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## ***Fundamental Rights***

### **THE ROLE OF COLLECTIVE LEARNING IN THE ESTABLISHMENT OF THE AREA OF FREEDOM, SECURITY AND JUSTICE IN THE EU**

By Olivier De Schutter

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## THE ROLE OF COLLECTIVE LEARNING IN THE ESTABLISHMENT OF THE AREA OF FREEDOM, SECURITY AND JUSTICE IN THE EU

Olivier De Schutter<sup>♦</sup>

### I. Introduction

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 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’.<sup>1</sup> The establishment of an area of freedom, security and justice 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,<sup>2</sup> which include the fundamental rights recognized in EU law.<sup>3</sup> 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.<sup>4</sup>

This paper argues that developing the potential of learning in the EU is crucial, both in order to ensure that the area of freedom, security and justice is grounded on a high level of protection of fundamental rights, and in order to complement negative integration (the abolition of barriers between national authorities in order to facilitate their mutual cooperation) by positive integration (the adoption of common standards) in the establishment of such an area between the EU Member States. Why learning matters, and how it could be encouraged, are the main concerns of the paper. Most of the examples are borrowed from the field of judicial cooperation in criminal matters, since this field offers a particularly clear illustration both of the role of fundamental rights in the area of freedom, security and justice and of the dialectic between mutual recognition and approximation of national rules. But more general lessons may be drawn, beyond that particular area, especially concerning the role of courts and of evaluation mechanisms in promoting the reflexivity of EU policies.

This paper is structured as follows. Part II addresses the question of how fundamental rights may contribute to give shape to the objective of the area of freedom, security and justice, and how they should be conceived as part of the broader aim of European integration. It concludes that, while a powerful

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<sup>♦</sup> Professor of Law, Catholic University of Louvain (UCL) and College of Europe, and Member of the Centre for Philosophy of Law (CPDR-UCL) ; and former Co-ordinator of the EU Network of Independent Experts on Fundamental Rights. This paper is prepared as part of the REFGOV project (n° CIT3-CT-2005-513420) funded under the 6th EC Framework Programme on Research and Development, coordinated by the CPDR-UCL. It constitutes a contribution to the debate launched by Charles Sabel and Jonathan Zeitlin on the emergence of a new architecture in the European Union, based on learning from local experimentation (Ch. F. Sabel and J. Zeitlin, ‘Learning from Difference : The New Architecture of Experimentalist Governance in the European Union’, unpublished draft, June 2006 (on file with the author)). This single reference to this work is meant to replace the very numerous references which could be made throughout the text, which is deeply indebted to this proposal.

<sup>1</sup> Article 2, al. 1, 4th indent, EU.

<sup>2</sup> According to Article 6(1) EU, ‘The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States’.

<sup>3</sup> Article 6(2) EU states : ‘The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.’ The EU Charter of Fundamental Rights (OJ C 364 of 18.12.2000, p. 1), which was proclaimed jointly by the Council of the European Union, the European Commission, and the European Parliament, at the Nice Summit of December 2000, constitutes a partial codification of these rights, although it should not be treated as containing an exhaustive enumeration.

<sup>4</sup> This is recognized explicitly in Article 31(1), c) and e) of the EU Treaty, which state that common action on judicial cooperation in criminal matters may seek, inter alia, to ensure compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation ; and to progressively adopt measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

argument could be made both in favour of the establishment of a systematic form of monitoring of fundamental rights within the EU Member States and in favour of the harmonization of certain fundamental rights throughout the Union in order to strengthen mutual trust between the Member States, this is unlikely to occur in the near future. The main reason why we should not expect such a development is that, in the division of tasks currently being negotiated between the European Union and the Council of Europe, the primary role of the latter organisation in the promotion and protection of fundamental rights has been reaffirmed,<sup>5</sup> as regards both standard-setting and monitoring of the Member States of the Council of Europe – including the 27 Member States of the European Union –, understandably leading the EU to adopt an attitude of greater restraint in this field. However, while it may be considered as too ambitious, the promotion and protection of fundamental rights may also be seen as an objective too narrow for the European Union to pursue in the establishment of an area of freedom, security and justice. ‘Mutual trust’ cannot rely exclusively on the assurance that all the EU Member States will comply with a high level of protection of fundamental rights : the ‘positive integration’ which must accompany ‘negative integration’, especially where the latter takes the form of mutual recognition, should also concern other fields, where this appears necessary for the achievement of the objectives of the area of freedom, security and justice as defined in the Article 2 of the EU Treaty.

Indeed, there exists a clear continuity between the development of tools within the EU to ensure the promotion and protection of fundamental rights, on the one hand, and the development of common standards, including the harmonization of criminal law and procedure, on the other hand. Whether the monitoring of fundamental rights is assumed by the national courts or by mechanisms specific to the European Union, it may lead to identify situations where the approximation of national laws is necessary, even beyond the harmonization of fundamental rights protection strictly construed. Indeed, forms of monitoring (or mutual evaluation) of the EU Member States, initially justified by the need to ensure that fundamental rights are fully complied with in mechanisms of judicial cooperation, in fact might develop into searching devices whose significance could go far beyond that relatively modest objective. The establishment of an area of freedom, security and justice between the EU Member States cannot dispense with a verification of the compliance with the requirements of the fundamental rights by the national authorities involved. But neither can it avoid constantly questioning the content of the area of freedom, security and justice 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 such an area between the EU Member States.

The situation of national courts is, in that framework, of crucial importance. National courts are central actors in the dialectic between mutual recognition and approximation of national laws : in their role as guardians of fundamental rights, which they balance against their role as interlocutors for the judicial authorities of the other Member States with whom they are expected to cooperate, they may contribute to identify the areas in which mutual recognition calls for further harmonization measures. Thus understood, their role is similar to that of existing or proposed evaluation mechanisms. Courts and evaluation mechanisms serve not only to ensure that the technique of mutual recognition of judicial decisions in criminal matters will not lead to violations of fundamental rights : they also contribute to progressively defining the very content of the area of freedom, security and justice. The aim of establishing such an area is defined with an extraordinary sense of ambiguity in Article 2 EU. This paper will argue that the area of freedom, security of justice, has no predefined content. It seeks to achieve a balance between conflicting goals – free movement of persons on the 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

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<sup>5</sup> The Council of Europe has been described as the ‘primary forum for the protection and promotion of human rights in Europe’ in the Action plan adopted at the Summit of Heads of State or government of the Member States of the Council of Europe, which met in Warsaw on 16 and 17 May 2005 (CM(2005)80 final 17 May 2005).

set by the Treaty. Both courts and 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.

The following parts of the paper ask, along these lines, how the fields where further initiatives might have to be taken are to be identified. 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, courts and, in the future, evaluation mechanisms, should be thought of as searching mechanisms, which should allow us to identify, on a systematic basis, what steps are required to progress towards the establishment of the area of freedom, security and justice. Parts III and IV of the paper examine the potential contribution of courts and evaluation mechanisms respectively 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.

## **II. The specific role of fundamental rights in the establishment of the area of freedom, security and justice**

This part focuses on the role of this shared commitment to fundamental rights in the field of judicial cooperation in criminal matters. Two questions are now raised, with a growing insistence, about the attempt to ground the establishment of the area of freedom, security and justice on this commitment. Both questions relate to the role of the international law of human rights in this process. A first question concerns the tools : the kind of monitoring of fundamental rights we may require. We are to ensure that the EU Member States will comply with the requirements of fundamental rights as recognized in EU law, as a condition for mutual cooperation. However, should we content ourselves, in this respect, with the fact that the EU Member States are parties to a set of international human rights instruments, including in particular the European Convention on Human Rights and the International Covenant on Civil and Political Rights ? Or should compliance with fundamental rights be monitored by mechanisms proper to the European Union, in order to create the mutual trust on which the cooperation between the EU Member States is premised ? A second question concerns the degree of convergence in the protection of fundamental rights which must be attained throughout the Union : which divergences between the EU Member States may be considered acceptable in the area of freedom, security and justice, and to which extent, conversely, may the harmonization or the approximation of national laws ensuring a protection of fundamental rights in the national legal orders be required ? Is it sufficient that the EU Member States respect certain minimum requirements in the field of human rights ? Or should it also be ensured that they will not present too wide divergences among themselves ? In which circumstances may it be necessary to approximate the national rules implementing such rights as they are listed in the EU Charter of Fundamental Rights or recognized in international instruments to which the Member States are parties, in order to ensure that mutual trust will not be threatened by such divergences ?

Rather than answering these questions directly, this part examines the processes through which, currently, answers are being sought in the EU. Courts play an important role, of course, as the guardians of fundamental rights in the EU legal order (1.). But the European legislator, too, may occasionally have to intervene (2.). Finally, the setting up of evaluation mechanisms in the area of fundamental rights could be envisaged (3.). The overall picture which emerges is of a rather *ad hoc* and unsystematic treatment of fundamental rights in the establishment of the area of freedom, security and justice, in large part attributable to considerations of comity towards the Council of Europe and to the fear that a more systematic monitoring of fundamental rights in the EU Member States would contradict the professed adherence to the principle of mutual trust (4.).

