quasi-constitutional principle of the European Union. Despite the evident importance of this concept, its meaning remained vague (one of the questions arising is whether diversity is to be understood in its protecting or in its interacting dimension).

(51) Art. 87(2d) EC, ex Art. 92(3) TEC).

(52) See Artt. 149 and 150 (ex Artt. 126 and 127) EC.

(53) Bruno de Witte, 'The scope of Community Powers in Education and Culture in the Light of Subsequent Practice', in R. Bieber and G. Ress, *The Dynamics of EC-law* (1987), p. 261.

(54) Directive 77/486 of July 1977, OJ 1977 No. L 199, p. 32. In two subsequent reports the Commission stated that the Member States were not (properly) transposing the directives. (See the 1988 report in COM (88) 787 Final). The Directive was also incorporated in the Agreement on the European Economic Area (Annex V of the Treaty – OJ 1994 No. L001, p. 325). The interest of the Community in the field of education of children living under special conditions later found expression in the resolution of the Council of Ministers meeting of 22 May 1989 on school provision for children of occupational travellers (see OJ 1989 No. C 153, p. 1) mainly addressing children of the around 200,000 bargemen, showmen and circus-people, or the Resolution of the Council of Ministers of Education meeting on 22 May 1989 on school provision for Gypsy and Traveller children (see OJ 1989 No. C 153, p. 3). The Community programme COMENIUS (see OJ 1995 No. L 87) finances measures foreseen in Directive 77/486. See Léonce Bekemans and Yera Ortiz de Urbina, *'The teaching of immigrants in the European Union'*, PE 167.225, EP-Working Paper, Education and Culture Series.

(55) Now Art. 40 EC (regulating the mobility of workers). The Maastricht Treaty introduced a legal basis for such measures inserting the chapter 'Education, Vocational Training and Youth' in Artt. 126 (now 149) and 127 (now 150) TEC.

(56) See De Witte, *The scope of ...*, p. 267.

(57) Community programme ARIANE (OJ 1997 No. L 291 and OJ 1999 No. L 57).

(58) This may be funded under the RAPHAEL programme (see OJ 1997 No. L 305).

(59) This may be funded under the KALEIDOSCOPE programme (see OJ 1996 No. L 99 and OJ 1999 No. L 57). Ariane, Raphael and Kaleidoscope will be grouped together in the new programme CULTURE 2000 (see Commission Proposal COM (98) 266 final). These three programmes were administrated by the

Commission's DG X (Audio-visual, Information, Communication and Culture).

(60) Speech at the inauguration of the EMCR in Vienna, 7. April 2000.

(61) See 'Declaration by the Council and the representatives of the Governments of the Member States ... on respecting diversity and combating racism and xenophobia', OJ 1998 No. C 001, p. 1. On the other hand diversity is not always meant to include minority cultures. This can be seen e.g. in the discussion regarding the inclusion of minority languages in the 'European Year of Languages' (see e.g. <http://www.eurolang.net/news.asp?id=181>).

(62) On relations between autonomy/region and minority rights see Javid Rehman, 'The Concept of Autonomy and Minority Rights in Europe', in P. Cumper and S. Wheatley, *Minority Rights in the 'New' Europe* (1999), p. 217; Daniel Thürer, 'Region und Minderheitenschutz - Aufbauelemente einer europäischen Architektur?', in U. Beyerlin, M. Bothe, R. Hofmann and E.-U. Petersmann, *Recht zwischen Umbruch und Bewahrung, Festschrift für R. Bernhardt* (1995) p. 1337; Stefan Oeter, 'Volksgruppen- und Minderheitenschutz durch Autonomieregelungen', in D. Blumenwitz, G.H. Gornig and D. Murswiek, op. cit., pp. 163.

