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### **The Role of Evaluation in Experimentalist Governance: Learning by Monitoring in the establishment of the Area of Freedom, Security and Justice**

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# **The Role of Evaluation in Experimentalist Governance: Learning by Monitoring in the establishment of the Area of Freedom, Security and Justice**

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## **ABSTRACT**

*This chapter examines the development of evaluation mechanisms in the Area of Freedom, Security and Justice since the establishment of such an area was defined as one of the objectives of the European Union. It shows how the rise of such mechanisms forms both a substitute and a complement to the classical alternative, which is borrowed from the law of the internal market, between mutual recognition or other forms of cooperation based on mutual trust on the one hand, and harmonization on the other hand. After presenting the general framework for this analysis, this contribution examines the emergence of evaluation in the field of fundamental rights, and the obstacles it has encountered. It then shows how the EU Member States have progressively come to realize that they needed to mutually evaluate themselves in a variety of fields beyond fundamental rights, such as external borders control, combating terrorism, or the administration of justice. The review of these mechanisms illustrates that evaluation fulfils a number of objectives, which include ensuring a feedback on the laws and policies adopted by the EU ; contributing to collective learning, on the basis of local experiments ; enhancing mutual trust between the Member States ; and stimulating democratic deliberation both at national and at European level. Unpacking these potentialities of evaluation in the EU serves to illustrate how the emergence of this new culture – in certain respects constituting a policy mode in its own right – may be seen as contributing to the rise of a new architecture of democratic experimentalism.*

## **I. Introduction**

The decentralized approach adopted in democratic experimentalism encourages the sub-units of a federal system to devise their own solutions to the regulatory problems they face. But local experiments will benefit the other sub-units only if they are evaluated, according to scales which are at once flexible enough to accommodate the novelty of experiments that work, and sufficiently robust in order to provide the adequate incentives to the sub-units. Through evaluation, the sub-units should be encouraged to take part in a collective search for solutions which can be replicated elsewhere ; and they should be discouraged from experimenting in ways which create negative externalities, which could lead to calls for the imposition of standards from above.

This chapter seeks to contribute to our understanding of the role of evaluation mechanisms in the architecture of democratic experimentalism, by focusing on the development of evaluation in the establishment of the Area of freedom, security and justice. It is one of the objectives of the European Union that it should ‘maintain and develop the Union as an area of freedom, security and justice, in

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which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime' (art. 2, al. 1, 4<sup>th</sup> indent, EU Treaty). The establishment of an area of freedom, security and justice (AFSJ) between the Member States of the European Union is based on the idea that national courts and administrations, as well as law enforcement authorities, should cooperate with one another, in particular by exchanging information and by mutually recognizing judicial decisions in civil and criminal matters. Such cooperation presupposes that the Member States share a set of common values, which include the fundamental rights recognized in EU law (art. 6 (1) and (2), EU Treaty). It may also require, in certain cases, the approximation of the national legislations of the EU Member States, insofar as this is necessary for such cooperation (art. 31 (1) (c) and (e), EU Treaty).

The standard explanatory framework to the progressive establishment of an AFSJ between the EU member States, then, is based on two complementary propositions. First, mutual recognition, the 'cornerstone' of establishment of the European criminal area, or other forms of cooperation between States in the field of law enforcement, presuppose a high degree of compliance with fundamental rights. The national authorities of the Member States should therefore refuse to cooperate where this would risk resulting in a violation of these values : this is not only a prescription of article 6(2) of the EU Treaty ; it is also reiterated in the instruments implementing the principle of mutual recognition in a variety of domains since the concept was introduced at the Tampere European Council of 1999.<sup>1</sup> Second, where there remain obstacles to mutual recognition or other forms of inter-State cooperation – due to diverging standards of protection of fundamental rights and to the resulting lack of 'mutual trust' between national authorities –, harmonization may be called for. Such approximation of national legislations might serve, in particular, to raise the overall level of protection of fundamental rights, and create the 'mutual trust' between the Member States which cannot merely be presupposed. We thus seem to witness in this area what neo-functionalists would see as confirming their view of the logic of European integration: 'positive integration', in the form of harmonization of national legislations, accompanies 'negative integration', especially where the latter takes the form of mutual recognition of national rules or decisions ; harmonization is the result of spillover from the abolishment of barriers to cooperation between the Member States.

This chapter challenges this classic narrative. It does not question the appeal of the standard view to the institutional actors. Nor does it underestimate the weight of the analogy to the establishment of the internal market in the mental representations of these actors – and, to that extent at least, the validity of the neo-functionalist logic of a complementarity at work between negative and positive integration. Rather, the aim of this chapter is to draw the attention to a competing logic, which may help us move beyond the debate between mutual recognition and harmonization. This competing logic is a logic both of evaluation and of collective learning: by setting up evaluation mechanisms and mutually observing one another, the EU Member States not only can create the mutual trust on which their cooperation depends ; they also can make progress together towards identifying the precise content of this new field of European integration.

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<sup>1</sup> See Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190 of 18.7.2002, p. 1), 12<sup>th</sup> recital of the Preamble and Article 1, §3 ("This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union"); Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196 of 2.8.2003, p. 45), Article 1, second sentence (stating that the framework decision "shall not have the effect of amending the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty"), as well as, with regard to the *ne bis in idem* principle, the observance of which may constitute a ground for non-recognition or non-execution, Article 7 §1, c); Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76 of 22.3.2005, p. 16), 5<sup>th</sup> and 6<sup>th</sup> recitals of the Preamble as well as Articles 3 and 20 § 3 ('Each Member State may, where the certificate referred to in Article 4 gives rise to an issue that fundamental rights or fundamental legal principles as enshrined in Article 6 of the Treaty may have been infringed, oppose the recognition and the execution of decisions'); the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, p. 59), 3<sup>rd</sup> recital of the Preamble and Article 1, § 2.

It is the emergence in the EU of a logic of mutual evaluation and mutual learning that this chapter documents. This logic is both an alternative to the balancing between positive integration and negative integration – since it is reducible to neither and opens up a third avenue by which to achieve coordination –; and a complement to those classic tools of integration – since we will use those classic tools better once we equip ourselves with the searching devices which evaluation mechanisms can constitute –. The approach is procedural, rather than substantive. It acknowledges that we cannot know, in advance of developing cooperation between the EU Member States, which obstacles such cooperation may face, and which measures should be adopted in order to remove these obstacles. But the alternative is not necessarily to rely on a purely *ad hoc* building of the area of freedom, security, and justice, guided by the priorities of national political agendas and espousing the rhythm of crises occasionally drawing the attention of policy-makers to certain, previously unidentified or underestimated, problems. Rather, evaluation mechanisms as described here should be thought of as searching mechanisms, which should allow us to identify, on a systematic basis, what steps are required to achieve progress towards the establishment of the area of freedom, security and justice. This chapter therefore examines the potential contribution of evaluation mechanisms to this process, in which the ends of the area of freedom, security and justice are constantly redefined as a result of developing the means to achieve it, and in which the shape of the area of freedom, security and justice is being discovered at the same time as it is being invented.

The chapter proceeds as follows. Part II briefly describes the standard view of how progress should be made towards the establishment of an Area of freedom, security and justice, per analogy of the establishment of the internal market. That standard view opposes mutual recognition (or some other form of cooperation built on mutual trust) to harmonization, understood as the adoption of common standards. A trade-off between diversity and unity is implicit in this standard view : the risks of diverging approaches by the Member States, in so far as they could threaten mutual recognition, are to be countered by the imposition of uniformity – harmonization thus, from above. In part, the logic of evaluation presented here is useful because it may allow us to escape such a trade-off. In order to describe how this alternative logic has been emerging, Part III of this chapter first describes how the institutions of the Union have progressively, albeit hesitatingly, moved towards such forms of evaluation in the field of fundamental rights. A systematic form of monitoring of fundamental rights within the EU Member States is unlikely to develop further, however. In part, this is because, by setting up such a form of monitoring, the EU would be overambitious, not only stepping out of its mandate, but also competing with the monitoring performed by the Council of Europe. But from another perspective, the monitoring of compliance with fundamental rights is not too ambitious, but instead insufficient. For ‘mutual trust’ between the EU Member States cannot rely exclusively on the assurance that all the EU Member States will comply with a high level of protection of fundamental rights. More, rather than less, is required : the Member States have progressively come to realize that they needed to mutually evaluate themselves in a variety of fields, such as external borders control, combating terrorism, or the administration of justice. Part IV of this chapter documents the rise of this culture of evaluation in the Area of freedom, security and justice. This review illustrates that evaluation mechanisms fulfil at least five distinct objectives. They may serve to monitor the implementation of EU laws and policies by the Member States ; ensure a feedback on those laws and policies themselves ; contribute to collective learning, on the basis of local experiments ; enhance mutual trust between the Member States ; and finally, stimulate democratic deliberation both at national and at European level. Part V examines these different functions of evaluation, and asks whether they can be reconciled in one single model of evaluation. The conclusions are presented in Part VI.

The logic of evaluation presented here may be seen as subverting the neo-functionalist logic for which it is a potential competitor. But it may also be seen as a necessary complement to that neo-functionalist

logic itself. Indeed, the establishment of an area of freedom, security and justice between the EU Member States cannot avoid constantly questioning the content of such an area itself, and in particular, the relationship between mutual recognition and harmonization (or, more broadly, between mutual cooperation and the definition of common standards) in the progressive establishment of this area between the EU Member States. By establishing such an area, the Union seeks to achieve a balance between conflicting goals – free movement of persons on the one hand, a high level of safety on the other hand –; and it does so by means which are as much competing against one another as they are complementary – mutual recognition and mutual cooperation to the fullest extent possible, accompanied by approximation of national legislations or the development of common standards where necessary –. Where the balance is to be struck, which degree of legal approximation should accompany mutual recognition, and according to which sequence this should happen, are left for us to discover as we move towards the fulfilment of the objective set by the Treaty. Evaluation mechanisms therefore may be conceived as searching devices which will enable us to better understand what this objective is, in the very process of implementing it. It is the potential of this logic of evaluation, including both monitoring and learning, that this chapter explores.

## II. The standard view

The standard view sees the establishment of an Area of freedom, security and justice in the EU as the search for an adequate equilibrium point between negative and positive integration. This view identifies a deep structure in the process of European integration, analogizing the establishment of the area of freedom, security and justice in this decade, to the establishment of the internal market in the 1980s. Mutual recognition is the rule, and it is based on the premiss that the national authorities of all Member States can be trusted to comply with the same set of values publicly agreed upon. Harmonization is the exception, but it constitutes the preferred remedy where mutual confidence breaks down, whether or not for objectively justifiable reasons: it constitutes the other horn of the alternative. In this view, fundamental rights fulfil, in the establishment of the area of freedom, security and justice, the same function as the ‘mandatory requirements’ famously put forward by the European Court of Justice in the *Cassis de Dijon* judgment of 1979 where, for the first time, the concept of mutual recognition was introduced in the law of the internal market.<sup>2</sup> In *Cassis de Dijon*, the Court had noted that there is ‘no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, [products] should not be introduced into any other Member State’ (para. 14), but it acknowledged that ‘obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer’ (para. 8). One generation later, the European Court of Justice was asked in the landmark case of *Gözütok and Brügger*<sup>3</sup> whether the national courts of the Member States should be obliged, under the *non bis in idem* principle enshrined in the Schengen Agreement (the right not to be judged or punished twice for the same offence),<sup>4</sup> to recognize that further prosecution is barred after the accused has arrived at a settlement with the prosecuting authorities of another Member State than the one where he is facing criminal charges. The Court explicitly noted that mutual recognition was not conditional upon the harmonization of criminal procedures across the Member States. Instead, said the Court, the ‘necessary implication’ of the *non bis in idem* principle is that ‘the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States *even when the outcome would be different if its own national law were applied*’ (para.

<sup>2</sup> Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (‘*Cassis de Dijon*’), 1979 ECR 649.

<sup>3</sup> Joined Cases C-197/01 and C-385/01, *Gözütok and Brügger*, 2003 ECR I-1345.

<sup>4</sup> Article 54 of the Convention implementing the Schengen Agreement (CISA) of 14 June 1985 on the gradual abolition of checks at the common borders, of 19 June 1990 (Schengen Convention), OJ L 239, 22.9.2000, p. 19.

33). The Court accepted that such mutual recognition would not be obligatory where it would jeopardize fundamental rights, such as the rights of victims of criminal offences; but it noted that, in the case at hand, that issue did not arise, since the *non bis in idem* principle ‘does not preclude the victim or any other person harmed by the accused’s conduct from bringing a civil action to seek compensation for the damage suffered’ (para. 47). The analogy between the concept of mutual recognition in the internal market and its function in the area of freedom, security and justice is clear. It was presented thus in the opinion of Advocate General Ruiz-Jarabo Colomer, delivered in the *In Gözutok and Brügge* cases : ‘This shared goal of facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions cannot be achieved without the mutual trust of the Member States in their criminal justice systems and without the mutual recognition of their respective judgments, adopted in a true common market of fundamental rights. Indeed, recognition is based on the thought that while another State may not deal with a certain matter in the same or even a similar way as one’s own State, the outcome will be such that it is accepted as equivalent to a decision by one’s own State because it reflects the same principles and values. Mutual trust is an essential element in the development of the European Union: trust in the adequacy of one’s partners’ rules and also trust that these rules are correctly applied’ (para. 124 of the opinion).