## 1. The role of courts in protecting fundamental rights

To the extent that judicial cooperation in criminal matters in the Union presupposes mutual trust between the EU Member States, compliance with fundamental rights is a prerequisite for such cooperation to develop in the future. The EU Member States are authorized under Union law to refuse to comply with the requirements of inter-State cooperation in the area of freedom, security and justice, in any situation where this might conflict with fundamental rights as recognized in the legal order of the European Union. This authorization originated in the case-law of the European Court of Justice. It now also has a constitutional basis in Article 6(2) EU, which in turn may be read in the light of the EU Charter of Fundamental Rights.<sup>6</sup> In addition, the authorization is confirmed by the various instruments that are based on the mechanism of mutual recognition of judicial decisions in criminal matters.<sup>7</sup> Indeed, not only may the national authorities, including the national judicial authorities, refuse to cooperate with the authorities of another member State where this would lead to a violation of a fundamental right ; they are under an obligation to deny such cooperation, both under European Union law and under international instruments such as, in particular, the European Convention on Human Rights.<sup>8</sup>

‘Blind’ mutual trust therefore cannot, without any compensatory measures, be reconciled with the obligation imposed on States by the international human rights instruments to which they are parties. On the other hand however, the reliance on this ‘fundamental rights exception’ in the area of freedom, security and justice may be the source of a number of difficulties. It is purely reactive and *ad hoc*, rather than proactive and systematic. It creates the risk of barriers to mutual cooperation, to the extent that national authorities may remain suspicious of one another’s ability to fully comply with the requirements of fundamental rights.<sup>9</sup> It places the national court before a dilemma, which is most pressing when at stake is the enforcement of pre-trial orders where it is a matter of the court *anticipating* the risk that the judicial authority of the State that has issued a European arrest warrant or that has issued an order to freeze property or evidence in the context of criminal proceedings might fail to respect fundamental rights after its decisions have been executed.<sup>10</sup> Should we trust the judicial authority of the issuing Member State in

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<sup>6</sup> Cited above, XXX

<sup>7</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.

<sup>8</sup> Although the case-law of the European Court of Human Rights has not fully clarified the conditions in which such responsibility may be incurred, it is in any case clear that a Member State of the European Union cannot evade this responsibility under the pretext of the mutual trust which the Union Member States place in each other. For an attempt to systematize this case-law, see O. De Schutter, “L’espace de liberté, de sécurité et de justice et la responsabilité individuelle des Etats au regard de la Convention européenne des droits de l’homme”, in G. de Kerchove and A. Weyembergh (eds.), *L’espace pénal européen: enjeux et perspectives*, Bruxelles, éd. de l’ULB, 2002, pp. 222-247.

<sup>9</sup> For instance, while acknowledging that it is legitimate for Member States to add to the grounds for refusal to execute a European arrest warrant the ground based on *ne bis in idem* before the International Criminal Court which the Framework Decision of 13 June 2002 does not explicitly provide for, as well as to expressly introduce grounds of refusal for violation of fundamental rights, the Commission points out, ‘However legitimate they may be (...), these grounds should be invoked only in exceptional circumstances within the Union’ (Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2004) 63 final of 23.2.2005, p. 5). This is symptomatic of the ambiguous relationship which exists between the area of freedom, security and justice and the requirements of fundamental rights : while these have to be respected in order for the area of freedom, security and justice to establish itself, they may, if broadly interpreted, create obstacles to this very objective.

<sup>10</sup> See in this sense G. Steessens, “The Principle of Mutual Confidence between Judicial Authorities in the Area of Freedom, Justice and Security”, in G. de Kerchove and A. Weyembergh (eds.), *L’espace pénal européen: enjeux et perspectives*, Institute of



accordance with the obligation of mutual recognition? Which degree of scrutiny should we exercise before this confidence can be given? What presumption of compatibility of the procedure followed in the issuing State with fundamental rights should be allowed? Which weight should be given to the fact that this State is bound to comply with the values on which the European Union is founded, and that there exist certain mechanisms to ensure that all EU Member States effectively stick to these values? The same dilemma occurs, however, in situations where the judicial authorities of a EU Member State are under an obligation to recognize *post hoc* a judicial decision acquitting, or convicting, an individual. Should the national jurisdictions of a second State establish a presumption that that decision was adopted in full compliance with fundamental rights, for instance for the purpose of recognizing decisions which impose certain financial penalties<sup>11</sup>?

Moreover, the precise extent of the authorization given to Member States to refuse to cooperate remains a subject of debate. In principle, infringement of a safeguard contained in the national Constitution of each State cannot justify a refusal to cooperate, for instance in mechanisms of mutual recognition,<sup>12</sup> unless this safeguard corresponds to a fundamental right recognized within the Union, for instance because the right in question is enshrined in the European Convention on Human Rights or may be considered as resulting from the common constitutional traditions of the Member States. Yet, it is not necessary for such a fundamental right to be recognized an identical scope by all the Member States for it to be deemed fit to figure among the general principles of Community law. In the *Omega Spielhallen- und Automatenaufstellungs GmbH* judgment of 14 October 2004,<sup>13</sup> the Court of Justice agreed that the German authorities could justify a restriction on the freedom to provide services in the name of respect for human dignity, while recognizing that ‘the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another’ and that, therefore, the competent national authorities must be allowed ‘a margin of discretion within the limits imposed by the Treaty’.<sup>14</sup> Similarly, the 6<sup>th</sup> recital of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties asserts that this instrument ‘does not prevent a Member State from applying *its constitutional rules* relating to due process, freedom of association, freedom of the press and freedom of expression in other media’.<sup>15</sup> Of course, as in the *Omega* case, it is not the national constitutional rules as such which, being in force in the executing State, would justify this State refusing to recognize and execute a decision imposing a financial penalty : those constitutional rules could only be relied upon to oppose the recognition and execution of such a decision insofar as they are the embodiment in national law of fundamental rights figuring among the general

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European Studies, ULB, pp. 93-103, here p. 94: “The recognition and enforcement of □pre-trial orders□ requires an even greater degree of mutual confidence between judicial authorities than the mutual recognition and enforcement of final judgments as these pre-trial orders are by definition *ex parte* measures, issued in a proceedings in which the affected party did not have the opportunity to raise its arguments”.

<sup>11</sup> 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).

<sup>12</sup> The transposition by Ireland of the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States is highly debatable on this point, as the Commission pointed out in the annex to its report based on Article 34 of this instrument (pp. 5-6).

<sup>13</sup> Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH*, judgment of 14 October 2004.

<sup>14</sup> At para. 31. In the immediately preceding paragraph, the Court had noted, however, that ‘the concept of ‘public policy’ in the Community context, particularly as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, *so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions*’ (para. 30; emphasis added). The balancing between these formulae show to the hesitations of the European Court of Justice between two conflicting approaches. One approach would restrict the possibility of Member States invoking fundamental rights as an exception to their obligations under European Union law to those rights which are recognized by all Member States and thus form part of the ‘*common constitutional traditions*’ referred to in Article 6(2) EU. A competing approach would leave a certain margin of appreciation to each State in determining the content of the fundamental rights to be protected under its jurisdiction, in order to ensure that European Union law will not oblige a Member State to renounce such a protection or to lower the level of protection of these fundamental rights. In *Omega Spielhallen- und Automatenaufstellungs GmbH*, the Court clearly prefers to espouse the second branch of the dilemma : ‘It is not indispensable (...) for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. (...) [The] need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State’ (paras. 37-38).

<sup>15</sup> The emphasis is added.

principles of Union law, as inspired in particular by the European Convention on Human Rights and the constitutional traditions the Member States have in common.<sup>16</sup> The wording adopted in the Preamble of the Framework Decision nevertheless causes some ambiguity, since it suggests that a State can draw arguments from its own domestic rules to refuse to cooperate in the execution of a judicial decision delivered in another Member State, whereas the obligation of execution is central to the concept of mutual recognition, including there where the legal system of the executing State would have led to a different outcome (such as an acquittal).

As a result of these ambiguities, the national courts of one Member State may be tempted to refuse to cooperate with the courts of another Member State, on the basis of what may be an excessively demanding understanding of the requirements of fundamental rights, in particular by assimilating the particular implementation a right has received in the national legal order with a requirement which may be imposed throughout the Union. But the converse may also occur: from both a psychological and political point of view, it may be very difficult for a court in a Member State to express its distrust of the safeguards offered in another Member State. In order to avoid such consequences as may result from the absence of a common understanding of the requirements of fundamental rights between the Member States of the Union, two possible solutions may be explored : one consists in legislating in the field of fundamental rights, in order to establish standards common to the EU Member States, over and above the minimum requirements imposed by the international human rights instruments they are bound by ; another consists in setting up monitoring mechanisms, in order to ensure, through procedures proper to the Union, that any risk of violations of fundamental rights by one Member State which could affect the cooperation with the other Member States will be appropriately addressed. Each of these complementary answers to the challenge of ensuring the protection of fundamental rights in the establishment of an area of freedom, security and justice in the EU is considered in turn.