(63) CoR (see Artt. 263-265 EC, ex Art. 198a-c TEC) was inserted into the Maastricht Treaty mainly following the requests of the German *Länder*, the Belgian and Spanish regions/communities, the Assembly of the Regions and the Conference on a Europe of the Regions as it was supposed to provide a sort of power compensation: Some of the competence areas transferred via the Maastricht Treaty to the Community (culture, education) were, in some member States, dominated (in one way or another) by the respective regions. Despite the fact that the Maastricht Treaty furthermore opened the Council of the EU to members of regional governments (as long as they are 'authorised to commit the government of the Member State' (see Art. 203 EC, ex Art. 146 TEC), this compensation does not seem to be satisfactory because of the above mentioned reasons.

(64) In 1995 the European Regional Development Fund (ERDF) included also a cultural dimension. Still, the indicators for the identification of problem areas are of an economic nature. For critical remarks regarding the minority protective effect of the Community's regional policy see: Biscoe, op.cit., 1999, p. 92.

(65) Compare Bruno de Witte who states that 'regions may . . . correspond to any ethnically or linguistically defined territory or not, and minority areas may have regional autonomy or not, and this choice is still entirely left to the Member States' internal constitutional rules' (De Witte, *Politics versus...*, p. 16).

(66) See OJ 1997 No. C 167, p. 245.

(67) See Commissioner Diamantopoulou in her speech at the conference 'Immigration, Discrimination and the Far-Right Public Policy Breakfast', Brussels, 20 June 2000.

(68) See the speech by Pádraig Flynn (European Commissioner for employment and social affairs under President Santer) delivered on 7 July 1998 (see Rapid file SPEECH/98/154).

(69) See part II, point B of the quoted Communication (OJ 1999 No. C 267, pp. 2-21). The same is said in the Annex of the 1999 Employment Guidelines (see OJ 1999 No. C 69, pp. 2-8).

(70) See the Council Resolution on the employment and social dimension of the information society (OJ 2000 No. C 008, pp. 1-3). See also the websites <http://www.bangor.ac.uk/cyc/melin/index1.htm> and <http://158.169.50.95:10080/mlis/>.

(71) For further information visit: <http://www.embnet.com>.

(72) A. Pellet, 'The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples', in *European Journal of International Law*, 3 (1992), p. 178.

(73) EC Bulletin 1991/12, p.119. Full text in C. Warbrick, 'Current Developments: Public International Law', *International and Comparative Law Quarterly* volume 41 (1992), p. 473.

(74) The historical roots for this development may be seen in Art. 34 of the Berlin Treaty of 1878, which established the freedom of religious groups as *quasi-conditio* for the recognition of Bulgaria, Montenegro, Rumania and Serbia. See Peter Hilpold, 'Anerkennung der Neustaaten auf dem Balkan', in *Archiv des Völkerrechts*, 31. Band, 4. Heft, p.401.

(75) The practice regarding this prerequisite was inconsistent as, for example, Croatia was recognised in 1992, although the Arbitration Committee had expressed reservations in regard to its minority protection laws, and, on the other hand, Macedonia was denied recognition thanks to Greece despite the fact that it complied with all the criteria (De Witte, *Ethnic Minorities ...*, p. 173).. On the politically special case of Macedonia (some provisions in the Guidelines on recognition were inserted only at a request by Greece, see Peter Hilpold, 'Völkerrechtsprobleme um Makedonien', in *Recht in Ost und West* 4 (1998), p. 119, in: Dieter Blumenwitz/Gilbert H. Gornig/Dietrich Murswiek (eds.), *Fortschritte im Beitrittsprozess der Staaten Ostmittel-, Ost- und Südosteuropas zur Europäischen Union*, 1999.

(76) It should be pointed out, however, that ignoring the issue of minority protection also in Central and Eastern European States would be much more damaging. Besides, imposing duties on applicant states, which are not fulfilled by all of the Member States, is a frequent practice. A "double standard" may also be found in EMU or in the Schengen system, since also in these contexts the applicant states have no possibility to opt out (in contrast to some of the Member State which gained such opting out options).