But just like the Area of freedom, security and justice, has inherited the concept of mutual recognition from the law of the internal market, it has been hostage to a strangely binary form of thinking characteristic of the ‘new approach’ to market integration. This standard view builds on the idea of a Grand Alternative between mutual recognition (in its many incarnations) and harmonization (see also Peers 2004). Only a few years ago, the approach of the Commission still offered a clear illustration of this. ‘Mutual recognition’, according to the Commission, ‘is a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one’s own state, the results will be such that they are accepted as equivalent to decisions by one’s own state’ (CEC 2000a: para. 3.1.). However, mutual recognition thus understood ‘rests on mutual trust and confidence between the Member States’ legal systems’, and such mutual trust may have to be ‘enhanced’ by certain harmonization measures: ‘Differences in the way human rights are translated into practice in national procedural rules [...] run the risk of hindering mutual trust and confidence which is the basis of mutual recognition’ (CEC 2003a: title I.7). The Commission stated thus, in 2005, that ‘[t]he first endeavours to apply the [mutual recognition] principle, in particular with the European arrest warrant, revealed a series of difficulties which could to some extent be resolved if the Union were to adopt harmonisation legislation [aimed at] ensuring that mutually recognised judgments meet high standards in terms of securing personal rights’ (CEC (2005a), para. 3.1.).<sup>5</sup>

Nor is this view applicable only the mutual recognition in the criminal justice field. A similar dialectic is for instance currently at play as regards the protection of personal data processed by law enforcement authorities, in the establishment of the area of freedom, security and justice. Just like the harmonization of the protection of personal data in the internal market was seen as a condition of mutual recognition of the relevant national legislations,<sup>6</sup> the development of common rules on the

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<sup>5</sup> For another example of this dialectic, see Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property, OJ L 68 of 15.3.2005, p. 49, where the Preamble (10<sup>th</sup> recital) says that it is “linked to a Danish draft Framework Decision on the mutual recognition within the European Union of decisions concerning the confiscation of proceeds from crime and asset-sharing, which is being submitted at the same time”. After being politically agreed upon in June 2004 by the Justice and Home Affairs Council (doc. 10027/04 of 3 June 2004, approved on 8 June 2004), this latter Framework Decision has now been formally adopted : see Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006, p. 59. In turn, the 8th Recital of the Preamble of this latter instrument refers back to the Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property.

<sup>6</sup> The Data Protection Directive (1995) defines minimum safeguards for the protection of private life in the processing of personal data throughout the Union. Article 1(2) of the directive provides that ‘Member States shall neither restrict nor

protection of personal data in law enforcement activities is considered a condition for the exchange of information between the law enforcement agencies of the Member States under what came to be called the principle of availability. As defined in the Hague Programme adopted by the European Council of 4-5 November 2004, the principle of availability means that, 'throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State' (European Council 2004: para. 2.1.). In other terms, information available in one Member State should be made available to the authorities of any other Member State, just as if these were authorities of the same State: 'The mere fact that information crosses borders should no longer be relevant. The underlying assumption is that serious crimes, in particular terrorist attacks, could be better prevented or combated if the information gathered by law enforcement authorities in EU Member States would be more easily, more quickly and more directly available for the law enforcement authorities in all other Member States' (CEC 2005b: para. 2.2.). It is this principle which is currently codified in the proposal for a Framework Decision on the exchange of information under the principle of availability (CEC 2005c).

The principle of availability plays in this field the role which, in the field of judicial cooperation in criminal matters, is played by the principle of mutual recognition. It presupposes the mutual trust which should exist between the Member States' national authorities. But it is also a technique through which leverage may be exercised in favor of the adoption of common standards in order to strengthen mutual trust (de Biolley 2006: 194). Indeed, as was stressed in the Hague programme itself (European Council 2004: para. 2.1.), the implementation of the principle of availability requires that all Member States ensure a high level of protection of personal data, thus justifying the high level of trust which this principle presupposes between the national authorities of the different Member States. However, the Data Protection Directive (1995) does not apply to the processing of personal data effectuated in the course of the activities of the State in areas of criminal law or matters falling under Title VI EU (art. 3(2)). Moreover, while all the EU Member States are parties to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981, the principles set forth in this instrument are expressed at a relatively high level of generality, and certainly does not ensure the same level of protection as, for instance, the 1995 Data Protection Directive. Therefore, almost simultaneously to proposing an instrument implementing the principle of availability, the Commission put forward a proposal for a Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (CEC 2005d). This was encouraged by the European Parliament (2005) and welcomed by the European Data Protection Supervisor (2006). It illustrates perfectly well the standard narrative, in which the need to adopt 'flanking measures', aimed at improving the level of protection of fundamental rights in the EU Member States, appears as a logical – and unavoidable – counterpart to the lowering the barriers to mutual recognition or exchange of information.

There is, of course, an inherent tension underlying the dialectic described in the standard view. Insofar as it justifies mutual recognition, mutual trust is *presupposed* by the very fact that each Member State has agreed to consider decisions adopted by the authorities of any other Member State as equivalent to decisions adopted by its own authorities: such a presupposition was, for instance, central to the reasoning of the *Gözütok* and *Brügge* judgment of the European Court of Justice. But insofar as it justifies, instead, the approximation of national legislations, the concept of mutual trust appears rather as a *precondition* for establishing the area of freedom, security and justice on the principle of mutual recognition (De Schutter 2005; Weyembergh 2004: 339). In this second perspective, mutual trust is not to be taken for granted: it has to be created. The desire to strengthen mutual trust may therefore

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prohibit the free flow of personal data between Member States for reasons connected with' the protection of the right to privacy with respect to the processing of personal data.

justify the approximation or the harmonization of legislations as a measure accompanying mutual recognition. In this sense, mutual trust is a goal to be achieved by the Union legislature, which must create the conditions that favour the harmonious functioning of a system based on the mutual recognition of judicial decisions.

Whether this latter function of the notion of mutual trust corresponds to the original understanding of mutual recognition may be doubted. The Treaty on the European Union does provide in Article 31, c), that common action on judicial cooperation in criminal matters shall include, *inter alia*, ‘ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation’. But this remains a particularly vague formulation. And when the concept of mutual recognition was originally put forward, with the evident purpose of achieving in the establishment of the criminal area what had been achieved in the internal market during the late 1980s, this was presented not as a lever to promote the further approximation of national legislations in this area, but on the contrary as a *substitute* for harmonization. The United Kingdom presidency document of 1998 which initially presented the idea of mutual recognition stated : ‘...a possible approach, comparable to that used to unblock the single market, would be to *move away from attempts to achieve detailed harmonization* to a regime where each Member State recognized as valid the decision of another Member State’s Courts in the criminal area with the minimum of formality’ (Council of the EU 1998 (emphasis added); Nilsson 2005). In this original view of mutual recognition, the fact that all the EU Member States are bound by the same international human rights instruments should suffice to justify establishing between them the mechanism of mutual recognition of judicial decisions adopted in criminal matters. And indeed, such has been hitherto the approach adopted by the Council of Europe instruments which promote mutual recognition on the criminal field : although these instruments – such as, in particular, the 1970 European Convention on the International Validity of Criminal Judgments<sup>7</sup> or the 1972 European Convention on the Transfer of Proceedings in Criminal Matters<sup>8</sup> – do contain certain safeguard clauses ensuring that criminal sanctions adopted by one State will not be enforced in another State in violation of the latter State’s international obligations or of the ‘fundamental principles of its legal system’,<sup>9</sup> they do not presuppose that both States will have implemented principles such as respect for the rights of defence or the presumption of innocence, through similar or comparable national legislations.

Whatever the original intent behind the introduction of the concept of mutual recognition in the establishment of the Area of freedom, security and justice, it soon became clear that, far from rendering unnecessary the adoption of common standards, the mutual recognition of judicial decisions in criminal matters could in fact constitute an incentive for further harmonization, especially where the level of protection of certain fundamental rights in criminal proceedings varies among the EU Member States. The idea of such complementarity between approximation of national laws and mutual recognition was recognized already by the Tampere European Council of 15-16 October 1999, which launched the idea of an Area of freedom, security and justice, and defined mutual recognition of judicial decisions in criminal matters as its ‘cornerstone’: the Conclusions adopted by the European Council in Tampere ask the Council of the EU and the Commission ‘to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition. In this programme, work should also be launched on [...] those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual

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<sup>7</sup> C.E.T.S. n° 70 ; signed in The Hague on 28 May 1970 and in force since 26 July 1974. This instrument provides that each Contracting State shall be competent under certain conditions to enforce a sanction imposed in another Contracting State which is enforceable in the latter State, upon the request of this State.

<sup>8</sup> C.E.T.S. n° 73; signed in Strasbourg on 15 May 1972 and in force since 30 March 1978. Under the mechanism established by this Convention, any Contracting State may prosecute under its own criminal law any offence to which the law of another Contracting State is applicable, upon the request of the latter State.

<sup>9</sup> See Article 6 of the European Convention on the International Validity of Criminal Judgments ; and Article 11 of the European Convention on the Transfer of Proceedings in Criminal Matters.

recognition, respecting the fundamental legal principles of Member States' (European Council (1999), para. 37).

Of course, whether mutual trust between the EU Member States should be enhanced through harmonization measures – or whether, instead, mutual trust can be *presupposed* –, cannot be dissociated from the fact that these States share a common *acquis* in the area of fundamental rights, in particular since they all are parties to the most important instruments of the Council of Europe. But this argument is not a decisive one. Apart from the fact that Council of Europe instruments do not cover all areas in which harmonization may be required in the EU in the field of criminal law, Council of Europe instruments often impose only *minimum* standards, particularly in the area of fundamental rights. But the strengthening of mutual trust by the adoption of common standards has been justified not only in the face of the risk that certain Member States may not be complying with the *minimum* standards laid down in such international instruments to which all the Member States are parties, but also in the face of the danger that, even if all States are above those minimum standards, *divergences* may appear between the Member States, if they are left to implement these standards without any attempt at approximation under EU Law. This is a remarkable displacement, which – if it is taken seriously – may relativize the argument that the Union should not take legislative action in order to protect and promote fundamental rights, particularly where such intervention would not have a clearly added value, in the presence of common undertakings of the EU Member States under international human rights instruments.

It is perhaps in the field of fundamental rights that the choice between harmonization on the one hand, and mutual recognition presupposing mutual trust on the other hand, presents itself in the purest form. And it is here, too, that the substitution of a logic of monitoring to the alternative between harmonization and mutual trust has been most heavily discussed. The scenario of human rights monitoring performed by the EU on its member States, in order to provide each Member State with the assurance that, if a serious threat to fundamental rights exists in one Member State, this will be identified and reacted to as appropriate, has been explored in the period 2000-2005. This avenue was finally not chosen, but essentially because of the fear that this would be competing with the kind of monitoring performed by the Council of Europe bodies. The episode is nevertheless instructive: it illustrates both the potential of evaluation within the EU, and how much this potential can be underestimated.

### **III. Monitoring fundamental rights**

The question of whether, and how, the EU should ensure a monitoring of the situation of fundamental rights in the EU Member States, has been asked with a growing insistence since the late 1990s. Some see such monitoring as required in order to establish the mutual trust on which the Area of freedom, security and justice is built. Others consider that the EU would be overstepping its legitimate role by developing such monitoring and that this should be left, instead, to the Council of Europe monitoring bodies.<sup>10</sup> Due in part to these controversies, the scenario of a fundamental rights monitoring by the EU has not fully materialized yet. But the building-blocks are there, should there be a political will to explore it further. When the Treaty of Amsterdam initially formulated in Article 6(1) EU the values on which the Union is founded, this affirmation was backed up by a mechanism provided for in Article 7 EU, allowing for the adoption of sanctions against a State committing a serious and persistent breach of these values ; this mechanism was further improved by the Treaty of Nice, which introduced the possibility of recommendations being addressed preventively to a member State, where a 'clear risk of

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<sup>10</sup> I argue elsewhere that these are not contradictory views : instead, a form of monitoring fundamental rights in the EU could develop, which bases itself on the findings of the Council of Europe monitoring bodies and ensures that any recommendations made by those bodies are effectively implemented (De Schutter 2008).

a serious breach' of those values is found to be present.<sup>11</sup> These developments raised the question whether these provisions of the Treaty on the European Union should lead to a permanent monitoring of the situation of fundamental rights in the Member States of the European Union.