## *2. The role of the European legislator in harmonizing the protection of fundamental rights throughout the Union*

A first answer to the need to ensure that inter-State cooperation in the area of freedom, security and justice develops on the basis of a high level of protection of fundamental rights may consist in the adoption of secondary EU Law going beyond the minimum requirements imposed on the EU Member States by the international instruments they are bound by. The protection of personal data offers one illustration of the interplay between what might be called ‘negative’ integration, by the abolishment of barriers between the EU Member States (including barriers to the exchange of information or to the mutual recognition of judicial decisions), and ‘positive’ integration, by the adoption of common standards, which may be seen in certain instances as its necessary complement. Already for the purposes of the establishment of the internal market, the adoption of a directive in this field was seen as a requirement, in the face of the existence of a diversity of national legislations which might constitute an obstacle to the free movement of personal data within the European Community and thus, in particular, to the free provision of services across Member States. At the time, the adoption of the 1995 Data Protection Directive<sup>17</sup> was justified in particular by the consideration that : ‘the difference in levels of protection of the rights and freedoms of individuals, notably the right to privacy, with regard to the processing of personal data afforded in the Member States may prevent the transmission of such data from the territory of one Member State to that of another Member State; [...] this difference may therefore constitute an obstacle to the pursuit of a number of economic activities at Community level, distort competition and impede authorities in the discharge of their responsibilities under Community law’.<sup>18</sup>

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<sup>16</sup> Article 20(3) of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties specifies : ‘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’.

<sup>17</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23.11.1995, p. 31.

<sup>18</sup> 7th Recital of the Preamble.

A similar dialectic is 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>19</sup> the development of common rules on the protection of personal 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’.<sup>20</sup> 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’.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> Indeed, as was stressed in the Hague programme itself,<sup>24</sup> 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. Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>25</sup> does not apply to the processing of personal data effectuated in the course of an activity which falls outside the scope of Community law, such as the activities of the State in areas of criminal law or matters falling under Title VI EU.<sup>26</sup> 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,<sup>27</sup> 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.<sup>28</sup> This was encouraged by the European

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<sup>19</sup> Article 1(2) of the Data Protection Directive provides that ‘Member States shall neither restrict nor 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.

<sup>20</sup> *The Hague Programme : Strengthening Freedom, Security and Justice in the European Union*, Annex I to the Conclusions of the Brussels European Council of 4-5 November 2004, EU Council doc. 14292/04, para. 2.1.

<sup>21</sup> Impact assessment annexed to the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters - Impact assessment, COM(2005) 475 final, SEC(2005)1241, 4.10.2005, para. 2.2.

<sup>22</sup> COM (2005) 490 final of 12.10.2005.

<sup>23</sup> S. de Biolley, ‘Collecte, échange et protection des données dans la coopération en matière pénale’, *Journal des tribunaux-Droit européen*, 2006, p. 193, at p. 194.

<sup>24</sup> *The Hague Programme : Strengthening Freedom, Security and Justice in the European Union*, cited above, n. 117, para. 2.1.

<sup>25</sup> OJ L 281 of 23.11.1995, p. 31.

<sup>26</sup> Art. 3(2) of the Directive.

<sup>27</sup> CETS n°108.

<sup>28</sup> COM (2005) 475 of 4.10.2005.



Parliament<sup>29</sup> and welcomed by the European Data Protection Supervisor.<sup>30</sup> It illustrates the need to adopt ‘flanking measures’, aimed at improving the level of protection of fundamental rights in the EU Member States, when lowering the barriers to mutual recognition or exchange of information.

The attempt to harmonize the procedural guarantees given to suspects in criminal proceedings offers another illustration of this balancing between presupposing mutual trust and strengthening it. In February 2003, the Commission presented its *Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*.<sup>31</sup> Under Title I.7, ‘Enhancing mutual trust’, we read:

Mutual recognition rests on mutual trust and confidence between the Member States’ legal systems. In order to ensure mutual trust, it is desirable for the Member States to confirm a standard set of procedural safeguards for suspects and defendants. The desired end result of this initiative is therefore to highlight the degree of harmonisation that will enhance mutual trust in practice. The Member States of the EU are all signatories of the principal treaty setting these standards, the European Convention on Human Rights, as are all the acceding states and candidate countries, so the mechanism for achieving mutual trust is already in place. The question is now one of developing practical tools for enhancing the visibility and efficiency of the operation of those standards at EU level. The purpose of this Green Paper is also to ensure that rights are not ‘theoretical or illusory’ in the EU, but rather ‘practical and effective’. Differences in the way human rights are translated into practice in national procedural rules do not necessarily disclose violations of the ECHR. However, divergent practices run the risk of hindering mutual trust and confidence which is the basis of mutual recognition. This observation justifies the EU taking action pursuant to Article 31(c) of the TEU. This should not necessarily take the form of intrusive action obliging Member States substantially to amend their codes of criminal procedure but rather as ‘European best practice’ aimed at facilitating and rendering more efficient and visible the practical operation of these rights. It goes without saying that the outcome will in no case reduce the level of protection currently offered in the Member States.

Following the consultations held on the basis of the Green Paper, the European Commission put forward a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union.<sup>32</sup> In the Explanatory Memorandum, the Commission replies in the following terms to the question of knowing whether the proposal respects the principle of subsidiarity (par. 19):

The Commission considers first that in this area only action at the EU level can be effective in ensuring *common* standards. To date, the Member States have complied on a national basis with their fair trial obligations, deriving principally from the ECHR, and this has led to discrepancies in the levels of safeguards in operation in the different Member States. It has also led to speculation about standards in other Member States and on occasion, there have been accusations of deficiencies in the criminal justice system of one Member State in the press and media of another. This would be remedied by the adoption of common minimum standards. By definition, the standards can only be *common* if they are set by the Member States acting in concert, so it is not possible to achieve common standards and rely entirely on action at the national level.

Remarkably, the assertion of the need to establish mutual trust justifies the adoption of European legislation not only in order to ensure that minimum thresholds of protection of the individual’s rights are respected throughout the European Union, but also to make sure that there are no excessive differences

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<sup>29</sup> See its recommendation to the European Council and the Council on the exchange of information and cooperation concerning terrorist offences (2005/2046(INI)), adopted on 7 June 2005, in favor of harmonising existing rules on the protection of personal data in the instruments of the current third pillar, bringing them together in a single instrument that guarantees the same level of data protection as provided for under the first pillar.

<sup>30</sup> See his Opinion on the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (COM (2005) 475 final), OJ C 47, 25.2.2006, p. 27.

<sup>31</sup> COM(2003)75 final of 19.2.2003.

<sup>32</sup> COM(2004)328 final of 28.4.2004.

between Union Member States in the way in which the requirements under Articles 5 and 6 of the European Convention on Human Rights are transposed. The fact that the instrument proposed is not entirely faithful to the declared intention<sup>33</sup> should not prevent us from discerning the two principles on which the proposal is based: while the European Convention on Human Rights, to which all the Member States are parties, constitutes a common minimum threshold of protection, its requirements are not detailed enough to create the necessary cement between Union Member States justifying mutual recognition ; mutual trust between Member States could be threatened, not only when a Member State violates this minimum standard which should be respected by all, but also when there are excessive differences between Member States. In so far as the proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union is based on this logic, it is by no means exceptional. It is, instead, illustrative of an almost neofunctionalist kind of development, in which incremental steps towards further integration, since they are grounded on the presupposition of mutual trust, produce feedback effects calling for the development of standards by the EU itself in the field of fundamental rights in order to justify that very presupposition. Although we are only at the first stages of the establishment of an area of freedom, security and justice in the EU, a wealth of examples could already be provided, which further illustrate this logic at work.<sup>34</sup>

This tendency calls for two comments. First, the concept of mutual trust appears here as a *precondition* for establishing the area of freedom, security and justice on the principle of mutual recognition. In this perspective, mutual trust is not to be taken for granted: it has to be created. The desire to strengthen mutual trust may therefore 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 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’.<sup>35</sup> In this original view of mutual recognition, the fact that all the EU Member States are bound by the same international human rights

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<sup>33</sup> In the Commission’s proposal, the Member States to which the Framework Decision is addressed may offer more favourable conditions to suspects (see Article 17 (non-regression clause)). This obviously creates the risk that potentially significant divergences between the levels of protection offered in different Member States will remain, or develop, following the adoption of the Framework Decision.

<sup>34</sup> In her Opinion delivered in the *Pupino* case (Case C-105/03), Advocate General J. Kokott justified the reliance on this legal basis for the adoption of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings in the following terms: ‘...common standards for the protection of victims when giving evidence in criminal proceedings may also encourage cooperation between judicial authorities, since they guarantee that that evidence is usable in all the Member States’ (para. 51). See also, e.g., the announcement of the presentation of a proposal for a Framework Decision on the presumption of innocence and minimum standards on the gathering of evidence made in the Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States (COM(2005) 195 final of 19.5.2005). More generally, this latter communication exemplifies this logic. Par. 3.1., on reinforcing mutual trust by legislative measures, says, ‘The 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’. On this question, see S. Peers, ‘Mutual Recognition and Criminal Law in the EU: Has the Council got it Wrong?’, (2004) *Common Market Law Review* 5.

<sup>35</sup> Presidency document 10600/98 CRIMORG 121 CK 4 39 JUSTPEN 78 (emphasis added). See the commentary by Hans G. Nilsson, ‘Mutual trust or mutual mistrust?’, in : Gilles de Kerchove and Anne Weyembergh (eds.), *Mutual Trust in the European Criminal Area*, Bruxelles, Institut d’études européennes, pp. 29-40.