(77) De Witte, '*Politics versus ...*', p. 3. In this regard I recall Hans van den Broek, who could not really answer the written question E-0963/98 which asked whether the Commission is also that concerned about respect for minority languages in the Member States as it is concerned, for example, about the minority situation in Slovakia, and with which efforts it is considering to ensure respect for Basque, Occitan, Corsican, Breton and other minority languages. Van den Broek merely referred to the B3-1006 budget line (see OJ 1998 No. C 310, p. 150).

(78) Adopted by the Council on 20 June 1994, see OJ 1996 No. C 274, pp. 52-54.

(79) For the impact of the end of the East West conflict on the issue of Minorities see Liebich André, *Ethnic Minorities and Long-Term Implications of EU Enlargement*, EUI working paper, RSC No 1998/49 (includes also helpful statistical information).

(80) The Presidency Conclusions adopted in Brussels on 11 December 1993 stated that there were three reasons for the initiative: (a) the urgent need to reinforce stability in Europe; (b) the contribution of the Union to the efforts of the countries preparing for accession; and (c) the implementation of the common foreign and security policy (Stability Pact: Summary report, Annex I, para. 6; see Rapid file DOC/93/11). The Presidency Conclusions of Copenhagen of 21-22 June 1993 state in their para. 8 that '*the initiative is directed towards assuring in practice the application of the principles agreed by European countries with regard to respect for borders and rights of minorities*' (see Rapid file DOC/93/3).

(81) It has been pointed out that one of the weaknesses of the Pact was the fact that the interested minority groups were neither invited to the negotiations of the Pact nor to the bilateral talks between governments (Kinga Gál, '*Bilateral Agreements in Central and Eastern Europe: A New Inter-State Framework for Minority Protection?*', ECMI Working Paper No. 4 (1999), p. 5).

(82) The splendid exception giving the Stability Pact great political importance was the treaty between Hungary and Slovakia signed in March 1995 (<http://www.htmh.hu/dokumentumok/asz-sk-e.htm>).

(83) The instrument of CSFP 'joint action' was used for convening the inaugural conference.

(84) The Union wanted to '*encourage the parties to establish good neighbour agreements...and to undertake efforts to improve, de jure and de facto, the situation of national minorities ... [to] encourage regional*



*co-operation arrangements ...*' (Presidency Conclusions of Brussels of 10-11 December 1993, Annex I, para. 5 – role of the Union, see Rapid file DOC/93/11).

(85) Funds from the PHARE and TACIS Programmes for Democracy. See Biscoe, op. cit., 1999, p. 98 and De Witte, *Politics versus...*, footnote 13. See also Regulation No. 2760/98 of 18 December 1998 (OJ 1998 No. L 345, p. 49) which provides funds for cross-border cooperation such as '*cultural exchanges*' and '*the development or establishment of facilities and resources to improve the flow of information and communications between border regions, including support for cross-border radio, television, newspaper and other media*'.

(86) Presidency Conclusions of Copenhagen, 21-22 June 1993, para. 8 (see Rapid file DOC/93/3).

(87) The Pact has a '*geographically open and evolutionary character, with the possibility of focusing initially on those countries of Central and Eastern Europe which have the prospect of becoming members of the European Union and vis-à-vis which the Union has greater opportunities to exert its influence more effectively ... The objective ... [is] to facilitate rapprochement between those states and the Union and their co-operation with it by helping them to fulfil the conditions listed by the European Council in Copenhagen*' (Presidency Conclusions of Brussels, 10-11 December 1993, Annex I, para. 2(2)).

(88) The Commission is launching a new Stabilisation and Association process (Stability Pact). The Stabilisation and Association Agreements (SAAs), for which Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia, FYROM and Albania would be eligible, are supposed to be a new category in this process. Conditions for commencing negotiations on such SAAs are those set out in the Conclusions of the General Affairs Council of 29 April 1997. In its Communication on the Stabilisation and Association process for South Eastern Europe the Commission announced that it will prepare regular reports on the developments in the countries in question (COM (1999) 235 final of 26 May 1999). The Commission Staff Working Paper of 17 May 1999 (SEC (99) 714) examines country by country whether or not they comply with the conditions set out in the Council Conclusions of 29 April 1999. One of the criteria is the '*Respect for and protection of minorities*' (See for documents <http://www.stabilitypact.org/>).