Immediately after the adoption of the EU Charter of Fundamental Rights at the Nice Summit of 2000, the European Parliament inaugurated the practice of adopting annual reports on the situation of fundamental rights in the Union.<sup>12</sup> This practice was justified by the consideration that, 'following the proclamation of the Charter, it is [...] the responsibility of the EU institutions to take whatever initiatives will enable them to exercise their role in monitoring respect for fundamental rights in the Member States, bearing in mind the commitments they assumed in signing the Treaty of Nice on 27 February 2001, with particular reference to new Article 7(1)', and that 'it is the particular responsibility of the European Parliament (by virtue of the role conferred on it under the new Article 7(1) of the Treaty of Nice) and of its appropriate committee [the LIBE Committee] to ensure [...] that both the EU institutions and the Member States uphold the rights set out in the various sections of the Charter'.<sup>13</sup> Since it soon appeared that the resources of the LIBE Committee and the expertise and time it had at its disposal were not sufficient to enable it to conduct this monitoring function in an entirely satisfactory manner, the European Parliament requested that

a network be set up consisting of legal experts who are authorities on human rights and jurists from each of the Member States, in order to ensure a high degree of expertise and enable Parliament to receive an assessment of the implementation of each of the rights laid down in the Charter, taking account of developments in national laws, the case law of the Luxembourg and Strasbourg Courts and any notable case law of the Member States' national and constitutional courts.<sup>14</sup>

That network was set up in September 2002.<sup>15</sup> In October 2003, the European Commission adopted a communication in which it set out its views about the implementation of Article 7 EU (CEC 2003b). Referring to the work of the EU Network of independent experts on fundamental rights, it took the view that the information collected by the network 'should make it possible to detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty'. It also emphasized the advantages presented by the decentralized organisation of the network, which was composed of one expert for each member State : 'Through its analyses the network can also help in finding solutions to remedy confirmed anomalies or to prevent potential breaches. Monitoring also has an essential preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent

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<sup>11</sup> This preventive mechanism is now described in Article 7(1) EU. By inserting this procedure into Article 7 EU, the Member States were drawing the lessons from the crisis provoked by the inclusion into the Austrian governmental coalition of the Freedom Party of Austria (FPÖ) led by J. Haider. On this crisis, see Happold (2000) and Bribosia et al. (2000).

<sup>12</sup> See the Report on the situation as regards fundamental rights in the European Union (2000) (rapp. Th. Cornillet), PE 302.216/DEF, EP doc. A5-0223/2001 (2000/2231(INI)); the Report on the human rights situation in the European Union (2001) (rapp. J. Swiebel), PE 311.039/DEF, EP doc. A5-0451/2002 (2001/2014(INI)) (and Resolution of 15 January 2003 on the situation concerning fundamental rights in the European Union (2001), OJ C 38 E, 12.2.2004, p. 174); Report on the situation as regards fundamental rights in the European Union (2002) (rapp. F. Sylla), PE 329.881/DEF, EP doc. A5-0281/2003 (2002/2013(INI)) (and Resolution of 4 September 2003 on the situation as regards fundamental rights in the European Union (2002), P5\_TA(2003)0376); Report on the situation as regards fundamental rights in the European Union (2003) (rapp. A. Boumediene-Thiery), PE 329.936/DEF, EP doc. A5-0207/2004 (2003/2006(INI)). The resolution proposed on the basis of the report by Ms A. Boumediene-Thiery was rejected by the European Parliament. The Cornillet Report was the first one to use the EU Charter of Fundamental Rights as its template. However, the practice of preparing an annual report on the situation of fundamental rights of the Union predated the adoption of the Charter : see Resolution on the annual report on human rights in the EU (1998-1999), (rapp. Haarder) of 16 March 2000 (EP doc. A5-0050/2000).

<sup>13</sup> Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000) (rapp. Thierry Cornillet) (2000/2231(INI)) (OJ C 65 E, 14.3.2002, pp. 177-350), paras. 2-3.

<sup>14</sup> Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000), cited above, para. 9.

<sup>15</sup> For the sake of transparency, it should be disclosed that the present author coordinated this group of experts.

trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded'. Finally, the Commission emphasized the usefulness of involving Member States' representatives in the evaluation tasks performed by the network, in order to ensure that its findings would constitute a platform for collective learning : the Member States, said the Commission, should be 'involved in the exercise of evaluating and interpreting the results of the work of the network of independent experts. With a view to exchanging information and sharing experience, the Commission could organise regular meetings on the information gathered with the national bodies dealing with human rights' (CEC 2003b: 9-10).

What the Commission was in fact suggesting, was that a permanent form of monitoring of the compliance with fundamental rights by the EU Member States should be established, both in order to contribute to the mutual trust in the establishment of an area of freedom, security and justice, and in order, where necessary, to provide the institutions of the Union with the information they require in order to fulfil the tasks entrusted to them by Article 7 EU. It saw the EU Network of independent experts on fundamental rights as the laboratory of such a mechanism ; the communication stated that this network might be established on a permanent basis in the future, in order to perform these functions. However, in its answer to the Commission, the Parliament disagreed. While deploring, in other respects, the timidity of the reading proposed by the European Commission of Article 7 EU, it insisted that the use of Article 7 EU should be based on a number of principles, including the principle of confidence, which it explained thus (European Parliament 2004: para. 12):

The Union looks to its Member States to take active steps to safeguard the Union's shared values and states, on this basis, that as a matter of principle it has confidence in:

- the democratic and constitutional order of all Member States and in the ability and determination of their institutions to avert risks to fundamental freedoms and common principles,
- the authority of the European Court of Justice and of the European Court of Human Rights.

Union intervention pursuant to Article 7 of the EU Treaty must therefore be confined to instances of clear risks and persistent breaches and may not be invoked in support of any right to, or policy of, permanent monitoring of the Member States by the Union. Nevertheless, the Member States, accession countries and candidate countries must continue to develop democracy, the rule of law and respect for fundamental rights further and, where necessary, implement or continue to implement corresponding reforms.

Therefore, it seems highly unlikely that, in the future, Article 7 EU will lead to the development envisaged by the European Commission in its Communication of 15 October 2003. It is revealing in that respect that the Fundamental Rights Agency of the European Union, when it was set up in 2007 after three years of discussions, did not receive the mandate to monitor the EU Member States in situations other than where they implement European Community law.<sup>16</sup> Although, to a large extent, the definition of the mandate of the Fundamental Rights Agency was guided by considerations of comity vis-à-vis the Council of Europe (De Schutter 2008), and although the choice not to give the Agency a formal role in the implementation of Article 7 EU resulted from the doubts which were expressed about the usefulness of such an explicit attribution and about the legality thereof, this choice

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<sup>16</sup> In the original proposals of the Commission (CEC 2005e), it was envisaged that the Agency could be invited to provide its 'technical expertise' in the context of Article 7 EU. The Legal Service of the Council however took the view that such a possibility would 'go beyond Community competence', and that, moreover, it would be incompatible with Article 7 EU itself, insofar as this provision did not allow for the adoption of implementation measures and was, in that sense, self-sufficient (Doc. 13588/05JUR 425 JAI 363 COHOM 36 (26 October 2005)). The compromise solution consisted therefore in appending to the Regulation establishing the Agency a Declaration of the Council confirming this possibility, without any reference being made to Article 7 EU in the text of the Regulation itself (Council of the EU 2007).

also corresponds to the idea expressed by the European Parliament that Article 7 EU should not become a pretext for placing the EU Member States under a permanent supervision as regards compliance with fundamental rights, since they are already subjected to such supervision in other frameworks.

There are therefore reasons to doubt that the European Union is transforming itself into a ‘human rights organisation’ – exercising the competences it has been attributed by the Member States in order to protect and promote human rights (von Bogdandy 2000) –, under the pretext of ensuring that the establishment of an area of freedom, security and justice between the Member States is effectively grounded on full compliance with fundamental rights. Yet, the mere fact that all the EU Member States are bound by the same international human rights instruments is not a substitute for further harmonization even in this field. First, while the existence of this *acquis* may justify an attitude of restraint of the European legislator, both out of consideration for the development of standards by the Council of Europe and because, in the presence of this *acquis*, harmonization may be unnecessary, there will be situations where higher standards of protection of fundamental rights will have to be achieved, since too important differences between the Member States in the level of protection of fundamental rights they ensure may result in obstacles to their mutual cooperation. Second, the exclusion of human rights monitoring within the EU does not exclude the establishment of more focused monitoring mechanisms, specifically designed to foster mutual trust between the Member States. For instance, the setting up of objective and impartial mechanisms to evaluate the judicial systems in the different Member States, which the Commission has proposed, could prevent the judicial authorities of a particular Member State from being tempted to infer from the fact that there are differences between their own judicial traditions and those of another Member State that there are certain deficiencies in the latter State that form an obstacle to mutual recognition; and it could ensure more objectivity in the assessment of certain real deficiencies which, in accordance with Article 6(2) of the EU Treaty, would indeed justify a refusal of mutual recognition.<sup>17</sup> More importantly however, harmonization may be required in other fields, and for purposes other than to guarantee an adequate level of protection of fundamental rights throughout the Union. In that sense, overambitious as it may be, fundamental rights monitoring within the EU is, especially, misdirected. Because it is conceived as a top-down mechanism, intent on verifying compliance with a pre-defined set of norms, it misses the original value of monitoring in the establishment of the area of freedom, security and justice. I will argue in the following part of this chapter that monitoring the member States is chiefly useful as a searching device : by allowing for comparisons to be made, and for each State to learn from the other, it not only cements mutual trust – it also provides hope that, in the future, the choice between mutual recognition and harmonization will be better informed, and that, beyond those two branches of the classic alternative, mutual evaluation will emerge as another potential coordinating tool.

#### **IV. Evaluation mechanisms in the Area of Freedom, Security and Justice: A Typology**

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<sup>17</sup> In its Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States (CEC 2005a), the European Commission emphasizes that the purpose of setting up mechanisms to evaluate the criminal justice systems – which is one of the objectives it has set itself in this Communication, in accordance with the mandate given by the European Council in the Hague programme of 4 and 5 November 2004 (European Council 2004) – is to ‘undertake a more general evaluation of the conditions in which judgments are produced in order to ensure that they meet high quality standards enabling mutual trust between judicial systems to be reinforced, without which MR will not be able to work, depends on broader-based and longer-term action. The Hague Programme states as a matter of principle that “mutual confidence [must] be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality” and calls for “a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice, while fully respecting the independence of the judiciary” to be established. In the context of boosting mutual trust by the certainty that judicial systems producing judgments that are eligible for Union-wide enforcement meet high quality standards, this evaluation must provide a fully comprehensive view of national systems’ (CEC 2005a: para. 31). The qualities which such an evaluation mechanism must have in order to adequately fulfil the functions that are assigned to it are set out in detail in EU Network of Independent Experts on Fundamental Rights (2005), at 32-34.

In order to understand the potential of such evaluation mechanisms particularly in an experimentalist mode of governance, we should first acknowledge the ambiguity of the position of the institutions of the EU on the criteria which they should follow when choosing, the terms of the Grand Alternative in the classic view, between mutual recognition and harmonization. For instance, the European Commissions states in its July 2000 Communication on the Mutual Recognition of Judicial Decisions in Criminal Matters: ‘Not always, but often, the concept of mutual recognition goes hand in hand with a certain degree of standardisation of the way states do things. Such standardisation indeed often makes it easier to accept results reached in another state. On the other hand, mutual recognition can to some degree make standardisation unnecessary’ (CEC 2000: para. 3.1.). The Hague Programme, too, remains vague on this crucial question. While this programme is intended to define the agenda of the Union in the field of justice and home affairs for the years 2005-2010, it simply mentions that the mutual trust on which mutual recognition of judicial decisions is based could be enhanced by a number of means, consisting both in legal measures and operational initiatives, and including in particular the ‘progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law’; ‘a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice’, providing ‘the certainty that all European citizens have access to a judicial system meeting high standards of quality’; the ‘development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions’; ‘the establishment of minimum rules concerning aspects of procedural law (...) in order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension’; and finally, the approximation of substantive criminal law as regards ‘serious crime with cross border dimensions’, as provided by the EU Treaty (European Council 2004: para. 3.2. and 3.3.).

This leaves to the European legislator an almost unlimited margin of appreciation. When it commented on the Hague Programme adopted by the European Council of 4-5 November 2004, the House of Lords urged caution on the question of approximation of the criminal laws of Member States in order to facilitate mutual recognition, emphasizing that ‘this is an area where the principle of subsidiarity will come prominently into play and due observance of it will be necessary’ (House of Lords 2005: para. 40).<sup>18</sup> What precisely the principle of subsidiarity might entail in this area, however, remains unaddressed. The Protocol on the application of the principles of subsidiarity and proportionality, appended to the 1997 Treaty of Amsterdam,<sup>19</sup> emphasized that subsidiarity is ‘a dynamic concept’, both in the sense that it ‘should be applied in the light of the objectives set out in the Treaty’ and that which actions it allows or disallows will depend on the evolution of the circumstances : the principle of subsidiarity, it stated, ‘allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified’ (para. 3). It also imposed a requirement that any action of the Union subject to the principles of subsidiarity and proportionality be justified by reference to these principles (para. 4). Most importantly, it shed further light on the content of these requirements. The principle of subsidiarity requires that it be demonstrated that ‘the objectives of the proposed action

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<sup>18</sup> A fuller citation may be provided : ‘Approximation of the criminal laws of Member States is likely to have a significant impact on Member States’ legal cultures and traditions and on national sovereignty. We are pleased to see that the Hague Programme views such approximation as being necessary only if it facilitates mutual recognition. However, the more progress that is made on developing the mutual recognition programme, the greater the need will be for some sort of minimum standard across the EU of procedures in the legal processes for which mutual recognition will be claimed. Such approximation is necessary not only to facilitate mutual trust and justify mutual recognition, but, more importantly, to protect the rights of the individuals affected. However, we would urge caution in the further development of harmonisation in sensitive areas such as the admissibility of evidence. Before any further expansion of harmonisation there needs to be a full examination of the implications of such a development for Member States. This is an area where the principle of subsidiarity will come prominently into play and due observance of it will be necessary’.