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>36</sup> or the 1972 European Convention on the Transfer of Proceedings in Criminal Matters<sup>37</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>38</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. At the same time, it is clear that the mutual recognition of judicial decisions in criminal matters constitutes an incentive for the further harmonization, among the EU Member States, of certain fundamental rights in criminal proceedings. The idea of a complementarity between approximation of national laws and mutual recognition has been recognized at the highest political level.<sup>39</sup>

A second comment concerns the relationship between the strengthening of mutual trust between the EU Member States through harmonization measures on the one hand, the fact that these States share a common *acquis* in the area of fundamental rights on the other hand, in particular since they all are parties to the most important instruments of the Council of Europe. Although the existence of an important *acquis* of the Council of Europe in the field of human rights, largely shared by the EU Member States, could be thought to facilitate the approximation of the national legislations of the EU Member States – after all, it is easier to harmonize in fields where the Member States are already aligned with one another in some basic respects – , in fact the relationship between the presence of such an *acquis* and legislative harmonization within the EU is a more complex and paradoxical one than could be imagined. For the existence of such a common *acquis* may in reality constitute an argument against the adoption of harmonization measures in the EU. As illustrated by the follow-up which was given to the proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union,<sup>40</sup> considerations of subsidiarity and proportionality when the Union seeks to intervene in fields in which has is not exclusively competent may justify a more restrained attitude, where a particular question has already been preempted by international instruments binding on all the EU Member States. According to these principles, made applicable to the European Union by Article 2 al. 2 of the EU Treaty, action may be taken by the Union in areas which do not fall under its exclusive competence ‘only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the [Union]’ ; moreover, any such action

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<sup>36</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>37</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>38</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.

<sup>39</sup> The Conclusions adopted at the European Council held in Tampere on 15 and 16 October 1999 mention the establishment of certain common minimum standards as a measure which should accompany mutual recognition. In those conclusions, the European Council ‘asks the Council 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 a European Enforcement Order and 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 recognition, respecting the fundamental legal principles of Member States’ (para. 37 of the Presidency conclusions).

<sup>40</sup> After it was presented to the Council, the proposal was seriously narrowed down : its scope now, it would appear, would be limited to the right to information, the right to legal assistance, the right to legal assistance free of charge, the right to interpretation and the right to translation of procedural documents – in fact, mostly procedural rights of the accused whose foreign nationality might create a vulnerability if he or she is arrested in a Member State other than his or her national state. At the Justice and Home Affairs Council meeting of 4-5 December 2006, it was concluded that ‘the main outstanding issues of the proposal relate to the question whether to adopt a Framework Decision or a non-binding instrument, *and the risk of developing conflicting jurisdictions with the European Court of Human Rights*’ (Press release following the 2768th meeting of the JHA Council of the EU, 15801/06, Presse 341, p. 12 (emphasis added)).

‘shall not go beyond what is necessary to achieve the objectives of this Treaty’.<sup>41</sup> With the development of the activities of the EU in the field of human rights, the question which will be increasingly asked is whether the requirement of subsidiarity should not also take into account the fact that, where the EU Member States cannot act alone – where common standards should be developed in the field of fundamental rights, due to the existence of divergences between the EU Member States –, the Council of Europe may constitute a forum where common standards should be negotiated and adopted, rendering the intervention of the Union unnecessary.<sup>42</sup>

This argument may not be decisive, however. As we have seen, the strengthening of mutual trust 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 the international instruments to which all the Member States are parties, but also in the face of the danger that 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 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.

Despite all these complexities, the adoption of EU legislation in the field of fundamental rights, in order to establish standards common to the EU Member States over and above the minimum requirements imposed by the international human rights instruments they are bound by, may be seen as a means to avoid the potentially anarchical consequences as may result from the absence of a common understanding of the requirements of fundamental rights between the Member States of the Union. But another possible solution consists in setting up monitoring mechanisms, in order to ensure, through mechanisms proper to the Union, that any risk of violations of fundamental rights by one Member State which could affect the cooperation with the other Member States will be appropriately addressed. Indeed, one possible answer to the need to firmly ground the establishment of the area of freedom, security and justice on fundamental rights could be that, while approximation of national rules relating to fundamental rights may be unnecessary, some form of monitoring of the EU Member States should nevertheless be performed within the European Union itself, 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. It is to fundamental rights monitoring – as an alternative to, or in combination with, legislative harmonization –, that the next section turns.

### *3. The role of evaluation mechanisms in monitoring the situation of fundamental rights in the EU Member States*

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 was 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 improved by the Treaty of Nice, which introduced the possibility of recommendations being adopted preventively, where a ‘clear risk of a serious breach’ of those values is found to be present.<sup>43</sup> These developments raised the

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<sup>41</sup> See also 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.

<sup>42</sup> See Parliamentary Assembly of the Council of Europe, Doc. 10894 (11 April 2006), Follow-up to the Third Summit: the Council of Europe and the Fundamental Rights Agency of the European Union, Report to the Committee on Legal Affairs and Human Rights rapp. Mr Erik Jurgens), at para. 31 : ‘What is clearly missing from the EU definition of subsidiarity (...) is the relationship between EU action and the activities of other international organisations, notably those with an essentially inter-governmental structure such as the Council of Europe’. See also paras. 11.9 and 11.10 of Recommendation 1744 (2006), based on that report.

<sup>43</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 M. Happold, ‘Fourteen against One : The EU Member States’ Response



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.

The European Parliament, through its Committee on Civil liberties, Justice and Home Affairs (LIBE Committee), took the leading role in this matter. As it noted itself, the Treaty of Nice ‘acknowledges Parliament’s special role as an advocate for European citizens’ by granting the European Parliament the right to call for a procedure to be opened in the event of a clear risk of a serious breach.<sup>44</sup> But even before that Treaty entered into force, the European Parliament inaugurated the practice of adopting annual reports on the situation of fundamental rights in the Union after the adoption of the EU Charter of Fundamental Rights at the Nice Summit of 2000.<sup>45</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>46</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>47</sup>

That network was set up in September 2002. In October 2003, the European Commission adopted a communication in which it set out its views about the implementation of Article 7 EU.<sup>48</sup> 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

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to Freedom Party Participation in the Austrian Government’, 49 *International and Comparative Law Quarterly* 953 (2000); and E. Bribosia, O. De Schutter, T. Ronse and A. Weyembergh, ‘Le contrôle par l’Union européenne du respect de la démocratie et des droits de l’homme par ses Etats membres : à propos de l’Autriche’, *Journal des tribunaux – Droit européen*, March 2000, pp. 61-65.

<sup>44</sup> See the Report on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)) (rapp. J. Voggenhuber), para. 6 of the proposal for a resolution; this passage has been maintained without amendment in the European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), adopted on 20 April 2004 (see para. 6 of the operative part of the resolution).

<sup>45</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>46</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>47</sup> Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000), cited above, para. 9.

<sup>48</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final of 15.10.2003.



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.

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 trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded.

It is important for the Member States to 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.<sup>49</sup>

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. 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 four principles, including the principle of confidence, which it explained thus :

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.<sup>50</sup>

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 has not received the mandate to monitor the EU Member States in situations other than where they implement European Community law.<sup>51</sup> Although, to a

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<sup>49</sup> At para. 2.2. of the communication, pp. 9-10.

<sup>50</sup> European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), adopted on 20 April 2004, para. 12.

<sup>51</sup> In the original proposals of the Commission (Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, COM (2005) 280 final of 30.06.05), 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

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, 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 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.

In sum, mutual trust may have to be strengthened in the area of freedom, security and justice, but it does not require the form of permanent monitoring of the Member States which the European Parliament, and then the EU Network of Independent Experts, have been exercising. This of course 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, do indeed justify a refusal of mutual recognition.<sup>52</sup>

#### 4. Conclusion

There are 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<sup>53</sup> –, 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 : 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

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any reference being made to Article 7 EU in the text of the Regulation itself (see, as the most recent document available at the time of writing, the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights in the compromise version prepared by the Finnish presidency of the Council and approved by the COREPER on 29 November 2006 (Council doc. 16018/06, JAI 663, CATS 184, COHOM 180, COEST 337) ; the 4-5 December 2006 Justice and Home Affairs Council of the European Union confirmed the general agreement on the proposal, although the formal adoption of the proposal would not intervene before the reception of the opinion of the European Parliament (press release following the 2768th meeting of the JHA Council of the EU, 15801/06, Presse 341, p. 10)).

<sup>52</sup> Since a separate chapter of this paper is devoted to the question of evaluation (see hereunder, 4.), this matter will not be discussed in detail here. It should be noted, however, that in its Communication to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States (COM(2005) 195 final of 19.5.2005), 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 – 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” (par. 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, Report on the Situation of Fundamental Rights in the European Union in 2004, May 2005, pp. 32-34 (available at [http://www.europa.eu.int/comm/justice\\_home/cfr\\_cdf/index\\_en.htm](http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm)).

<sup>53</sup> See Armin Von Bogdandy, ‘The European Union as a human rights organisation? Human Rights and the core of the European Union’, 37 *Common Market L. Rev.* 1312 (2000).

Member States in the level of protection of fundamental rights they ensure may result in obstacles to their mutual cooperation. Moreover, harmonization may be required in other fields, and for other purposes than to guarantee an adequate level of protection of fundamental rights throughout the Union : leaving aside the specific situation of fundamental rights – a field in which the EU legislator has been largely pre-empted –, ‘negative’ integration by the abolition of barriers to mutual cooperation between national authorities may have to be complemented by ‘positive’ integration in certain areas.