(89) Presidency Conclusions, Copenhagen European Council, 21-22 June 1993, para. 7(A iii). For a critical view on the use of this criteria: Dieter Blumenwitz, 'Die minderheitenschutzrechtlichen Anforderungen der EU hinsichtlich des Beitritts der ost- und ostmitteleuropäischen Staaten', in D. Blumenwitz, G.H.G. Gornig, D. Murswiek, *Fortschritte...*, 1999, p. 25.

(90) Published as Supplements to the Bulletin of the European Union, 1997.

(91) As pointed out by Bruno de Witte, the Commission maintained this approach in the case of Latvia and Estonia and made no distinction between citizens and non-citizens (De Witte, *Politics versus ...*, p. 6).

(92) See for the regular reports: <http://europa.eu.int/comm/enlargement/index.htm>.

(93) See under point B.1.2 (Human Rights and Protection of Minorities) for the new Commission's views on the respective minority-situations in the applicant states. For the regular reports see <http://europa.eu.int/comm/enlargement/index.htm>. See also point III. 1. of the general Strategy paper.

(94) According to para. 14 of the Presidency Conclusions of Luxembourg of 12-13 December 1997, the Accession Partnership is the '*key feature of the enhanced pre-accession strategy*' (for an enlightenment on the latter see the quoted conclusions; for the accession strategy see Annex IV of the Presidency Conclusions of Essen of 9-10 December 1994). In reality the 'Partnerships' are not a bilateral instrument (as the name would suggest), but mere communications of the Commission (see OJ 1998 No. C 202, pp.1-97). The system of Accession Partnership may be described as a three-level construction, having as its basis a general regulation (regulation no. 622/98, see OJ 1998 No. L 85) which states that the Council decides for each country on the principles, priorities, aims and conditions of the partnership. These statements are then respected in the Commission's communications. The Council's decisions are to be found in OJ 1998 No. L121, pp.16.



(95) See OJ 1999 No. L 335 from 28.12.1999 or: <http://europa.eu.int/comm/enlargement/docs/index.htm>.

(96) For the concept of the 'structured relationship' see Annex II of the Presidency Conclusions of Copenhagen of 21-22.06.1993 and in more detail in Annex IV of the Presidency Conclusions of Essen of 9-10.12.1994. Legally, the strongest instruments are the Association Agreements as they are real bilateral treaties based on Art. 300 EC (ex Art. 228 TEC). The case of Slovakia shows that the Association Councils may also assume a role in minority issues: In April 1998 the EU ministers in the AC reiterated the demand for the urgent adoption of a new law on the use of minority languages (see Agence Europe, 29.04.1998, p.7).

(97) Art. 49 EU: 'Any European State which respects the principles set out in Art. 6 (1) may apply to become a member of the Union . . . '.

Art. 6 (1) EU: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.

(98) The membership of a State violating the Copenhagen criteria would violate the existing Community and EU law, but the accession itself of such a state might, strictly legally speaking, not. Those who consider the criteria of Copenhagen as legally binding criteria which must be fulfilled before accession in order to avoid an illegitimate enlargement, will confront the interesting question whether and to what extent the criteria are justiciable. See Thomas Bruha / Oliver Vogt, 'Rechtliche Grundfragen der EU-Erweiterung', in: *Verfassung und Recht in Übersee* (VRÜ) 30 (1997), p. 477, especially at p. 490. In practical terms there is nearly no difference between these two views.

(99) See e.g. Boris Cilevics, 'A view of a Parliamentarian on the Role of Minority Issues in the Process Towards European Integration', BalkanHR mailing list (<http://www.egroups.com/message/balkanhr/559?source=1>).

(100) Art. 11 EU defines as one objective of the CFSP to 'preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charte'.

(101) See Artt. 6 (2) EU (ex Art. F (2) TEU) and 288 (2) EC (ex Art. 215 (2) TEC).