<sup>19</sup> Protocol (n° 30) on the application of the principles of subsidiarity and proportionality, appended to the Treaty of Amsterdam, in force since May 1st, 1999.

cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community'. The verification of this condition may be influenced by considerations relating to the question whether 'the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States' ; 'actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests'; or 'action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States' (para. 5). Of these, the second justification for an intervention by the Union is clearly the most relevant in the establishment of the area of freedom, security and justice : where the divergences between the Member States' approaches to a certain issue result in an obstacle to their mutual cooperation and, thus, threaten the aim of an area of freedom, security and justice, 'in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime' (article 2, al. 1, 4th indent of the EU Treaty), this may call for the approximation of national legislations, administrative regulations or practices; in addition, according to the principle of proportionality, the intervention of the Union should be limited to what is necessary.

There are a number of signs indicating that mutual evaluation is emerging as a policy mode in its own right, either as a substitute to the mutual recognition / harmonization alternative and as a means to identify any divergences between the member States which may call for harmonization, consistent with the principle of subsidiarity which has just been recalled. While a general monitoring, performed by mechanisms established within the European Union, on the compliance of the EU Member States with the values on which the Union is founded, may never be set up, other, more low-profile forms of monitoring have been developing recently, in recognition of the need to ground mutual cooperation on a firm basis (Weyembergh and de Biolley 2006). Two general forms of evaluation currently in force may be distinguished. Under a first model, the European Commission is recognized a leading role, corresponding to its function under the EC Treaty of guardian of the Member States' obligations : it monitors the implementation of specific instruments adopted under title VI of the EU Treaty, on the basis of information collected from the national authorities. Under a second model, the Member States organize among themselves a form of peer evaluation, in order to improve the mutual understanding of one another's approaches to certain issues of common interest (such as the policing of external borders or the fight against terrorism), and to exercise political pressure on the Member States where certain deficiencies are identified. More recently, a third and more ambitious model, which may be seen as a synthesis an an extension of these two existing models, has been proposed.

### *1. The evaluation of the implementation of third pillar instruments*

A first category of 'evaluations' in fact aim, at a rather modest level, to compensate for the absence of infringement proceedings filed by the Commission against the Member States under Title VI of the Treaty on the European Union, in situations where they would fail to comply with their obligations under EU law, especially in the implementation of framework decisions. Thus, a number of these framework decisions require the Member States to report to the Commission, within a prescribed deadline after the period left for implementation has expired, about the measures they have adopted to comply with the framework decision ; the Council is then expected to 'assess the extent to which Member States have taken the necessary measures in order to comply' with the framework decision on the basis of a report prepared by the Commission following the receipt of this information.<sup>20</sup> Indeed,

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<sup>20</sup> See, e.g., Article 11(2) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190 of 18.7.2002, p. 1); Article 14(2) of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196 of 2.8.2003, p. 45); Article 16(2) of the Council Framework Decision 2005/214/JHA of 24 February 2005 on the

even in the absence of an explicit legislative mandate to that effect, the European Commission has occasionally considered that it should present such an evaluation of the measures adopted by the Member States in the context of such an implementation, putting forward the importance of the instruments concerned (CEC 2004: 3).

Such evaluations, however, are limited in what they may achieve (de Biolley and Weyembergh 2006: 75-98). The information sent to the European Commission by the EU Member States relates to the implementation of a particular legislative instrument – in particular, framework decisions, which require that implementation measures be adopted by the EU Member States –, rather than to the full set of measures adopted in a certain policy area. The evaluations focus therefore, not on the general situation of the judicial system or respect for the rule of law or fundamental rights in the Member States, but only on the implementation of specific instruments adopted under Title VI of the EU Treaty (for more details, CEC 2001: para. 1.2.2.). These evaluations moreover are concerned only with the question whether the Member States have adopted the measures required under these instruments : they do not examine whether these implementation measures comply with the requirements of fundamental rights ; nor do they address whether, in the light of these measures and the difficulties, perhaps, the Member States encounter in fully complying with their obligations under EU law, the legislative instruments adopted by the Union may have to be amended, or even completely redesigned. They concentrate on the adoption of legal measures by the Member States : they are silent about the practical impact of such measures, and about the question whether these measures effectively contribute to the establishment of the area of freedom, security and justice. Indeed, the information on which the current evaluations are based concerns generally the legal measures which have been adopted, rather than the practice of the authorities, including the concrete application of these measures and the results achieved. Although there have been attempts to move beyond the practice of evaluations based exclusively on the legal measures adopted, in particular as regards the implementation of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, which constitutes the first and most visible instrument based on the principle of mutual recognition of the judicial decisions in criminal matters,<sup>21</sup> the uneven quality of the information on which this was based has been recognized to be a serious deficiency of the process (CEC 2006a). The Commission did suggest more far-reaching evaluation mechanisms, such as involving independent experts in monitoring the effective compliance by all the EU Member States with the fair trial requirements imposed under the proposed Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, or imposing on the national authorities an obligation to collect statistics about the impact of this instrument (CEC 2004a). But these proposals for strengthening the monitoring of implementation of EU law apparently met with strong resistance.

In sum : the evaluations which have been set up under specific instruments adopted under the third pillar hitherto have served to monitor the compliance of the Member States with their obligations, in a classical top-down fashion ; but they are not seen as a potential source of reflexivity for the EU institutions or as providing an opportunity for collective learning between the Member States. It is as if the European legislator could do no wrong. And it is as if the adoption of legal measures, by itself, would be sufficient to create the conditions which will ensure that they will achieve their objective, however diverse and evolving the settings in which these measures are to be implemented.

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application of the principle of mutual recognition to financial penalties (OJ L 76 of 22.3.2005, p. 16); Article 19(2) of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, p. 59).

<sup>21</sup> Although principally based on the national provisions giving effect to the arrest warrant, as communicated to it by the Member States (as required under Article 34(2) of the Framework Decision), the evaluation reports of the Commission (CEC 2006a) also rely on the replies given to the European Judicial Network's questionnaire, which concerned the practical aspects of the arrest warrant prior to 1 September 2004, and by maintaining a bilateral dialogue with the designated national contact points.

## 2. Peer evaluation

In the kind of evaluation discussed above, the European Commission plays the central role as the guardian of the Member States' obligations. Alternatively, peer evaluations have developed in certain areas. One of the oldest and most interesting forms of peer review organized in the justice and home affairs field results from the establishment of a Standing Committee on the evaluation and implementation of Schengen, and entrusted with evaluating both the degree of preparedness of the States who are candidates to participating in the Schengen Convention, and the level of compliance of States parties.<sup>22</sup> This committee, initially placed under the authority of the Executive Committee established by the Convention implementing the Schengen Agreement – and now established as a working group of the Council, the 'Schengen Evaluation Working Party' (SCH-EVAL) –, is composed of one high-ranking representative from each Signatory State. Its delegations, composed of inspectors representing the Member States willing to contribute – each State funding its own representative within the group –, visit the countries subject to the evaluation procedure, according to a workprogramme defined initially by the Executive Committee, and now by the Council of the EU. The mutual evaluation is organized on the basis of the information collected through these visits as well as information provided by the host State.

The functions of this mechanism are twofold. Firstly, it is to establish whether all the preconditions for bringing the Convention Implementing the Schengen Agreement into force in a candidate State thereto have been fulfilled. The second function is more relevant for our purposes. As defined in the initial decision establishing the Standing Committee, this task is to 'lay the foundations so that the Executive Committee can ensure the proper application of the Schengen Convention by the States which have already brought it into force, in particular by following up the recommendations made by the visiting committees to the external borders, by ensuring that follow-up action is taken to remedy the shortcomings mentioned in the Annual Report on the External Borders, by focusing greater attention on the joint efforts needed to improve the quality of controls at the external borders and by optimising the application of the Convention in the fields of police cooperation, judicial cooperation and the SIS [Schengen Information System]. The Standing Committee shall seek solutions to the problems detected and shall make proposals for the satisfactory and optimal implementation of the Convention'.

The visits on which the evaluation mechanism is based lead to a dialogue between the host State and the experts, as well as to recommendations being addressed to that State about any shortcomings. Originally, each visit led to the preparation of a report, identifying shortcomings and proposing remedial measures. It was submitted to the host State, which could prepare an opinion in response. Both the report and the opinion were to be discussed within the Standing Committee, which was to seek a consensus between the two documents ; if no such consensus could be found, the Standing Committee was to present the position of each of the Parties, in order for the Executive Committee to adopt a final decision. All the information collected in the course of the preparation of the reports, as well as the reports themselves, were confidential.

Since the SCH-EVAL working group of the Council has taken over, the methodology has been modified in a number of respects.<sup>23</sup> But the peer review mechanism is still based on inspections in the States concerned as well as on written procedure, through the filling of questionnaires by States ; the procedure remains fully confidential ; it leads to the adoption of conclusions at the political level of the Council of the EU, which may approve recommendations adopted by the Working group. After a State has been subjected to an evaluation, it must present a follow-up report stating how it met the

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<sup>22</sup> Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/ Com-ex (98) 26 def.), OJ L 239, 22.9.2000, p. 138. See Genson and van de Rijt (2006).

<sup>23</sup> See Council of the EU, doc. 8286/1/03, of 6 May 2003 (Maintaining and increasing the efficiency of the Schengen Evaluation mechanism) ; and Council of the EU, doc. 15275/04, of 29 November 2004.

recommendations made by the experts. The follow-up may identify the measures which were adopted in response to those recommendations ; or it may state why certain reforms could not be implemented immediately – for example, certain reforms require the reinforcement of the existing capacities, for which the necessary budgets may be lacking – ; in certain cases, the States concerned have contested the recommendations addressed to them.

The evaluation mechanism is thus conceived to allow the detection of any problems encountered in the implementation of the Schengen Convention, and to identify solutions proposed for applying the Convention in a satisfactory and most effective manner. While the Decision creating the Schengen evaluation mechanism emphasizes that ‘sole responsibility for checking to ensure that the Convention is properly applied shall continue to remain with the Schengen States’, and that it is adopted ‘mindful of the need to observe the principle of national sovereignty’ (Preamble, 5<sup>th</sup> alinea), the work of the Standing Committee on the evaluation and implementation of Schengen and, now, of the SCH-EVAL working group, nevertheless places the participating States under a close supervision, focused not only on the legal transposition of the Schengen acquis, but also – and primarily – on the practical implementation, in areas such as border controls, visas, protection of personal data, or the expulsion or readmission of foreign nationals. In the development of the Schengen evaluation mechanism, a number of remarkable evolutions have taken place.<sup>24</sup> Particularly noteworthy is the fact that the catalogues prepared in order to facilitate the implementation of the Schengen acquis – these are compendia of best practices in areas such as, for instance, the crossing of external borders and the delivery of visas<sup>25</sup> – are taken into account in the practice of evaluations, despite these catalogues not having a binding legal effect ; and that the reports of the inspection visits have been structured in a more harmonized way, thus ensuring the possibility to compare between evaluations.

Peer assessments broadly similar to the Schengen evaluation mechanism have developed in the fields of terrorism and of organized crime. The Joint Action of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime<sup>26</sup> provides perhaps the best illustration. This peer evaluation, intended to cover at least five States per year, is supervised by the members of the Multidisciplinary Working Party on Organized Crime (MDW). Acting on the proposal of the presidency of the Council, the MDW defines the specific subject of the evaluation<sup>27</sup> as well as the order in which Member States are to be evaluated. The evaluation itself is made by evaluation teams, comprising three experts for each Member State subject to the evaluation drawn from a list of experts presented by the other Member States, and including in addition one or two members of the General Secretariat of the Council, one representative of the Commission, and occasionally a member of a body such as (depending on the subject of the evaluation) Europol or Eurojust. On the basis of the answers of the Member State concerned to a questionnaire and of a visit in that Member State allowing the evaluation team to meet the officials involved, a draft report is prepared, and transmitted to the Member State concerned in order to receive its comments. The draft report is transmitted to the MDW along with the comments of the State which were not accepted by the evaluation team. The MDW adopts conclusions by

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<sup>24</sup> There are currently plans to further improve the evaluation mechanism. In its conclusions on the EU border management strategy adopted at the Justice and Home Affairs Council of 4-5 December 2006, the Council states that it is necessary to maintain and develop the Schengen evaluation system. Experts from all Member States should evaluate, even critically if necessary, the border management system of a Member State in accordance with the evaluation system. The Council also calls on the Commission to draw up a proposal describing how to develop evaluations and enable unannounced inspections.

<sup>25</sup> Common Manual (OJ C 313 16.12.2002 p.97) and the Common Consular Instructions on visas for the diplomatic missions and consular posts (OJ C 313 16.12.2002 p.1)

<sup>26</sup> See Joint Action 97/827/JHA of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime, OJ L 344, 15.12.1997, p. 7.

<sup>27</sup> These have been mutual judicial assistance in criminal matters ; the action of law enforcement authorities in the area of drug trafficking ; the exchange of information between law enforcement authorities of the Member States and between the Member States and Europol ; and the application of the European arrest warrant.

consensus, following a presentation of their report by the evaluation team, and the explanations received from the State subject to the evaluation. Those conclusions are transmitted to the Council. The Joint Action provides that the Council ‘may, where it sees fit, address any recommendations to the Member State concerned and may invite it to report back to the Council on the progress it has made by a deadline to be set by the Council’ (art. 8(3)). The follow-up of the recommendations is generally weak : although most States do answer to the recommendations addressed to them, the information the States concerned send to the Council does not lead to any further discussions. Interestingly however, the MDW has occasionally included recommendations addressed to the Council itself, or to Europol : this suggests that, although conceived initially for the monitoring of the Member States’ application and implementation of international undertakings in the field of organized crime, this mechanism has the potential to bring about improvements also in the approach developed at European level in this field. On the other hand, the mechanism does not contribute to the accountability of the executives towards either the national parliaments or to civil society organizations, since the whole process is in principle confidential, although the Member States evaluated may if they wish make public the reports under their own responsibility.