The following parts of this paper examine how to identify the areas in which an intervention by the Union is required, whether for the harmonization of fundamental rights or for the approximation of the national laws of the Member States. The Commission has been remarkably ambiguous on this issue. In its July 2000 Communication on the Mutual Recognition of Judicial Decisions in Criminal Matters, it states for instance : ‘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.’<sup>54</sup> 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.<sup>55</sup>

This leaves to the European legislator a broad 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’.<sup>56</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>57</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

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<sup>54</sup> Communication from the Commission to the Council and the European Parliament, *Mutual Recognition of Final Decisions in Criminal Matters*, COM(2000) 495 final, of 26.7.2000, at para. 3.1.

<sup>55</sup> See paras. 3.2. and 3.3. of the *Hague Programme : Strengthening Freedom, Security and Justice in the European Union*, Annex I to the Conclusions of the Brussels European Council of 4-5 November 2004, EU Council doc. 14292/04.

<sup>56</sup> House of Lords, European Union Committee, 10th Report of session 2004-2005, *The Hague Programme : A Five Years Agenda for EU Justice and Home Affairs*, HL Paper 84, 23 March 2005, at para. 40. 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>57</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.

circumstances.<sup>58</sup> 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.<sup>59</sup> 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 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’.<sup>60</sup> 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, threatens 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’,<sup>61</sup> this may call for the approximation of national legislations, administrative regulations or practices<sup>62</sup>; in addition, according to the principle of proportionality, the intervention of the Union should be limited to what is necessary.<sup>63</sup> How such divergences can be identified, and the need for an intervention of the Union demonstrated, is discussed in the remainder of this paper.

### III. The role of courts in establishing the area of freedom, security and justice

Parts III and IV of this paper explore further the interaction between courts, evaluation mechanisms, and the European legislator, in the progressive establishment of an area of freedom, security and justice between the EU Member States. The need to strengthen mutual trust may justify, particular, an approximation of the criminal law systems of the Member States on the basis of Article 31 EU.<sup>64</sup> Even in

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<sup>58</sup> The principle of subsidiarity, it is 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’ (Protocol (n° 30) on the application of the principles of subsidiarity and proportionality, cited above, para. 3).

<sup>59</sup> ‘For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators’ (Protocol (n° 30) on the application of the principles of subsidiarity and proportionality, cited above, para. 4).

<sup>60</sup> Protocol (n° 30) on the application of the principles of subsidiarity and proportionality, cited above, para. 5.

<sup>61</sup> Article 2, al. 1, 4th indent of the EU Treaty.

<sup>62</sup> As we have seen, the logic of harmonizing fundamental rights does not differ substantially from this, insofar as such harmonization will be justified in any case where the national authorities of a Member State will justifiably refuse to cooperate with the authorities of other Member States because of the risk of fundamental rights violations. What does make this area specific are the existence of a common *acquis* of the EU Member States in the field of fundamental rights and the role of the Council of Europe as the primary standard-setting organization in this area.

<sup>63</sup> The principle of proportionality requires moreover that the form of the action chosen remain ‘as simple as possible’. In the context of Community law, not only is it understood that the Community shall legislate ‘only to the extent necessary’ : in addition, ‘□□□ther things being equal, directives should be preferred to regulations and framework directives to detailed measures’. Furthermore, sufficient room should be left to the EU Member States in the implementation of instruments adopted at the level of the Union. See Protocol (n° 30) on the application of the principles of subsidiarity and proportionality, cited above, paras. 6-7.

<sup>64</sup> In her Opinion delivered in the *Pupino* case (Case C-105/03), Advocate General J. Kokott justified the reliance on this legal basis for the adoption of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings in the following terms: “...common standards for the protection of victims when giving evidence in criminal proceedings may also encourage cooperation between judicial authorities, since they guarantee that that evidence is usable in all the Member States” (recital 51). See also the Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States (COM(2005)195 final of 19.5.2005), in particular par. 3.1 on reinforcing mutual trust by legislative measures, where it says, “The 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



fields where the cooperation between the Member States' national authorities is based on mutual recognition, such harmonization may be justified : as Anne Weyembergh has rightly pointed out,<sup>65</sup> mutual recognition should not be seen as a substitute for the approximation of legislations ; it is, rather, a goal to be achieved, to which the approximation of legislations constitutes the necessary complement.<sup>66</sup> This part examines the contribution of courts to the identification of areas where further approximation of national legislations is desirable. While courts may perform a useful role in this respect, however, this is not sufficient : in Part IV, the contribution of evaluation mechanisms to the development of the area of freedom, security and justice, as a necessary complement to the role fulfilled by courts, will be studied in further detail.

In order for the establishment of an area of freedom, security and justice to develop on the basis of the dialectic between mutual recognition and harmonization, the impact of mutual recognition should be carefully monitored, and its results be subject to deliberation between the Member States. Courts – the national courts, in cooperation with the European Court of Justice – may contribute also to collective learning thus conceived. In particular, by having to apply EU legislation (or national legislation transposing EU legislation) in concrete settings, courts may identify areas in which further harmonization is required ; and they may contribute to our permanent redefinition of the objectives of the establishment of an area of freedom, security, and justice. Just like evaluation mechanisms conceived for the explicit purpose of testing EU policies in the light of their implementation in a diversity of contexts, courts may be seen as searching devices, and in that sense, as essential institutions for the promotion of collective learning. In particular, by imposing upon the Member States a strong understanding of the requirements of mutual recognition, thus obliging them to measure the consequences of not acting in order to complement mutual recognition by harmonization, the courts may encourage the European legislator to act, where these consequences appear undesirable. The recent decisions adopted by the European Court of Justice on the question of the scope of the rule prohibiting double jeopardy in the Schengen Convention offer a perfect illustration. They also exemplify the limits of courts as a mechanism for the permanent evaluation of the EU legislation and policies in area of justice and home affairs.

### *1. The example of the ne bis in idem principle applied in transnational context*

In *Gözütok and Brügge*,<sup>67</sup> two national courts in Germany and Belgium respectively asked the Court whether the *ne bis in idem* principle enshrined in 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),<sup>68</sup> also applied to procedures whereby further prosecution is barred once the accused has satisfied certain conditions imposed in a settlement arrived at with the prosecuting authorities. Article 54 of the CISA provides that a person whose trial has been finally disposed of in one Contracting Party ‘may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has

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mutually recognised judgments meet high standards in terms of securing personal rights”. On this question, see S. Peers, ‘Mutual Recognition and Criminal Law in the EU: Has the Council got it Wrong?’, (2004) *Common Market Law Review* 5.

<sup>65</sup> A. Weyembergh, *L’harmonisation des législations: condition de l’espace pénal européen et révélateur de ses tensions*, Institute of European Studies of the ULB, 2004, p. 339 : “...approximation is the very precondition of judicial cooperation in criminal matters and in particular of mutual recognition, despite the current tendency of calling this traditional function into question, given the recent development of the cooperation mechanisms which are designed to overcome the divergences between the domestic legal systems of the Member States. This development actually assigns a growing role to mutual trust. The realization and legitimacy of this trust, however, depends to a large extent on the approximation”.

<sup>66</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. 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>67</sup> Joined Cases C-197/01 and C-385/01, *Gözütok and Brügge*, □2003□ ECR I-1345 (judgment of 11 February 2003).

<sup>68</sup> OJ L 239, 22.9.2000, p. 19.



been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'. In this case, Mr. Gözütok, a Turkish national residing in the Netherlands and running a business in Germany, and Mr. Brügge, a German national, had respectively agreed to a settlement proposed by the Dutch Public Prosecutor and to a settlement proposed by the German Public Prosecutor. They had nevertheless been prosecuted for the same acts before a German court (Gözütok) and a Belgian court (Brügge), which referred questions for a preliminary ruling. The European Court of Justice took the view that the prohibition of double jeopardy applied in such circumstances. It considered that the *ne bis in idem* principle laid down in Article 54 of the CISA also applies when a decision has been taken by which 'the Public Prosecutor in a Member State discontinues, without the involvement of a court, a prosecution brought in that State once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor'.<sup>69</sup> In reaching its conclusion, the Court had regard to the fact that the procedure for discontinuing criminal proceedings through a settlement proposed by the Public Prosecutor involves 'an authority required to play a part in the administration of criminal justice in the national legal system concerned',<sup>70</sup> and penalizes the unlawful conduct which was allegedly committed by the accused, who is obliged to perform certain obligations such as, for example, the payment of a fine.<sup>71</sup>

In the *Gözütok and Brügge* judgment, the Court thus inferred an obligation of mutual recognition of decisions definitively discontinuing prosecutions from the right not to be judged or punished twice for the same offence. This is not impeded by the absence of harmonization of the criminal law systems of the Member States with respect to procedures for the discontinuation of criminal proceedings. The mutual trust which such a harmonization would serve to strengthen is not a *precondition* of mutual recognition<sup>72</sup> :

In those circumstances, whether the *ne bis in idem* principle enshrined in Article 54 of the CISA is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, there is a necessary implication [of the *non bis in idem* principle] 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.<sup>73</sup>

The Court deduces this broad interpretation of the wording of Article 54 of the CISA from the general framework in which this provision is incorporated, namely the enhancement of European integration through the creation and development within the Union of an area of freedom, security and justice.<sup>74</sup> The analogy of the concept of mutual recognition of decisions adopted by prosecuting authorities to the function fulfilled by the concept of mutual recognition in the area of the free movement of goods is explicit.<sup>75</sup> The Court points out, furthermore, that it would be paradoxical to reserve the obligation of

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<sup>69</sup> Para. 48.