(102) See, for example, Case C-4/73 [1974] ECR 0491; see also Barbara Brandtner and Allan Rosas, 'Human Rights and the External Relations of the European Community: 'An Analysis of Doctrine and Practice'', *European Journal of European Law*, 9 (1998).

(103) Case C-274/96, para. 29. See Toggenburg, *Der EuGH ...*, 1999, p. 11.

(104) This can be illustrated by the reservation of the French Government to Art. 27 of the 1966 International Covenant on Civil and Political Rights which states that the French nation is one and is indivisible and that therefore there is no room for the existence of minorities in the sense of Art. 27. This issue re-emerged in 1999 during the discussion on whether or not to ratify the Council of Europe Charter on Regional and Minority Languages. The sensible stance of Greece regarding minority-issues is well known. The written question No. 1416/97 by Mr Kaklamanis to the Commission regarding Commission funding for ECMI (OJ 1998 No. C 21, p. 53) may serve as picturesque expression of this sceptical view.

(105) Customary law may be developed as primary law (*consuetudo et opinio iuris sive necessitatis* of the Member States) or as secondary law (in this case law may develop independently from the habitus of the member State, for example through the actions of the EC organs. This customary law has to comply with the principle of enumerated powers and is henceforth not of great assistance in our context).

(106) At least this is the case if one considers the mentioned Court competence on Art. 220 EC (ex Art. 164 TEC). This view corresponds in our eyes more to the supranational character of the Community. A contrary view seems adequate if one considers Art. 288 para. 2 EC (ex Art. 215 para. 2) TEC as the basis for competence. See also Niamh Nic Shuibhne, 'The impact of European Law on Linguistic Diversity', in: *Irish*

*Journal of European Law*, 1996, pp. 62-80, at p. 76.

(107) Cf. on this point Josef Azizi (judge at the ECFI in Luxembourg), interview in *ACADEMIA 26* (2000, forthcoming) (<http://www.eurac.edu/Academia/index.asp>).

(108) Parliament had two representatives in the Reflexion Group, Elmar Brok and Elisabeth Guignon, who insisted on the insertion of the minority issue in the Treaty (see the Dury/Maij Weggen report of 13.03.1996-PE 197.401, especially point 4.13): '*Europe's multiplicity is to be regulated paying attention to the particular protection of traditionally residing national minorities through the creation of Community legal standards in the framework of human rights, democracy and the rule of law*' (motion for resolution of Bourlanges/Martin of 26.04.1995 (for the resolution see OJ 1995 No. C 151, p. 56)). Finally, a motion for a resolution by De Giovanni tried, unsuccessfully, to introduce in Art. 13 EC the majority voting procedure (02.06.1997, see PE 222.685).

(109) The most active was the Starting Line Group which received the backing of almost 300 organisations with their initiative *Starting Line*. ENAR (European Network Against Racism) provides on a study on the Amsterdam Treaty '*Guarding standards shaping the agenda*'.

(110) Art. 12(1) TEC: '*Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*'.

(111) See on all these arising questions Mark Bell, 'The New Art. 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?', *Maastricht Journal*, Vol. 6, No. 1, (1999) p. 5 as well as Lisa Waddington, 'Testing the Limits of the EC Treaty Article on Non-Discrimination', *Industrial Law Journal*, Vol. 28 (June 1999) No. 2, p. 133.

(112) This can be seen in Art. 7 TEC which says that '*each institution shall act within the limits of powers conferred upon it by this Treaty*' (principle of enumerated powers).

(113) See, for example, case C-274/96 (Bickel/Franz), paras. 14, 15, or case C-186/87 (Cowan).

(114) This does not mean that Art. 13 will only become operative in those fields in which the Community has competence *expressis verbis*. According to Mark Bell, the logic prohibiting nationality discrimination, for example in housing (an area in which the EC has no express competence), may be extended to justify the Community establishing common rules against other forms of discrimination in housing: Discrimination in access to housing against ethnic minorities may seriously undermine their ability to migrate to another Member State in the 'freedom and dignity' which Regulation 1612/68 seeks to maintain (Bell, 1999, p. 18).