This system was further built upon in order to ensure a form of peer evaluation of the action of the Member States against the threat of terrorism. On the premise that, while ‘the primary responsibility for designing each legal system and implementing it at national level rests with each Member State’, the EU Member States should ‘inform each other of the content in order to achieve greater efficiency in the fight against terrorism’, it was decided to develop a mechanism specific to this area which would enable the Member States to ‘evaluate the national legal systems in the fight against terrorism and their implementation on a basis of equality and mutual confidence’.<sup>28</sup> The mechanism is closely modeled on the preexisting mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime, from which it is derived.<sup>29</sup> It is placed under the supervision of the Committee of high-level national public servants established under Article 36 EU in order to prepare the discussions within the COREPER and the Council in the fields of police cooperation and judicial criminal cooperation.

For each cycle of evaluation, the ‘Article 36 Committee’ chooses one theme.<sup>30</sup> On that basis, a questionnaire is prepared by the Presidency of the Council with the assistance of the General Secretariat of the Council and the Commission. The questionnaire is to be filled in by the Member States within one month. Within six weeks after receiving the reply to the questionnaire, an evaluation team composed of two national experts from other Member States and assisted by the General Secretariat of the Council and the Commission may if appropriate travel to that Member State, in order to clarify the replies to the questionnaire : a programme of visits is arranged to that effect by the Member State visited on the basis of the evaluation team’s proposal, for interviews with the political, administrative, police, customs and judicial authorities and any other relevant body. Whether or not the answers to the questionnaire are complemented by the information collected through such a visit, a draft report is prepared by the evaluation team, which may amend it in the light of any comments made by the State evaluated on a first version of the draft. The comments which are not accepted by the evaluation team are sent, alongside the draft report itself, to the members of the Article 36 Committee. On the basis of a discussion introduced by the presentation of their report by the members of the evaluation team, the Article 36 Committee adopts conclusions by consensus. At the end of a complete evaluation exercise, the Council is informed of the results of the evaluation exercises. The Council ‘may, where it sees fit, address any recommendations to the Member State

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<sup>28</sup> Council Decision of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism (2002/996/JHA), OJ L 349, 24.12.2002, p. 1.

<sup>29</sup> See Joint Action 97/827/JHA of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime, OJ L 344, 15.12.1997, p. 7.

<sup>30</sup> The theme of the first evaluation cycle was the exchange of information on terrorist activities.

concerned and may invite it to report back to the Council on the progress it has made by a deadline to be set by the Council'.<sup>31</sup> The information collected by the evaluation teams in this process, as well as the country-specific recommendations, are confidential. Only the synthesis reports adopted by the Council at the close of an evaluation cycle are public, and are transmitted to the European Parliament ; however they contain no references to specific states.

### 3. Strategic evaluations

Each of the evaluation processes described above presents a number of deficiencies. The evaluations made by the Commission on the implementation of certain specific instruments adopted under title VI of the EU Treaty essentially focus on the adoption of legal measures by the Member States, rather than on the practical effectiveness of the policies which those instruments seek to contribute to. If they add to our understanding of the adequacy of those instruments themselves, this results from chance rather than from design. As a tool to improve the reflexivity of European policies – one which should allow for those policies to be revised in the light of their impact in different settings –, they are poor. And even as a tool to exercise pressure on the Member States in order to ensure that they will adopt all the implementation measures required, they meet with only partial success, since the Commission cannot file infringement proceedings against the Member States failing to comply with the obligations imposed by instruments adopted under the third pillar of the EU Treaty.

As to the peer evaluations conducted in order to contribute to the implementation of the Schengen acquis, or in the fields of organized crime or terrorism, they have a potential to bring about policy changes in certain Member States, and they may contribute to mutual learning in certain fields where the Member States have adopted significantly different approaches. But these evaluations make a limited contribution to improving the accountability of the governmental departments concerned because, with few exceptions, their results are not public, and any pressure exercised on a State by the other Member States within the Council of the EU cannot be relayed by national parliaments or by civil society organizations. In addition, as clearly illustrated by the preparation of compendia of best practices such as the Schengen catalogues in the Schengen evaluation mechanism, and as follows from the very way they are conceived, these evaluations presuppose that, for any question of common interest, there exists one 'adequate' or 'best' way to implement certain predefined objectives : while the same processes may also occasionally lead to 'discover' new approaches to old problems, on the basis of certain experiments conducted by one Member State, this is not the explicit aim of the peer evaluations – and even where this happens, the end goal still appears to be more uniformity, even if this may take the form of the adoption by all the States of certain best practices identified in one State. Finally, these peer evaluations, even considered in combination with the evaluations conducted by the European Commission on the implementation of specific instruments, remain fragmentary and *ad hoc*, rather than guided by any overarching vision about how evaluation may contribute to the rationality and reflexivity of EU policies.

This may be changing. The Lisbon Treaty provides that the Council may adopt measures 'laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in [Title IV : Area of Freedom, Security and Justice] by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation'.<sup>32</sup> Clearly, the intention is not solely to

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<sup>31</sup> Article 8(3) of Council Decision of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism, cited above.

<sup>32</sup> Article 61C of the Treaty on the Functioning of the European Union (as the EC Treaty will be renamed by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, of 17 December 2007, p. 1)). Article III-260 of the Treaty establishing a Constitution for Europe (OJ C 310 of 16.12.2004, p. 1) had anticipated the introduction of such an evaluation mechanism.

supervise the faithful implementation by the Member States of instruments adopted in this field (something which, under the new framework established by the Treaty of Lisbon, should in any event be facilitated by recourse to the more classical means currently used in Community law). Rather, that evaluation should serve other goals, primarily to establish mutual trust between the Member States' national authorities, and to ensure that the development of EU policies are fully informed by the difficulties encountered in practice by the Member States in the course of the implementation of these policies, in order to allow for them to be revised in the light of such obstacles. In addition, not only the European Parliament, but also the national parliaments are to be involved in the evaluation. This should increase the pressure on the Member States, and it should improve the accountability of the Executives who fail to comply with their obligations under EU Law. But it should also contribute to each national parliament gaining a better understanding of the stakes of European integration, and of the nature of the obstacles faced in other Member States in the implementation of European policies developed in the field of freedom, security and justice.

The Hague Programme adopted by the European Council on 4 November 2004 has in fact anticipated the systematic development of evaluations as an instrument to encourage mutual recognition, stating : 'In order to facilitate full implementation of the principle of mutual recognition, a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice, while fully respecting the independence of the judiciary and consistent with all the existing European mechanisms, must be established' (European Council 2004: para. 3.2.). On 2-3 June 2005, the Council and the Commission adopted an Action Plan translating the Hague Programme into specific measures. The setting up of a system for objective and impartial evaluation of the implementation of EU measures in the field of Freedom, Security and Justice, was listed as the first priority.<sup>33</sup> The result was the presentation by the Commission, on 28 June 2006, of a communication on the evaluation of the EU policies on Freedom, Security and Justice (CEC 2006b).

This communication goes much further, however, than what the Member States had anticipated. It proposes a form of systematic evaluation of the implementation of the EU policies in the fields of freedom, security and justice,<sup>34</sup> aimed not only at ensuring compliance with the Member States' obligations under EU law, but also at evaluating the *EU policies* as such. The Hague Programme had stated that '[e]valuation of the implementation *as well as of the effects of all measures* is (...) essential to the effectiveness of Union action' (emphasis added). In line with this mandate, the communication on strategic evaluations deliberately seeks to ensure that the evaluation of developments at Member State level will serve to improve the design of EU policies, which are therefore being 'tested' at the same time that the Member States' implementation is being 'monitored'. Evaluation of the implementation of the EU policies, in this perspective, ensures a feedback on the EU policies themselves, which may have to be revised in the light of the problems encountered in their implementation or the – perhaps unintended – impacts they produce ; and, beyond the aim of monitoring as a means to ensure compliance, evaluation serves the aim of promoting learning, by the comparisons it should allow of the experiences of the different Member States in the implementation process.

The mechanism proposed in the communication consists in the Member States providing the Commission with information about the implementation of EU policies in the fields of freedom, security and justice, by the regular delivery of 'factsheets' (one for each policy area), describing the achievements of each Member States on the basis of a relevant set of indicators. Such factsheets should be communicated twice every five years, since they will focus on 'slow-moving outputs and results and on medium-term data' (CEC 2006b: para. 35). The information contained in these

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<sup>33</sup> Council of the EU, doc. 9778/2/05 REV 2, 10 June 2005 ; OJ C 198, 12.8.2005, p. 1.

<sup>34</sup> This comprises six areas : external borders, visa policies and free movement of persons; citizenship and fundamental rights ; coordination in the field of drugs ; immigration and asylum ; the establishment of an area of justice in civil and criminal matters ; law enforcement cooperation and prevention of and fight against organized crime.

factsheets would be commented upon by the relevant stakeholders. The Commission would then prepare an ‘evaluation report’, including certain political recommendations. Finally, where justified, an ‘in-depth evaluation report’ would be prepared by the Commission in specific areas. ‘Strategic’ evaluations thus conceived should add value to the current practices as described above, according to the Commission, notably by (CEC 2006b: para. 33):

- (a) focusing on **policies** (or coherent sub-sets), rather than individual instruments (for instance, evaluation of the common immigration policy);
- (b) analysing the **coherence** of different instruments within a given policy (e.g. how financial programmes support and facilitate implementation of the EU legislation in a given field);
- (c) investigating how a certain policy contributes to the **overall objective** of establishing an Area of Freedom, Security and Justice;
- (d) determining the overall **rate of achievement** of that general objective; and
- (e) assessing achievement of an overarching objective in the field of freedom, security and justice (for instance, safeguarding of fundamental rights).

This goes far beyond a banale practice of monitoring compliance of the Member States with their legal obligations under the EU Treaty, in particular to compensate for the absence of infringement proceedings filed by the Commission under Title VI EU ; and, although it will allow the monitoring of compliance with fundamental rights by the Member States in a large range of areas which are of particular importance to civil liberties, this will be neither the main purpose of these evaluations, nor their most interesting dimension. Rather, as described in the communication, the strategic evaluation of the EU policies adopted in the field of freedom, justice and security constitutes a means to ensure a) that, beyond the compliance achieved by the adoption of legal instruments, the effectiveness of the measures adopted (their ability to achieve the objectives of the policies pursued) is measured ; b) that the political objectives are regularly redefined in the light of the lessons which may be drawn from implementation by the Member States ; and c) that our common understanding of the requirements of an ‘area of freedom, security and justice’ is progressively transformed by this iterative process. In sum, this ‘strategic evaluation’ should serve to transform what currently may be seen as a liability (the absence between the Member States of a common understanding of the end-goal of an area of freedom, security and justice, combined with the inability of the Commission to effectively impose on them such an understanding) into a virtue : the very ambiguities about the meaning of this project are productive, in that they allow a collective learning to take place in which the ‘principals’ learn from the ‘agents’ and, in the light of the information provided by the agents, may be led to revise their understanding of what political initiatives may be required.

As already mentioned – and as confirmed by the mostly sceptical reactions it triggered from the Member States<sup>35</sup> – the communication on strategic evaluations goes beyond what was anticipated in

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<sup>35</sup> The Member States expressed their concern at what they consider the overambitious nature of the proposals of the Commission. In general, they stated to be in favor of less frequent cycles of evaluation (every five years instead of twice every five years) ; and they advocated a focus, initially, on limited sectors, in order to ‘test’ the evaluation mechanism before extending it to all the policies covered by the communication. In addition, noting that the data-gathering techniques across the Union are not uniformized, they questioned whether it was worth the effort reaching beyond the information already available in each Member State. See Council of the EU, ‘Evaluation of Policies on Freedom, Security and Justice – Discussion Paper,’ 8752/07 LIMITE, 23 April 2007; Finland’s answers, 8752/07 ADD7 LIMITE, 29 May 2007; Sweden’s answers, 8752/07 ADD9 LIMITE, 29 May 2007; Czech Republic’s answers, 8752/07 ADD6 LIMITE, 29 May 2007; Answers from Republic of Slovenia, 8752/07 ADD1 LIMITE, 29 May 2007; Romania’s answers, 8752/07 ADD3 LIMITE, 29 May 2007; Ireland’s answers, 8752/07 ADD4, 29 May 2007; Poland’s answers, 8752/07 ADD5 LIMITE, 29 May 2007; Austrian answers, 8752/07 ADD2 LIMITE, 29 May 2007; Denmark’s answers, 8752/07 ADD8 LIMITE, 29 May 2007; Slovakia’s answers, 8752/07 ADD10 LIMITE, 30 May 2007; Hungary’s answers, 8752/07 ADD12 LIMITE, 31 May 2007; Belgium’s answers, 8752/07 ADD11 LIMITE, 30 May 2007; Latvia’s answers, 8752/07 ADD13 LIMITE, 31 May 2007; United Kingdom response, 8752/07 ADD14 LIMITE, 6 June 2007; Estonian answers, 8752/07 ADD16 LIMITE, 7 June 2007; Replies by the French delegation, 8752/07 ADD15 LIMITE, 6 June 2007; Greece’s answers, 8752/07 ADD17 LIMITE, 8 June 2007; Portugal’s answers, 8752/07 ADD18 LIMITE, 11 June 2007; Answers from Cyprus, 8752/07 ADD19

Article III-260 of the Treaty establishing a Constitution for Europe and what is envisaged, now, in the Lisbon Treaty. It envisages the evaluation process as leading to an improved accountability of the policy-makers, both at European and at national level, by the dissemination of the results of the evaluation and the involvement of a variety of actors in the process : in particular, the ‘evaluation report’ prepared by the Commission on the basis of the factsheets communicated by the Member States will be transmitted not only to the Council and European Parliament but also to the European Economic and Social Committee and the Committee of the Regions ; it will be ‘disseminated as appropriate to wider audiences, including via ad-hoc public events’ (CEC 2006b: para. 21); more generally, the Commission will ‘ensure that the views of the civil society will be taken into account and will establish appropriate mechanisms to ensure its participation in the evaluation of all policies in the area of freedom, security and justice’ (CEC 2006b: para. 16).