<sup>70</sup> Para. 28.

<sup>71</sup> Para. 29.

<sup>72</sup> Para. 32.

<sup>73</sup> Para. 33. This paraphrases the view of the European Commission that 'Mutual recognition 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' (Communication from the Commission to the Council and the European Parliament, *Mutual Recognition of Final Decisions in Criminal Matters*, COM(2000) 495 final, of 26.7.2000, at para. 3.1.).

<sup>74</sup> Paras. 35-37. In its above-cited communication of July 2000, the European Commission had already expressed the view that 'final decisions' to which the concept of mutual recognition should extend should include agreements between suspects and prosecution : see Communication from the Commission to the Council and the European Parliament, *Mutual Recognition of Final Decisions in Criminal Matters*, COM(2000) 495 final, of 26.7.2000, at paras. 3.2. and, on the 'ne bis in idem' principle in particular, para. 6.2.

<sup>75</sup> The analogy is presented thus in the opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 19 September 2002 : '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

mutual recognition of decisions definitively discontinuing prosecution solely to decisions taking the form of judgments – or judicial decisions – since such a restrictive interpretation would in fact mean that defendants who are guilty of more serious offences which in any case require the intervention of a court would enjoy a greater freedom of movement than is granted to perpetrators of minor offences, with respect to whom only the Public Prosecutor can decide to offer a settlement.

The philosophy underlying the *Gözütok and Brügge* judgment was confirmed in the more recent case-law. In the case of *Van Straaten*,<sup>76</sup> the defendant in the main proceedings had been convicted *in absentia* in 1999 by an Italian court for possession of heroin and for exporting heroin to the Netherlands. However, in 1983, within months following his arrest, he had been acquitted by a Dutch court on the charge of importing heroin, since the competent District Court considered it not to have been legally and satisfactorily proved. That part of the judgment had become final. After Mr Van Straaten became aware that the Italian authorities had entered an alert in the Schengen Information System (SIS) for the arrest of Mr Van Straaten, he sought to impose on the Italian authorities an order that his name be deleted from the SIS. He claimed that, by virtue of Article 54 of the CISA, he should not have been prosecuted in Italy and that all acts connected with that prosecution were unlawful. This litigation led to two questions of interpretation of Article 54 of the CISA being referred to the European Court of Justice.

Since the prosecutions in the Netherlands and in Italy respectively were based on the same set of material facts, but were interpreted slightly differently and received different legal qualifications in both States, the first question submitted to the Court concerned the relevant criteria for the purposes of applying the concept of ‘the same acts’ within the meaning of Article 54 of the CISA. The Court reiterated its position that, in the absence of harmonisation of national criminal law, ‘a criterion based on the legal classification of the acts or on the legal interest protected might create as many barriers to freedom of movement within the Schengen area as there are penal systems in the Contracting States’.<sup>77</sup> It concluded not only that the relevant criterion for the purposes of the application of the notion of ‘the same acts’ in Article 54 of the CISA is ‘identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected’, but also that neither the fact that the quantities of the narcotic drugs at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not identical, nor the fact that the same acts are prosecuted as exporting narcotic drugs in one State and as importing the same narcotic drugs in another State should in principle constitute obstacles to the application of the *ne bis in idem* principle.

The second question submitted to the Court was whether, since Mr Van Straaten has been acquitted because of lack of evidence before the Dutch courts, the *ne bis in idem* principle embodied in Article 54 of the CISA should apply. The position of the Italian authorities was that no decision had been given on Mr Van Straaten’s guilt by the judgment adopted in 1983 by the competent District Court in the Netherlands, in so far as it concerns the charge of importing heroin, since he was acquitted on that charge. Thus, the argument went, Mr Van Straaten’s trial had not been disposed of, within the meaning of Article 54 of the CISA, as regards that charge. This reasoning was dismissed by the Court of Justice : ‘in the case of a final acquittal for lack of evidence, the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations. The accused would have to fear a fresh prosecution in another Contracting State although a case in respect of the same acts has been finally disposed of’.<sup>78</sup>

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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).

<sup>76</sup> Case C-150/05, *Van Straaten*, nyr (judgment of 28 September 2006).

<sup>77</sup> At para. 47. For essentially the same reasons, the Court had held in Case C-436/04, *Van Esbroeck* ([2006] ECR I-2333), that the wording of Article 54 of the CISA referring to ‘the same acts’ should be interpreted as referring only to the nature of the acts in dispute and not to their legal classification.

<sup>78</sup> At para. 59.

In *Gasparini*, decided on the same day as *Van Straaten*, the European Court of Justice took the view that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred.<sup>79</sup> In the main proceedings before the Spanish courts, seven individuals were prosecuted before the Spanish courts for having allegedly put smuggled olive oil on the Spanish market. Two of the defendants, however, had been previously acquitted in Portugal by the *Supremo Tribunal de Justiça* (Supreme Court of Justice), on the ground that their prosecution was time-barred. The European Court of Justice considered that the *ne bis in idem* rule applied. In order to justify this extended reading of Article 54 of the CISA, the European Court of Justice noted that the main purpose of this provision was to ‘ensure that no one is prosecuted for the same acts in several Contracting States on account of the fact that he exercises his right to freedom of movement’ : persons who have been prosecuted and have had their case disposed of ‘must be able to move freely without having to fear a fresh prosecution for the same acts in another Contracting State’. This objective would be undermined by a refusal to apply Article 54 of the CISA in the circumstances of the case. Citing its 2003 judgment in *Gözütok and Brügge*, the Court added that the fact that the laws of the Contracting States on limitation periods have not been harmonised should not constitute an obstacle to the recognition of final decisions of acquittal adopted by the jurisdictions of one Contracting State, since ‘nowhere in Title VI of the EU Treaty, relating to police and judicial cooperation in criminal matters (...), or in the Schengen Agreement or the CISA itself is the application of Article 54 of the CISA made conditional upon harmonisation, or at the least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred (...) or, more generally, upon harmonisation, or at the least approximation, of their criminal laws’.<sup>80</sup>

Nor would it be justified to read the decision adopted in *Miraglia* as derogating from the approach exhibited by *Gözütok and Brügge*, *Van Straaten* or *Gasparini*.<sup>81</sup> Mr Miraglia was charged before the referring Court – the Tribunale di Bologna in Italy – with having organised, with others, the transport to Bologna of heroin-type narcotics. However, criminal proceedings had been brought for the same facts against Mr Miraglia in the Netherlands, where he had been briefly detained prior to his arrest by the Italian authorities. Those proceedings were closed shortly after his release, on 13 February 2001, without any sanction being imposed on him : the Dutch public prosecutor considered that he should not press the charges against Mr Miraglia since a prosecution in respect of the same facts had been brought against him in Italy. When asked whether Article 54 of the CISA applied in such a situation, the European Court of Justice considered that the principle *ne bis in idem* should not apply to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination as to the merits of the case. Any other conclusion would have created a situation where criminals could ‘forum-shop’, by seeking deliberately to be prosecuted in more than one Member State, and then, once charges are dropped in one place in order to avoid concurrent proceedings, seek to escape prosecution in any other State by invoking the *ne bis in idem* principle : as the Court remarked, the consequence of applying article 54 of the CISA to a decision to close criminal proceedings on the sole ground that criminal proceedings have been initiated in another Member State against the same defendant and in respect of the same acts, would be to ‘make it more difficult, indeed impossible, actually to penalise in the Member States concerned the unlawful conduct with which the defendant is charged’.<sup>82</sup>

Rather than creating an exception to the principle of mutual trust as established in *Gözütok and Brügge*, *Miraglia* confirms this very principle : only where criminal proceedings lead to a final decision being adopted based on an examination of the merits does the question arise whether or not that decision should be ‘trusted’ and, thus, recognized as barring prosecutions in another State. However, *Gasparini* is based on an even broader understanding of the principle : it stands for the proposition that, in order to determine

<sup>79</sup> Case C-467/04, *Gasparini and Others*, judgment of 28 September 2006, nyr.

<sup>80</sup> See paras. 27-30 of the judgment.

<sup>81</sup> Case C-469/03, *Miraglia*, [2005] ECR I-2009 (judgment of 10 March 2005).

<sup>82</sup> Para. 33.

whether the principle applies, the decisive criterion is not whether the decision to close proceedings was adopted by the judicial authorities of a Member State on the basis of an assessment of the unlawful conduct with which the defendant was charged or in the absence of such an assessment going to the ‘merits’ of the case ; it is, rather, whether it is the very fact that criminal proceedings were brought in a second Member State that justified the discontinuance of the prosecution by the Public Prosecutor in the first Member State.<sup>83</sup> In any other situation than this rather exceptional one, which necessarily has to be introduced as an exception to the applicability of the *ne bis in idem* principle in the absence of rules governing the allocation of jurisdiction in criminal matters in the European Union, mutual trust should lead the judicial authorities in each Member State to recognize as barring further prosecutions the fact that a final decision has been adopted about the same facts, towards the same defendants, whether the decision has been favourable to the defendant or whether, instead, the decision has imposed sanctions on the defendant, provided in the latter case such sanctions have been enforced, are being enforced or can no longer be enforced under the laws of the State whose authorities have imposed the sentence.