(115) We may recall the protest of Member States when the 1990 Council Resolution on the fight against racism and xenophobia (OJ 1990 no C 157, p. 1) was initially planned to protect all persons on Community territory whether they were nationals of a Member State or not.

(116) De Witte and there quoted references, *The European Community ...*, 1993, p. 183.

(117) See the heading '*fair treatment of third country nationals*' under point A.A 'A common EU Asylum and Migration Policy' in the Presidency conclusions. Under this perspective one should also observe the legislative process regarding the proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community (OJ 1999/C 67/10) COM(1999) 3 final1999/0013(CNS).

(118) An example is employment quotas where a specific number of positions are reserved for ethnic minorities. Such measures have been deployed in the USA, but are not familiar to the European tradition (an exception might be the Dutch law on the equal participation of foreigners in the labour market). See Mark Bell, 'European Union Anti-Discrimination Policy: From equal opportunities between women and men to combat racism', Parliament's working document, *Public Liberty Series*, LIBE 102 EN.

(119) In the past, NGOs and Parliament sought the inclusion of the provisions on positive discrimination in the documents. Accordingly, in its resolution on the functioning of the TEU with a view to the 1996 IGC, the Parliament postulates that greater substance for the concept of EU citizenship should also be provided by *'the preservation of Europe's diversity through special safeguards for national minorities in terms of human rights, democracy and the rule of law'* (see OJ 1995 No. C 151, p. 56)

(120) According to Art. 141 EC *'[...] the principle of equal treatment shall not prevent [...] adopting measures providing for specific advantages in order to make it easier for the underrepresented [...] to [...] compensate for disadvantages [...]'*.

(121) Agence Europe, 10. February, 2000, p. 6

(122) Speech given to a European Conference on Anti-Discrimination: *'Anti-Discrimination: the way forward'*, Vienna, 4 December 1998.

(123) Explicitly in this sense Kirsty Hughes replacing the responsible Commissioner in a speech for the conference *'Ethnic Minorities in Europe-rethinking and restructuring antidiscrimination strategies'*, Birmingham, 17-19 February 2000.

(124) See in this context Waddington, op. Cit, who quotes the Case C-249/96 (Grant v. South-West Trains) where the Court stated in paras. 44 and 45 that the general principles of Community law *'cannot have the effect of extending the scope of the Treaty provisions beyond the competences of the Community'*. With this reasoning the Court felt unable to follow the Human Rights Committee in applying the right not to be discriminated against on the basis of gender also to homosexuals.

(125) Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, see OJ No. L 180, 19.07.2000, pp. 22-26. For the development of this directive see also the respective opinions of the Committee of the Regions (12 April), the Parliament (18 May), the Economic and Social Committee (25 May) and the amended proposal of the Commission (COM(2000) 328 final, 31 May 2000).

(126) As example the Commission mentions the case of a dramatic performance where racial or ethnic origin is required for reasons of authenticity.

(127) I may recall that the three *'wise men'* who had to analyse the situation in Austria, were carrying out their task on the basis of a mandate issued by fourteen Member States of the Union. This mandate stated that the report to be drawn up has to cover (beside the political nature of the FPÖ) *'the Austrian Government's commitment to the common European values, in particular concerning the rights of minorities, refugees and immigrants'*. The report is to find e.g. under <http://www.virtual-institute.de/de/Bericht-EU/index.cfm>

(128) More than a dozen of proposals have been presented; the most detailed one was tabled by the International Institute for Right of Nationality and Regionality (May 2000 by D. Blumenwitz and M. Pallek). See <http://db.consilium.eu.int/df/default.asp?lang=en>.

(129) European Academy Bozen, *Package for Europe – Measures for Human Rights, Minority Protection, Cultural Diversity and Economic and Social Cohesion*, 1998. This proposal has been elaborated by a team of experts at the European Academy Bozen (<http://www.eurac.edu/fb2>). For an introduction see <http://www.eurac.edu/publications/package.asp>.