The form of ‘strategic evaluation’ which is proposed should not be seen as a form of open method of coordination in the canonical definition it was given by the Lisbon European Council of March 2000. The Member States are not requested here to prepare action plans which will be subjected to peer review, and lead to the adoption of guidelines by the Council : they are, rather, to provide factual information to the Commission about the effectiveness of the policies they are pursuing, for the Commission to draw political conclusions and stimulate debate about the need to revise the EU policies adopted in the field.<sup>36</sup> Nevertheless, the dimensions of mutual learning and of peer review are not absent from the strategic evaluations. Even more importantly, these strategic evaluations are devised as a response to the uncertainty we are facing in the fields they will cover : the reason why there is a need to evaluate the effectiveness of the EU policies developed in these fields is that the ‘good’ answer to the questions of how to create the mutual trust required for the mutual recognition of judicial decisions in civil and criminal matters, how to effectively prevent organized crime, or how to combat illegal immigration – to mention only those examples – are not readily available, and that the initiatives adopted so far may appear to be based on misguided information, not to have anticipated on certain secondary effects, or to have underestimated certain obstacles to the implementation by the national authorities. Indeed, not only are the means to be permanently ‘tested’ in the light of the experience of the national authorities in the implementation of EU policies ; the ends themselves – *what we mean* by the establishment of an area of freedom, security and justice – need to be redefined, or reinvented, as we unpack the implications of seeking to implement them.

## V. The potential of evaluation

On their surface, the strategic evaluations the European Commission proposes to introduce in the field of freedom, security and justice, should provide the Commission and the Member States the information they require to improve the EU policies in the six areas they will cover, ranging from the policing of external borders, visa policies, immigration and asylum, to the establishment of an area of justice in civil and criminal matters, law enforcement cooperation and prevention of and fight against organized crime, and including citizenship and fundamental rights or coordination in the field of drugs. The practice of such evaluations fits into the broader framework of improving governance in the European Union : in the July 2001 White paper on governance, the Commission had already emphasized the need for a ‘a stronger culture of evaluation and feedback (...) in order to learn from

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LIMITE, 11 June 2007; Bulgaria’s reply, 8752/07 ADD21 LIMITE, 12 June 2007; Malta’s reply, 8752/07 ADD20 LIMITE, 11 June 2007. I am grateful to Violeta Moreno Lax for having collected these answers.

<sup>36</sup> The option of proposing the launching of an open method of coordination was apparently considered in the course of the preparation of the communication on the evaluation of EU policies in the fields of freedom, justice and security. This option was rejected, however. It was considered not to be politically feasible, since it was anticipated that the Member States would resist subjecting policies as closely linked to their national sovereignty to some form of peer review. In addition, the view was expressed that OMCs fit areas which are primarily intergovernmental in the absence of competences of the Union, whereas in the freedom, justice and security fields covered by the evaluation proposed by the Commission, there exist EU policies and, increasingly, instruments implementing these policies (CEC 2006c: 12).

the successes and mistakes of the past' (CEC 2001b: 22). And it constitutes a clear recognition that, in the standard division of tasks between the EU institutions in EU law- and policy-making, such an evaluation is not satisfactorily organized. Neither the European Commission nor the European Parliament have all the information required from the Member States to perform such evaluations – indeed, to make this information available in a transparent and non-selective manner is precisely what the June 2006 communication seeks to achieve –. The Council of the European Union has been developing a practice of peer assessment since almost ten years in certain well-defined areas. But it is seriously handicapped by the natural tendency of the Member States not to put excessive pressure on one another, especially in fields such as law enforcement which are traditionally associated with the core of national sovereignty. In addition, it is difficult for the Council to question, in the light of the resistance it may meet in certain member States, the general orientations it has set, since this would risk undermining its credibility and encouraging non-compliance. Indeed, it is perhaps at this last level that the novelty of the 'strategic evaluations' proposed by the European Commission is most striking : rather than offering to monitor compliance of the behaviour of the Member States with certain instruments, or predefined policy options, the strategic evaluations explicitly consider that the difficulties of certain Member in the implementation phase may indicate not that the Member States concerned are acting in bad faith, or are unwilling to contribute to the common objective – but that these predefined instruments or options may be misguided, or that they may have underestimated the obstacles resulting from the need to apply them in particular settings whose dynamics could not be anticipated.

Yet, as conceived in the communication on the evaluation of EU policies in freedom, justice and security, the reflexive potential of evaluation may be lost, if a number of conditions are not fulfilled. By reviewing the aims of evaluation in the fields covered by the communication, we may hope to shed some light on the conditions which should be created for such evaluations to effectively contribute to the legitimacy and efficiency of these policies. However, as we will discover, the relationship between the different objectives of the system of strategic evaluation proposed remains ambiguous and, if not considered for its own sake, could become a source of tension. Five objectives at least may be distinguished. The two first objectives, which only a thin line separates from one another, are considered together.

### *1. Monitoring the quality of implementation of EU policies and ensuring feedback on those policies*

Article 61C of the Treaty on the Functioning of the European Union shall mention the need to establish 'an objective and impartial evaluation of the implementation of the Union policies in the area of freedom, security and justice by Member States' authorities'. This refers to the aim of monitoring whether or not the EU Member States loyally cooperate in the implementation of these policies, not only by transposing the instruments which are adopted but also, for instance, by ensuring that their authorities cooperate with the authorities of other Member States, or that the operational measures required for the implementation of EU instruments are adopted. But the Commission communication on the evaluation of EU policies on freedom, security and justice mentions a quite different aim, which is to 'improve policy-making, by promoting systematic feedback of evaluation results into the decision-making process' (CEC 2006b: para. 7). Here, the EU policies themselves, rather than their implementation by the Member States, are presented as being subject to the evaluation: from an evaluation of the implementation measures by the Member States, the communication has shifted to an evaluation of the *effects* of such implementation, *in order to improve the policies adopted at EU level*. The notion of evaluation which this displacement relies on is the one defined initially in the context of the reform of EU governance, at a time when both the legitimacy and the efficiency of the Union's policies were under heavy criticism. Among the many initiatives which this reform has led to since 1999-2000, is the adoption of an internal communication on evaluation which states that

Evaluation is '*judgement of interventions according to their results, impacts and the needs they aim to satisfy*'. It is a process in which DGs and Services engage in order to identify what can be learned for policy and planning. Furthermore, evaluation findings should contribute to Commission level decision-making on priorities and resource allocation.<sup>37</sup>

It is this document which the 2006 communication on the evaluation of EU policies in the freedom, justice and security areas alludes to where it writes that the evaluation mechanism proposed 'is based on this comprehensive definition which, in the Commission's view, should allow a full understanding of the quantity and quality of results achieved on freedom, security and justice' (CEC 2006b: para. 7). It will be noted, however, that a distinction may be made between policy feedback and policy learning. As explained by Anton Hemerijck and Jelle Visser: 'Policy learning is analytically distinct from policy feedback in that it essentially gives pride of place to the reflexive and evaluative, both cognitive and normative, activities of policy actors' (Hemerijck and Visser 2006: 37). In Kuhnian terms, one might say that policy learning seeks to question the policy paradigm itself, and not only the adequacy of the implementation measures adopted under the paradigm guiding the policymakers in a particular policy area. If we use this distinction in that sense, while the 'strategic evaluations' proposed by the Commission might lead to policy learning within the Member States themselves (a question which is further examined below), it is more doubtful whether it will ensure genuine learning in the design of the EU policies themselves, once such policies have been defined by a consensus of the Member States: while the evaluation is designed to judge interventions according to their results and impacts, in the light of the needs they aim to satisfy, these needs themselves – the general objectives, typically set by the European Council – will presumably not be questioned in this process.

The definition of evaluation quoted above is too narrow in another respect. If we take this formulation literally, this evaluation should consist in judging the impact of interventions. However, one of the main aims of strategic evaluations should also be to judge the impact of the *absence* of interventions, i.e., of the *failure* of the EU either to harmonize or approximate national laws, regulations and practices, or to improve the coordination, through any alternative means, between national authorities. These evaluations are explicitly stated to focus on *policies* (such as, for instance, the common immigration policy) rather than on specific *instruments*. This creates the possibility that the information collected from the national authorities will highlight the need for more EU intervention, for instance in order to encourage the diffusion of the best practices identified in one Member State or in order to ensure that certain measures adopted in one Member State (say, massive regularization of foreigners illegally staying on the territory) are not undercutting the efforts of another Member State in the same area (such as to discourage candidates to illegal immigration in the EU). The information collected from the national authorities are conceived as relating not only to the existing EU instruments, but more broadly to policy objectives identified at European level. The factsheets through which this information will be provided to the Commission will 'indicate an overall policy objective for each area and list the main instruments (legislative, non-legislative and financial) contributing to attaining that objective. The mechanism should provide a clear overview of the achievements' (CEC 2006b: para. 25).

Because the evaluations will cover measures adopted in areas where the EU has not acted (or has not acted yet), they have the potential of both depoliticizing and repoliticizing the interpretation of the principles of subsidiarity and proportionality, which should guide the exercise of EU competences in the fields which it shares with the Member States. Indeed, by ensuring that the Commission and the Council will be informed of the full set of measures adopted by each Member State in a particular area, the answer to the question of whether the intervention of the EU would have a truly added value – insofar as the objectives cannot be sufficiently achieved by Member States' individual actions and can therefore be better achieved by action on the part of the Union, to paraphrase the Treaties – will be

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<sup>37</sup> CEC 2000b: 2. The definition of evaluation is borrowed from the Glossary appended to the White Paper on Reform.

based on evidence, and on the comparison of data from all the EU member States, rather than on the basis of mere intuition or on considerations relating to the political feasibility of any particular initiative. In that sense, a system of objective and reliable evaluation of the member states' policies in the fields of freedom, security and justice, should better insulate decisions about the desirability of EU intervention from political pressure : hence, the depoliticization of subsidiarity and proportionality this might entail. But at the same time, these principles would be repoliticized, insofar as the evaluations may be a tool for ensuring the participation of the European Parliament, the national parliaments and a wide range of other stakeholders in the discussion about which lessons should be drawn from the information pooled (CEC 2006b: paras. 11-16). These are not conflicting tendencies. They both point towards ensuring that agenda-setting in the EU, and the sequencing of EU interventions, is made more transparent and the subject of explicit deliberation, based on sound and comparable evidence concerning the evolution of policies developed at Member State level.

## *2. Promoting mutual learning*

A third, and again distinct, aim of evaluation, is to promote mutual learning between the Member States. Under an evaluation emphasizing the first aim identified above (that of ensuring compliance with certain predefined instruments or policies), uniformity (or at least convergence) between the Member States is seen as positive and desirable ; and diversity, instead, is considered with suspicion. In contrast, where the focus is on mutual learning, diversity is cherished as a potential source of progress. The Member States are not encouraged to demonstrate that they act according to a script prepared for them ; they are asked what original approaches they have to offer which might lead others to revise their own presuppositions about the most efficient approach. It is in the fulfilment of this aim that peer evaluations have a potential which no other form of evaluation may compete with, especially when the evaluation is conducted – as in the Schengen evaluation mechanism or in the mechanisms established in the areas of organized crime or counter-terrorism – by the counterparts, in the other Member States, of the very officials who are in charge of implementing a particular policy and who may be visited by an evaluation team. This kind of interaction between national civil servants may lead to blurring the differences between the respective positions of the 'evaluators' and the 'evaluated' ; instead of the former controlling whether the latter effectively comply with what is expected by their European partners, the national agencies who are subjected to the evaluation may be developing original approaches towards certain problems faced also in other States, which the evaluators might seek inspiration from and which they may even wish to promote. The claim is not that such an identification and diffusion of best practices takes place effectively under the peer evaluations which are currently practiced in the fields of freedom, security and justice – although it is more likely than not that examples of this happening could be found. Rather, the claim is that if mutual learning is one of the objectives of evaluation processes, peer evaluations may be the most adequate tool through which this can be implemented.