Thus, the outcome of the *Miraglia* litigation is perfectly reconcilable with the line of cases beginning with *Gözütok and Brügge* and provisionally closing with *Garparini* and *Van Straaten* : *Miraglia* in fact makes mutual recognition based on mutual trust workable, by ensuring that the *ne bis in idem* principle will not be abused by those whom it is intended to protect. The system is still far from perfect. In practice, in the absence of common rules allocating jurisdiction in criminal cases or procedures for resolving positive conflicts of jurisdiction, crimes presenting a transnational character over which more than one State may exercise jurisdiction, will be decided by the jurisdiction where the criminal proceedings are fastest. The allocation of jurisdiction should depend, one would think, on the strength of the links the competing jurisdictions have to a case, on the respective locations of the victims, the evidence, or the defendant, or on the outcome of consultations between the different States concerned. Instead, under the current system, chance presides to this allocation.<sup>84</sup>

Whether or not the situation resulting from a broad reading of *ne bis in idem* is acceptable from the point of view of the area of freedom, security and justice lay at the core of the disagreement between the Advocate Generals of the European Court of Justice. The *Gasparini* judgment of 28 September 2006, which offers this broad reading an applies it to a decision of acquittal because of the prosecution of the offence being time-barred, was adopted against the views expressed in her opinion by AG Sharpston. The Advocate General had proposed to the Court, instead, that discontinuance of criminal proceedings through the application of a time-bar without any assessment of the merits (i.e., without the conduct of the defendant being assessed prior to a decision that the prosecution is time-barred) should not be covered by the principle of *ne bis in idem* in Article 54 of the CISA. The main argument put forward in the opinion<sup>85</sup> is that this solution would be striking ‘a more appropriate balance between the two desirable objectives of promoting free movement of persons, on the one hand, and ensuring that free movement rights are exercised within an area of ‘freedom, security and justice’ characterised by a high level of safety, in which crime is effectively controlled, on the other hand’ (para. 97). Neither the definition of the area of freedom,

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<sup>83</sup> In *Miraglia*, the Court remained vague about the respective weight of the two arguments : see para. 32 of the judgment .

<sup>84</sup> This is clearly acknowledged by the European Commission : ‘without a system for allocating cases to an appropriate jurisdiction while proceedings are ongoing, *ne bis in idem* can lead to accidental or even arbitrary results: by giving preference to whichever jurisdiction can first take a final decision, its effects amount to a “first come first served” principle. The choice of jurisdiction is currently left to chance □...□’ (*Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings*, COM(2005) 696 final, 23.12.2005, at p. 3).

<sup>85</sup> In addition, AG Sharpston emphasized the need to interpret the scope of Article 54 of the CISA in accordance with the *ne bis in idem* rule as applied in the EC Treaty, particularly in competition cases (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P to C-252/99 P and C-254/99 P, *LimburgseVinyl Maatschappij and Others v Commission* [2002] ECR I-8375; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others v Commission* [2004] ECR I-123 (Cement)). This argument will not be detailed here. It will be noted however that, insofar as this argument consists in emphasizing that the principle of *ne bis in idem* as applied in competition law cases and the same principle as embodied in Article 54 of the CISA should be given a similar interpretation since both would follow from the recognition of certain values common to the EU Member States in Article 6(1) EU, it is in clear tension with the position adopted in the opinion that the Member States have failed to agree on a precise meaning of the concept embodied in Article 54 of the CISA (see para. 79 of the opinion, and the reference in particular to the failed attempt of the Greek Presidency to gain approval for a Council Framework Decision concerning the application of the ‘ne bis in idem’ principle (OJ 2003 C 100, p. 24)).



security and justice in Article 2 EU, which has been recalled above,<sup>86</sup> or the restatement in Article 29 EU that by providing for police cooperation and judicial cooperation in criminal matters between the Member States, the Union's objective shall be 'to provide citizens with a high level of safety within an area of freedom, security and justice', are explicit about how such balance should be struck. The view of AG Sharpston was, however, that 'whilst free movement of persons is indubitably important, it is not an absolute'.<sup>87</sup> Instead, since free movement of persons and ensuring a high level of safety may be conflicting goals, what is required is to advance an appropriate definition of *ne bis in idem* 'that allows free movement rights within an area of freedom, security and justice characterised by a high level of safety'.<sup>88</sup>

The notion of 'criminal forum-shopping' provides perhaps the most vivid illustration of the threat to the 'high level of safety' in the European Union which an extensive reading of the *ne bis in idem* principle stipulated in Article 54 of the CISA might lead to. As described by AG Sharpston, the notion refers to the situation of an individual 'deliberately courting prosecution in a Member State where he knew that proceedings would necessarily be declared to be time-barred; and then relying on *ne bis in idem* to move freely within the EU' (para. 104). The example offered in the opinion is of Belgium and the Netherlands being the preferred location for dealers in stolen works of art, because of the lenient treatment of such offences in the countries concerned. But the European Commission also had imagined, in another context, the following scenario : 'in Member State A, euthanasia is a crime, whereas in Member State B, it is legal if the person wishing to die gives his or her consent in a written statement. Both Member States under their national, non-coordinated rules have jurisdiction for the matter. A person having performed euthanasia covered by a written statement wishing to obtain immunity for this act in Member State A could see to it that he or she is prosecuted in Member State B, withholding the fact that the written consent has been obtained. Once the trial has begun, he or she would present the statement, and could be sure of an acquittal, which would then have to be recognised in Member State A'. The Commission noted that such a consequence would be difficult to accept, in their discussion of the abandonment of the requirement of double criminality in mutual recognition.<sup>89</sup> But in *Gasparini*, while they advocated a broad interpretation of the *ne bis in idem* principle embodied in Article 54 of the CISA, it is precisely such a consequence which could logically follow.

AG Sharpston considered that the solution she proposed should not be seen as falling foul of the emphasis placed thus far by the Court of Justice on the importance of 'mutual trust' between Member States, since 'a distinction can and should be drawn between trusting other Member States' criminal proceedings in general (including such matters as fair trial guarantees, the substantive delineation of offences and rules on production and admissibility of evidence), on the one hand, and trusting a decision that no substantive assessment of the offence can take place at all because the prosecution is time-barred, on the other hand. The first is a proper expression of respect, in a non-harmonised world, for the quality and validity of other sovereign States' criminal law. The second is tantamount to *de facto* harmonisation around the lowest common denominator' (para. 109). Of course, whether this is a fair assessment depends on what you see as constituting a 'low' denominator ; for the position of AG Sharpston also implies, from the point of the view of the suspect, that she will potentially remain under the threat of being prosecuted under the laws of 16 other States,<sup>90</sup> even where it appears that, under the State in which she is present, time limits to prosecution preclude her from being prosecuted. Or, to take another example : since the age of criminal responsibility differs widely between the Member States, any Member State – including the United Kingdom, where a child can be criminally liable at 7 years of age – could potentially seek to prosecute a

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<sup>86</sup> See above, fn. 1.

<sup>87</sup> Para. 84 of the opinion.

<sup>88</sup> *Id.*

<sup>89</sup> Communication from the Commission to the Council and the European Parliament, *Mutual Recognition of Final Decisions in Criminal Matters*, COM(2000) 495 final, of 26.7.2000, at para. 8.

<sup>90</sup> Altogether, 17 States are bound by Article 54 of the CISA. These are the 13 Member States that have fully implemented the Schengen acquis ; Iceland and Norway as Contracting Parties to the CISA ; and the United Kingdom and Ireland as regards, *inter alia*, Articles 54 to 58 of the CISA.



minor, even where the individual concerned is not prosecutable under the legislation of the State where he is staying<sup>91</sup>.

In the opinion he delivered just a week earlier in the parallel case of *Van Straaten*, AG Ruiz-Jarabo Colomer adopted a strikingly different approach. Schengen, as he saw it, sought to reinforce the integration of the peoples of Europe ; the principle of *ne bis in idem* should be seen as contributing to the right to move freely within that area. He acknowledged that the gradual suppression of border controls within that area ‘is not without risks’, since it advantages those who seek to benefit from the abolishment of these controls. This requires further police and judicial cooperation within the common area. However, the objective of establishment this area ‘must be attained without infringing upon inalienable freedoms in a democratic society founded on the rule of law’.<sup>92</sup>