The listing of mutual learning among the aims of evaluation assumes that policy changes may develop not only incrementally, as a result of small-scale corrections to the dominant approaches in place through feedback mechanisms and as a result of trial-and-error processes, but also through cognitive or normative shifts in the policymakers' understanding of causality chains or in the values guiding policy, i.e., in the definition of the ends they seek to pursue. It assumes, further, that such shifts may result from the confrontation of policymakers to other perspectives, or approaches, adopted in other Member States, towards the same problem. Certain conditions must be created, however, before mutual learning effectively occurs, and in order that it be successful. One set of conditions relate to the circumstances surrounding the process of learning. For instance, a sense of crisis – the conviction of policymakers that things cannot continue developing as they have developed and that the perpetuation of routines is not a viable option – may enhance the willingness of policymakers to learn, and thus create the necessary motivation to borrow from solutions developed elsewhere. In that sense, although not necessarily a condition for mutual learning, crisis (provoked by the failure of previous

policies to achieve the ends pursued) may be seen as facilitating policy changes. Thus, while it is one of the aims of this paper to encourage a form of policy-making which escapes the ‘tyranny of the crisis’ – in which agenda-setting is made hostage to the development of crises regularly facing the EU –, when a sense of crisis does exist, this may be seen also as an opportunity.

While certain such conditions favourable to learning cannot necessarily be created, some others can. Thus, it may be presumed that if a particular experiment conducted in another jurisdiction is shared with a wide variety of actors in the ‘receiving’ jurisdiction, it will have more chances of influencing policy debate and, perhaps, to bring about changes. Similarly, if there exists, within the ‘receiving’ jurisdiction, an agency specifically dedicated to the understanding of such foreign experiments and to answering the question whether the transposition of such experiments would be successful in the receiving jurisdiction, this could greatly contribute to overcoming bureaucratic inertia and the resistance of policymakers who, in the face of uncertainty about whether change will be rewarding, might otherwise prefer to opt for the perpetuation of routines – for choosing without searching. In that sense, the reception structures may be more or less favorable to mutual learning : the wide diffusion of foreign policy experiments, to a broad range of actors, as well as the establishment of expert bodies or think tanks whose mission it is to draw the attention of policymakers to the need to explore those solutions, could greatly contribute to the success of mutual learning as one possible result of evaluation.

Another set of conditions relate to the channels of mutual learning – the process itself through which learning occurs or not. In particular, a contextualization both of the solutions developed in other settings and of the problems encountered in the ‘receiving’ jurisdiction seem required for learning to be successful. Solutions developed elsewhere cannot simply be presumed to be transposable into any other context : instead, what makes one approach successful in any particular situation will depend on a full range of factors which may or may not be present in the context in which that solution is being replicated. In what may be seen as one version of the ‘garbage can’ logic of decision-making (Cohen et al. 1972), the available solutions risk predetermining the understanding of the problem to be addressed, rather than the problem being diagnosed independently of which solutions offer themselves. Therefore, any attempt by a ‘receiving’ jurisdiction to borrow from solutions developed elsewhere to similar policy problems should be preceded by an attempt to identify the conditions which allowed those particular solutions to be effective where they were first experimented, and by a diagnosis of the reasons why the approaches currently in place in the receiving jurisdiction have failed, which should be conducted independently of the existing catalogue of alternative policies. While foreign experiences may serve to shed light on the existence of certain problems in the ‘receiving’ jurisdiction (problems which might otherwise have been underestimated or ignored), they should not be seen as a substitute for the analysis of those problems under the specific circumstances in which they have arisen. The risk of such a ‘decontextualized learning’ however, in which solutions are prescribed irrespective of local conditions (Hemerijck and Visser 2006: 42), is especially high where the analysis of policy options is sectorialized, i.e., where this analysis focuses on discrete areas of public policy, defined relatively narrowly, and thus detached from the analysis of the background conditions which may play a role in the success or failure of the policy options which are experimented. It seems contestable, for instance, to evaluate the policy of the Member States in the area of trafficking of human beings without considering the different approaches to prostitution ; or to evaluate their respective counter-terrorism strategies in isolation from the tools they develop to integrate third-country migrants residing on their territory and ethnic or religious minorities members of which may be tempted by violent radicalization.

### *3. Enhancing mutual trust*

As noted by The Hague programme adopted by the European Council – which mentioned that the mutual trust on which mutual recognition of judicial decisions was based could be enhanced in

particular by ‘a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice’ (European Council 2004: paras. 3.2. and 3.3.) –, a practice of evaluation may limit the risk of misunderstandings occurring between national authorities of different States, where such misunderstandings may develop simply because of differences between the legal systems in which they operate : evaluation thus conceived may be a means to ensure that, however important those differences may seem, all the States at least comply with certain standards ; and it may encourage a better knowledge of one another’s system, facilitating in turn cooperation between the authorities concerned. As under an evaluation emphasizing the first aim mentioned above, however, conformity will be rewarded under an evaluation conducted for the purpose of creating mutual trust : if there are differences, these will be minimized ; rather than being an asset, original solutions to common problems are a threat, since they risk undermining mutual confidence.

#### *4. Stimulating democratic deliberation*

The 2001 White paper on European governance lists both participation and accountability – along with openness, effectiveness, and coherence – among the five principles of good governance (CEC 2001b: 10). Evaluation of course, contributes to the effectiveness of EU policies. But it may also stimulate democratic debate and promote accountability. Provided with the results of the evaluation made of the achievements of the Member State concerned in one policy area, opposition political parties, civil society organizations, the media, and the public at large, not only will be better equipped to request explanations from the policymakers holding office, and to critically gauge the justifications offered for pursuing particular policy options ; they also will be more motivated to invest into any existing participatory mechanisms which are proposed to them. The broad discussion of alternatives to the dominant solution may provide the office holders with an incentive to revise their routines, and compensate at least partly for their fear that, by exploring those alternatives, they risk betraying established expectations and threatening acquired positions, which may be costly in electoral terms – especially since, as noted by James G. March and Johan P. Olsen, voters tend to sanction mistakes, more than the failure to explore certain opportunities when these are untested, leading policy-makers to be generally risk-averse.<sup>38</sup>

Indeed, this may be one possible result of the strategic evaluations as conceived by the Commission (CEC 2006b). Past evaluations have taught that it may be difficult to rely exclusively on information provided by the Member States’ authorities themselves. In the communication of 28 June 2006, the Commission therefore describes the mechanism of information gathering and sharing as being based on ‘factsheets’ to be ‘filled in by the Member States’ competent authorities’, but adds : ‘In areas for which information is already available in a similar format, the Commission will fill in the factsheets in advance as far as possible. In parallel, the factsheets will be put out to consultation with relevant stakeholders and civil society’ (CEC 2006b: para. 24). It is indeed essential that the information provided by the Member States be completed by other sources. Although the strategic evaluation mechanism is ostensibly designed to improve the EU policies rather than to monitor the contribution of each Member State to the implementation of these policies, the quality of this implementation, or whether such implementation complies with the requirements of fundamental rights, will in fact by necessity also be an issue in these evaluations. The national authorities therefore may be reluctant to provide the European Commission – and, thus, the other Member States and the broader public – with information which places them under an unfavourable light. The ‘factsheets’ as completed by the national authorities therefore should be verified in the light of any other information available, including in particular information collected by independent experts or civil society organizations. An interesting precedent in this regard is the establishment, by DG Employment, Social Affairs and Equal Opportunities of the European Commission, of networks of independent experts in order to monitor

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<sup>38</sup> March and Olsen 1995: 227. In that sense, ‘Democratic institutions (...) are both arranged to speed up and slow down learning from experience and adaptation’ (March and Olsen 2001: 13).

the implementation of the directives adopted in the equality field<sup>39</sup> : these experts provide the Commission with crucial information not only on the legal measures which have been adopted in each Member State – in a format which is generally more complete and systematic than what could be expected from national administrations –, but also on any gaps which those measures present, or the problems met in their practical implementation. Although these networks are focused on specific instruments only, and essentially contribute to monitor the implementation at Member State level of the instruments concerned – therefore hardly at all contributing to the evaluation of the EU policies in the field of equality of treatment –, such a mechanism could equally be conceived in other areas, in order to ensure that the evaluation is based on reliable and balanced reports.<sup>40</sup> But even in the absence of such independent assessment, the publicity given to the factsheets filed by the Member States, combined with the possibility for other interested parties, including in particular non-governmental organisations, to complement or contradict this information – and with the possibility for opposition political parties in national parliaments to hold the government accountable for the information it provides –, should ensure the trustworthiness of that information.

## 5. Combining the diverse aims of evaluation

While all these aims potentially served by an evaluation mechanism are clearly desirable, it is a distinct question whether they all can be pursued at the same time, through similarly conceived processes. There are two possible views of this. Under one view, we would have to choose between two models, neither of which is capable of fulfilling all the aims listed above. The first model is of relatively closed, peer review mechanisms, through which the member states may have frank exchanges on the basis of information which – because it is not public – can be presumed to be more reliable than if it were to be shared and therefore potentially used against them. This model, directly involving civil servants from the member states in the evaluations, would also be more conducive of mutual learning, since the evaluations are conducted by the very individuals who benefit most from the learning it may allow. The second, alternative model, is put forward by the 2006 communication on the evaluation of EU policies in freedom, justice and security. The communication intends the strategic evaluation mechanisms it proposes to be broadly participatory, with an involvement of a wide range of actors including civil society organizations ; and it envisages that the factsheets prepared by the Member States will be made public. As already noted, this approach – in line with the White paper on European governance of 2001 (CEC 2001b) – has the potential to enrich democratic deliberation and to improve the accountability of policymakers, by obliging them to provide justifications for not exploring certain alternatives to the prevailing routines. But such openness, it could be argued, may also constitute a disincentive for the disclosure of certain failures or resistance encountered in the implementation of policies : it may be difficult to convince the national authorities to be fully transparent about such failures or the nature of the obstacles they are facing, since this not only may be

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<sup>39</sup> One network currently monitors the implementation of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19.7.2000, p. 22) and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2.12.2000, p. 16) ; it is funded under the Community action programme to combat discrimination (2001 to 2006) (see Council Decision of 27 November 2000, OJ L 303 of 2.12.2000, p. 23). See : [ec.europa.eu/employment\\_social/fundamental\\_rights/policy/aneval/legnet\\_en.htm](http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm). Another network of legal experts has been set up, since 1984, on the application of Community law on equal treatment between men and women. According to its website, its tasks are to ‘facilitate the Commission to monitor the implementation of the *acquis communautaire* in the Member states with regard to legislation and case law on equal treatment between women and men’ ; ‘assist the Commission in the preparation of European Court of Justice cases, in particular infringement procedures’ ; and assist the Commission in developing ‘new strategies and ideas’ in this field : see [www.ec.europa.eu/employment\\_social/equ\\_opp/rights/experts\\_en.html](http://www.ec.europa.eu/employment_social/equ_opp/rights/experts_en.html).

<sup>40</sup> Existing academic networks, such as the European Criminal Law Academic Network (see [eclan-eu.org/](http://eclan-eu.org/)) in the criminal law area or the Odysseus Network on asylum and immigration (see [www.ulb.ac.be/assoc/odysseus/index2.html](http://www.ulb.ac.be/assoc/odysseus/index2.html)) could be used that effect.

held against them in internal electoral debates, but could also provide a pretext for proposing further interventions by the EU in areas where the national authorities appear particularly jealous to preserve their national sovereignty.

This is not a true dilemma, however. In fact, the virtues attributed to peer review evaluation mechanisms can also result from more openness and transparency, rather than less. As we have seen, the best way to ensure that policy learning takes place may be to provide a broad range of actors with an incentive to challenge dominant policy paradigms in the light of the available alternatives, and a wide discussion about such alternatives might make them more desirable to espouse by the office holders. Therefore, while peer review mechanisms, entirely left in the hands of the states, may be conducive of mutual learning thanks to the direct exchanges they allow for, the resulting advantages may be more than offset by the lack of involvement of other actors, especially at the national level, whose support may be decisive for any policy learning which takes place to lead to actual improvements in the design and implementation of policies. As to the reliability of the information provided by the Member States, while it may to a certain extent be achieved by this information not being made public, it also may result from any information provided by the national authorities being widely discussed and cross-examined, by national parliaments and civil society organisations. In sum, while the secrecy of peer review mechanisms may seem to present certain advantages, these same advantages can be gained through an entirely different strategy, which emphasizes openness over closure, and publicity over confidentiality.

A more serious dilemma may be between the prescriptive and the non-prescriptive dimensions of evaluation – in other words, between the monitoring and the learning in evaluation. Where monitoring compliance with predefined instruments or policies is emphasized, the Member States will have a natural tendency to present their practices and results in the best possible light ; where the focus is, instead, on collectively deciding what approaches should be privileged, or on evaluating whether the EU policies work, they may become more open about their failure to achieve results and the obstacles they face. In a form of evaluation promoting mutual learning, the member states will put forward how they have developed different approaches ; in one which seeks to monitor compliance with agreed upon instruments or objectives, or which is seen as a contribution to creating mutual trust, they will dismiss these differences as only superficial, and seek to convince their interlocutors, rather, that what they are doing is really the same as what others are doing – or that it better follows the script agreed upon.

In the face of this second dilemma, it is again tempting to contrast, in a binary mode, two forms of ‘evaluation’, the one geared towards verification of compliance with certain objectives commonly agreed upon, and which could lead to addressing recommendations to the States concerned when they deviate from those prescribed objectives, and the other aiming at ‘exchange of experiences’, without any dimension of monitoring present. The fields of asylum and immigration provide a striking example of this contrast, since we seem to have moved, in these two fields, from the former form of ‘evaluation’ to the latter. The European Commission initially had proposed, in two separate communications of 2001, an open method of coordination as an adjunct to the adoption of legislative measures under Articles 61-69 EC. In the field of immigration, the initial proposal was to launch an open coordination method as a means of reflecting the multi-dimensional aspects of migratory phenomena, the large number of different actors involved and the responsibility of Member States. The objective of an OMC was to coordinate the application of the proposed European legislation in the Member States – and to supplement the common policy that emerges as a result – in order to help ensure the further, coherent development of the key components of a common immigration policy in line with joint rules. This was to be achieved by the adoption by the Council of ‘multiannual guidelines for the Union accompanied by specific timetables for achieving the goals which they set in the short, medium and long term’. These guidelines, which were to be revised on an annual basis in the framework of the open method of coordination, were then to be ‘translated into national policy by the setting of specific targets, which take into account national and regional differences’ (CEC 2001c). In the field of asylum, another communication adopted during the same period argued that the adoption of legislation was to be complemented by the adoption of European guidelines on the basis of

which national action plans were to be prepared by the Member States ; by an improved coordination of national policies, and the exchange and promotion of best practices ; by the monitoring and evaluation of the impact of Community policy ; and finally, by the organisation of regular consultations with third countries and international organisations (CEC 2001d).<sup>41</sup>

These proposals were met with scepticism, however,<sup>42</sup> and the Commission has now put forward a proposal to enhance mutual information of national immigration and asylum policies between Member States' policy-makers with the creation of a mutual information procedure on planned national asylum and immigration measures (CEC 2005f). It thus retreated to a more modest approach based exclusively on information collecting and pooling. The more recent proposal is justified by the consideration that

Member States will (...) benefit from the proposed information procedure, as they will be able to obtain a better knowledge of other Member States' policies and will be in a position to improve coordination between them. Member States could have the possibility to know other Member States' views, if an exchange of views takes place on a given draft national measure, before the latter becomes adopted legislation. Finally, the negotiation of new EU legislation will also be enhanced, as a result of better coordination of national policies and increased mutual knowledge and confidence.

Under this new scheme, the Member States are expected to 'communicate to the other Member States and to the Commission measures [legislative, administrative and judicial] which they intend to take in the areas of asylum and immigration, at the latest when they are made public', to the extent that those measures are 'susceptible of having an impact on other Member States or on the Community as a whole'. The information thus transmitted will be made available to all the other Member States through a web-based network run by the Commission, making it possible for any Member State or the Commission to request additional information on a particular measure. This should result in an 'exchange of views', the purpose of which is 'the identification of problems of common interest; therefore, discussions will not lead to any voting nor will they result in any kind of recommendations to the Member State concerned'.

The main change in comparison to what was proposed in 2001 is that the burden facing the Member States will be much lighter. The States are not expected to prepare national action plans or strategies on the basis of guidelines set at European level. Indeed, no guidelines or recommendations will be addressed to the Member States : in that sense, in contrast to an open method of coordination as traditionally conceived, the system for a 'mutual information' of the Member States is designed solely to ensure that there will be a swift exchange of views where developments in one Member State might be seen as having sufficiently important impacts in the other Member States, so as to justify that the need for coordination measures be examined. Similarly, as we have seen, in the broader area of freedom, security and justice, the Commission defines a sharp contrast between an open method of coordination and the form of evaluation of EU policies which it now proposes the EU Member States to participate in. The option of introducing an open method of coordination in one or more of the fields covered by the communication on the evaluation of EU policies in the fields of justice, freedom, and security was rejected,<sup>43</sup> it will be recalled, due to the political sensitivity of the areas covered (CEC 2006c: 12).

Thus, both in the fields of asylum and immigration and in the broader area of freedom, security and justice, the exchange and pooling of information between the Member States, coordinated by the

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<sup>41</sup> This had already been anticipated by the Communication on the common asylum procedure and uniform status (COM(2000)755 final, of 22.11.2000).

<sup>42</sup> The fear was expressed, in particular, that such open methods of coordination might become a substitute for the implementation of a programme of legislative measures (Economic and Social Committee 2002: para. 3.6. and 5.1.1.).

<sup>43</sup> See above, n. 36.

Commission, has been preferred to the adoption of guidelines by the Council and the preparation of national plans to implement those guidelines. At the same time, the consequences of this shift should not be overemphasized : once it agrees to report on its policies in a particular area, and to have this information made public, each Member State accepts in principle to be held accountable, both to the other Member States (for any externalities of its unilateral actions) and to the public opinion at home and abroad (for any gap between its own achievements in reaching a goal collectively recognized as desirable and the achievements of its neighbours confronted with a similar set of circumstances). Whether evaluation takes the form of OMC-like processes or of less demanding exchanges and pooling of information, some form of diagnostic monitoring takes place, in which the achievements of each Member State are related both to the conditions it is facing and to the policies in place, in order to assess whether the policies should be changed or, instead, inspire others – thus breaking down the distinction between learning and monitoring. The difference however, is in the mode of identification of the best means to achieve the objectives agreed in common : whereas, in an OMC-like process, what the best practices are is the subject of a deliberation between the Member States within the Council, in procedures limited to mutual information, these best practices are, at best, progressively defined by the Commission in the reports it prepares on the basis of the information coming from the Member States ; at worst, this identification remains implicit, it is never openly discussed for its own sake, and as a result, what is most desirable may be understood quite differently by each actor. In defence of this approach, it may be said that such an ambiguity may be productive : it may encourage the Member States to explore a diversity of approaches, experimenting for others what the other Member States then may seek inspiration from, and replicate, partially or wholly, taking into account their local circumstances. But it could also be argued, conversely, that the lack of any attempt even to make explicit what the best practices are which should inspire developments in other Member States artificially separates the definition of the European public interest by the Council from the identification of the means through which such public interest may be realized – the very opposite of what a public policy based on the iterative redefinition of the objectives in the light of implementation should resemble. It is therefore crucial that the pooling of information through mutual information processes feeds into a debate concerning the further steps to be taken in the legislative and policy agenda of the Union. Indeed, it is in the light of their contribution to the objectives pursued by the Union – rather than in the light of purely national preoccupations – that the measures adopted at Member State level should be evaluated : only if the information delivered by each Member State is examined in this light will such a process shape, in time, the attitudes of national actors, who instead of vetoing changes which would disrupt their expectations or acquired positions, could then become active participants in mutual learning aimed at the realization of the European public interest.

## *VI. Conclusion*

The lack of a clear, unambiguous understanding of the final shape of the area of freedom, security and justice, would constitute a disability under a classical, formalistic conception of policy-making : it would create an obstacle to the choice of the measures to be adopted and to their sequencing ; and it would leave us ill-equipped when asked to define where mutual recognition can proceed, and where harmonization instead is required as a precondition. But the vague definition of the aims of the area of freedom, security and justice, and especially of their prioritization, can also be seen as an opportunity : perhaps counter-intuitively, it could encourage a mode of agenda-setting responsive more to the actual needs of the mutual cooperation between national authorities than to sudden events which, perceived as crises calling for urgent answers, may lead to an *ad hoc* and disorderly building of the area of freedom, security and justice. For this to happen, however, adequate mechanisms should be put in place. The monitoring of the situation of fundamental rights in the EU Member States is probably not a priority in this respect. Although such monitoring clearly would enhance mutual trust between the Member States, this is also an area where the standards are most uniform across the Member States, and where the need for harmonization, therefore, may be weakest. If problems do occur – if, in other terms, diverging approaches to fundamental rights risk threatening mutual cooperation in the area of

freedom, security and justice –, courts generally may be counted upon to identify them : indeed, whether or not such problems will exist depends largely on the attitude of courts, when they will be confronted with allegations that mutual cooperation will result in a violation of fundamental rights.

But more is required, rather than less. First, the kind of monitoring which is required should go beyond fundamental rights strictly conceived ; instead, it should ensure a screening of the developments within the Member States in all areas in which the EU has launched policies, whether or not those developments relate to the implementation of a specific EU instrument, in order to identify the lacunae of existing EU policies and the need, therefore, to move further or even to change directions. Second, evaluation therefore should not be conceived primarily as a mode of supervision, or of verification of compliance with preestablished commitments. To the extent that it includes an element of monitoring, this dimension should be limited to identifying instances where measures adopted in one Member State produce externalities on other Member States, which may lead to the conclusion that some form of coordination, or possibly harmonization, is required. But the main purposes of such evaluation should be to promote *mutual learning* between the Member States and to ensure the *pooling of information on developments within the Member States which is required to define the agenda of the Union*. Any monitoring there is should be of a diagnostic nature: it should climb up the causality chain and identify which remedial measures might be suggested, and whether such measures should be adopted at the national level or at the level of the Union.

The fulfilment of these objectives calls for a procedure as open and transparent as possible, as well as for the development of participatory mechanisms. Such procedures should ensure that the improved understanding gained from experiences conducted in other jurisdictions will not remain the privilege of certain high-level public servants involved in intergovernmental working groups, but instead will be diffused as largely as possible, in particular through umbrella non-governmental organizations or social actors established at European level. While it is often asserted that publicity can only operate at the expense of truthworthiness – since the national authorities may be tempted to report only partially, putting forward their successes rather than their failures, if they know that the information they provide will be made public –, any such tendency to misrepresent local conditions should be responded to by more transparency, rather than by more confidentiality : indeed, the preparation of shadow reports by non-governmental organizations may constitute a powerful incentive for States to provide a picture as impartial and balanced as possible of the problems they are facing, in order not to be accused of manipulating the facts. It is clear that in certain areas, confidentiality is required : where reports are presented about the control of the external borders, about counter-terrorism strategies or about the fight against organized crime, it is understandable that such reports should remain secret, since they may contain sensitive information which traffickers or terrorists, for example, might be able to use. But this will be the case only in very exceptional situations, and in very limited fields. The fact that it is precisely in those areas that peer evaluations have been developed since a decade in the EU should therefore not be misconstrued : although, as we have seen, these evaluations are secret,<sup>44</sup> they are in this respect the exception, and should not constitute the norm for the future. In addition, while confidentiality may be a condition for a fully effective evaluation mechanism whose main objective it is to ensure that Member States comply with certain requirements (such as, for instance, to control external borders, or to apply and implement at national level international undertakings in the fight against organised crime), since States in such a mechanism may have an interest in avoiding criticism, this justification is absent where the objective of evaluation is mutual learning or improving the relevance of EU policies and their ability to address the problems they seek to respond to.

While mutual learning and the guiding of EU policies should be the primary objectives of evaluation mechanisms set up in the EU, such mechanisms at the same time should allow to improve the accountability of national policy-makers and the quality of democratic deliberation. Openness and

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<sup>44</sup> See above, part IV, sect. 2.

participation are conditions for mutual learning to take place : the more different actors are involved, the less the national policy-makers directly in charge of particular policy area will be able to afford to ignore the lessons from other jurisdictions ; and the easiest it will be for them to effectuate policy changes on the basis of those lessons, since the actors who could otherwise have vetoed or opposed such changes will themselves have been involved in this redefinition of policy. Evaluation mechanisms thus conceived – based on the twin principles of publicity and participation – also have a deeply democratizing potential : they heighten the scrutiny to which national policy-makers will be subjected, since these policy-makers will have to explain both why their policies are failing where the policies developed elsewhere seem to work better, and why they are implementing certain policies despite their impact on other Member States ; and they provide opposition political parties, civil society organisations, and the public at large with a broader range of options from which to choose and against which the policies in force might be gauged. A virtuous circle may thus take shape, in which an improved evaluation of EU policies will have a democratizing effect at national level and, as a result, lead to improved national policies whether or not guided by a direct intervention from the EU.

For this to happen, building an evaluation mechanism at EU level along the lines of the proposals of the European Commission will not be enough. The conditions should also be created, both at European and at national level, for the establishment of such a mechanism to produce the far-reaching impact we can hope for. The Member States must be convinced that it is in their interest to contribute to this evaluation process : that they can improve their policies by agreeing to discuss these policies with the other Member States, by asking how these policies contribute to the gradual shaping of the area of freedom, security and justice, and by learning from the experiences of others. The national parliaments should use this evaluation process as an opportunity to better monitor the governments, who, as a result of this process, will have to provide justifications which they may not have had to provide previously – although at the same time, the national parliaments will be led to redefine their understanding of what constitutes a valid justification, in the light of the impact on other Member States any particular choice made at national level may have. Civil society organizations should be active in this process, the success of which will depend, to a large extent, on their vigilance and on their ability to feed into the evaluation the kind of grassroots knowledge they alone, in certain cases, may possess or may be willing to provide. Finally, specialized bodies, possessing a degree of expertise and independence ensuring that their opinions cannot be ignored or dismissed without justification by the government, could make an important contribution to this evaluation process conceived as a tool for mutual learning. Building an area of freedom, security and justice, is not to be conceived simply as the superimposition, above our national systems of governance, of another – European – layer, only marginally affecting the practices and ethos of the national authorities. On the contrary, because of the direct cooperation it requires between national authorities – law enforcement officers, national administrations, national judges –, it could deeply transform those practices and ethos, and create among those concerned a sense of belonging to a new, broader and more diverse, community. It is our responsibility to ensure that this europeanization of national practices in fields which, hitherto, were traditionally conceived of as belonging to the core of the sovereign powers of the State, results in more accountability, and in a richer democratic debate at both national and at European levels, rather than in the *déjà vu* impression of powerlessness of the masses in the face of European elites. While, realistically, this latter scenario – the darker one – has more chances of materializing in the next few years, this is by no means a necessity or the inevitable result of further powers being exercised at a level to which no *demos* corresponds. But we bear the burden of proving that there is an alternative.

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