This difference of opinions is not based on a different understanding of the facts. Both AG Sharpston and AG Ruiz-Jarabo Colomer agree that the abolishment of internal borders controls in the Schengen area poses new difficulties to the fulfilment of the law enforcement duties of the States concerned ; both, therefore, affirm the need for a reinforcement of police and judicial cooperation, to counterbalance this impact. But both Advocate-Generals differ on the balance to be struck between freedom of movement and compensation measures and, therefore, on the desirable sequencing<sup>93</sup>: while AG Ruiz-Jarabo Colomer considers that freedom of movement should not only be recognized, but even encouraged by guaranteeing to all who seek to exercise this right that they will be protected, *inter alia*, by a generous understanding of the fundamental rights they are guaranteed – in this sense, the *ne bis in idem* principle contributes to the effectiveness of freedom of movement –, AG Sharpston would be suspicious of a conception of fundamental rights which would risk making it more difficult for the law enforcement authorities of the Member States of the Schengen area to maintain the high level of safety which it is the very purpose of the establishment of an area of freedom, security and justice to ensure. Whether these competing views follow from different conceptions of the scope to be recognized to the *ne bis in idem* principle in the supranational (or, as they would have it, ‘multinational’) context, or whether, instead, these diverging conceptions themselves are seen as a consequence of diverging views of the stage reached in European integration, is not clearly discernable from the opinions. In proposing a broad reading of the principle of *ne bis in idem*, AG Ruiz-Jarabo Colomer (as well as, for that matter, the European Commission) may be instrumentalizing the content of the right not to be prosecuted twice for the same offence for the sake of the ideal of European integration. It is more plausible however that this generous reading of the fundamental right at stake, which is based not only on a teleological interpretation of this right but also on a firm textual analysis and on the formulation of the equivalent right in the EU Charter of Fundamental Rights,<sup>94</sup> is seen as imposing itself to the Court, which would have no other choice but to accept it. In this view, since they agreed to Article 54 of the CISA (and, indeed, to the EU Charter of Fundamental Rights), the Member States should live by the consequences of this choice : either they move towards an improved police and

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<sup>91</sup> It is precisely to avoid that such prosecution could lead to the issuance of an European Arrest Warrant that the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States lists such a situation among the grounds for mandatory non-execution of the European arrest warrant. See Article 3(3) of the Framework Decision (stating that the European arrest warrant shall not be executed ‘if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State’). On this question, the position of AG Sharpston is that as long as this question is not harmonized between the Member States, ‘a vaguely defined ‘principle of mutual trust’ would not form an appropriate basis for treating the discontinuance of criminal proceedings in the ‘first’ Member State because the defendant was under the age of criminal responsibility as the trigger for applying *ne bis in idem* in another Member State where the age of criminal responsibility was lower’ (para. 112 of the opinion).

<sup>92</sup> Opinion of AG Dámaso Ruiz-Jarabo Colomer presented in the *Van Straaten* case on 8 June 2006, at para. 59. The translation is of the author since, at the time of writing, there was no English translation available.

<sup>93</sup> Although, out of courtesy for his colleague, AG Ruiz-Jarabo Colomer does not explicitly state his position about the attitude the Court should have in the *Gasparini* case pending at the time he delivered his opinion in *Van Straaten*, it is clear from the opinion that he would favor recognizing the applicability of the *ne bis in idem* principle in that case also : see para. 65, and fn. 38 of his opinion.

<sup>94</sup> Article 50 of the EU Charter of Fundamental Rights is referred to in para. 53 of the *Van Straaten* opinion of AG Ruiz-Jarabo Colomer.

judicial cooperation in criminal matters, in order to compensate for the risks entailed by the freedoms recognized to the individual in the Schengen area (or, more broadly, in the area of freedom, security and justice) ; or they will find it increasingly difficult to combat effectively certain forms of transnational crime, combined with the mobility of those who commit them.

## 2. *The division of tasks between the courts and the legislator*

The substance of the argument of AG Ruiz-Jarabo Colomer discussed above is that we should accept treating the EU Member States as engaged in a common enterprise, which is analogized to nation-building<sup>95</sup> : it is up to the States to adopt the measures this state of matters seems to call for. In contrast, AG Sharpston would make the extension of the *ne bis in idem* conditional upon further harmonization, for instance (since this was the issue in *Gasparini*) on the question of the time-limits for the prosecution of certain offences. In that sense, the debate concerning the implications of mutual trust in the area of freedom, security and justice, is only superficially about the ‘content’ of the *ne bis in idem* rule in a transnational context. The idea that such a content could be somewhat identified by a close examination of the notion is not only naïve; it also obfuscates that, underneath the surface, the real debate is about the nature of European integration and the balance between freedom and security in the area of freedom, security and justice. This is a normative question. It should be the subject of democratic deliberation, rather than be answered by judicial pronouncements. In this first, banale, sense, courts may be seen as agents of democracy, since they could stimulate precisely the kind of fundamental discussion which the Member States and the EU legislator may prefer to avoid. This however presupposes a form of interaction between the judge and the legislator which has not always been effectively functioning in the European Union.

It is equally obvious from this case-law that the question whether there exists between the judicial authorities of the EU Member States a sufficient degree of trust to justify mutual recognition goes beyond the question whether each State complies with fundamental rights. It may also be whether the authorities of the issuing State have diligently prosecuted a case and were not influenced by non-legal considerations in the course of the prosecution or when deciding the issue of criminal liability. In fact, this is precisely the reason why, when the European Convention on the Transfer of Proceedings in Criminal Matters was prepared under the authority of the European Committee on Crime Problems (ECCP) within the Council of Europe, it was decided to include provisions relating to the *ne bis in idem* principle in that instrument, rather than as an additional protocol to the European Convention on Human Rights. As stated in the Explanatory report to the European Convention on the Transfer of Proceedings in Criminal Matters, apart from the fact that, since ‘the recognition of a foreign judgment presupposes a certain degree of confidence in foreign justice’, it would hardly be justifiable to recognize a right to *ne bis in idem* in transnational context which would be invocable *erga omnes* (i.e., where the jurisdiction of any other State, whether or not a Member State of the Council of Europe, would have delivered a decision concerning the same defendant based on the same facts), the recognition in transnational context of a *ne bis in idem* principle presupposes a more advanced degree of unification which ‘at the present moment □...□ appears to be difficult to obtain in view of the pronounced differences between the technical rules of criminal procedure’.<sup>96</sup>

In other terms, it is not enough, to justify the application of the principle of *ne bis in idem* between different States, that the State whose jurisdictions have delivered the first (final) decision complies with the requirements of fundamental rights. It is also of importance that the criminal law of the first State does not led to acquitting individuals in situations which would deprive the authorities of the second State (before whose jurisdictions the *ne bis in idem* principle would be invoked) from their legitimate ‘right to punish’.

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<sup>95</sup> The analogy is explicit between the situation of the Member States within the European Union and constituent units of one single State : noting that no one would contest the applicability of the *ne bis in idem* principle if a situation such as that presented in the Van Straaten case occurred within a single State, AG Ruiz-Jarabo Colomer concludes that ‘therefore, we should not have doubts about imposing a similar solution in a supranational framework such as that of the European Union, except by adopting a timid and reluctant conception, ignoring two pillars of this common area : mutual trust, with the reciprocal acceptance of judicial decisions, and the respect for the fundamental rights of citizens’ (para. 73, unofficial translation).

<sup>96</sup> In para. 39 of the Explanatory report.

Striking a balance between the right to *ne bis in idem* of the individual already prosecuted in a first State and towards whom a final decision was adopted on the one hand, and the *ius puniendi* of the second State on the other hand, the European Convention on the Transfer of Proceedings in Criminal Matters is based on the principle that, although final judicial decisions leading to criminal convictions or to acquittals should be recognized for the purpose of applying the *ne bis in idem* rule, neither the State on whose territory the criminal offence has been committed nor the State against whose interests the offence was directed, in principle, should be disallowed from seeking to convict the offender, unless the first State has been taking proceedings upon the request of the second State.<sup>97</sup> The 1970 European Convention on the International Validity of Criminal Judgments provides for the same solution.<sup>98</sup> In the instruments which, to date, have implemented in Union law the principle of mutual recognition of judicial decisions in criminal matters, the solution to this problem has consisted in imposing mutual recognition only with respect to certain categories of offences, and in certain cases to approximate the national legislations of the Member States as regards the definition of such offences. This avoids imposing an across-the-board obligation of mutual recognition without taking into account the important differences which exist between the national criminal legislations, which in turn result from the variety of sensibilities among the Member States as to certain categories of crimes.

A third lesson may be drawn from the debate around the *Gözütok and Brügge* line of cases, which is more fundamental in the context of this paper. Essential as they are, courts remain a poor mechanism through which to ensure a feedback, on the EU legislation and policies, of their application in concrete settings throughout the Union. Certain of the infirmities of such a system are specific to the institutional framework organized under Title VI of the Treaty on the European Union. There exists no institutionalized, or systematic, link between the application of EU law under Title VI EU, and the preparation of legislative initiatives by the European Commission or by the Member States.<sup>99</sup> Moreover, in contrast to what exists under the EC Treaty, the European Court of Justice is not always in a position to ensure the uniformity of interpretation of the instruments adopted under this Title of the EU Treaty, and to provide guidance to the national courts facing problems of interpretation in their application thereof.<sup>100</sup> The national courts of the different Member States not only may or may not have the possibility to seek the cooperation of the

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<sup>97</sup> Article 35 of the Convention provides that where a State has itself requested another State to take proceedings, the requesting State shall always recognise the judgment delivered as a result of these proceedings. Apart from this exceptional situation, criminal judgments never have the effect of *ne bis in idem* in relation to the State in which the offence was committed (paragraph 3), or in the case of specified offences directed against the particular interests of a State in relation to that State (paragraph 2). In all other situations, and in particular in all cases where judgment was delivered in the State where the offence was committed, the judgment has the effect of *ne bis in idem* in relation to other States in the event of an acquittal or a conviction where the sanction imposed is enforced in the normal manner or where the court has convicted the offender without imposing a sanction (paragraph 1). The requirement that, following criminal convictions, the sanctions imposed have been enforced, are in the process of being enforced, have been wholly or with respect to the part not enforced the subject of a pardon or an amnesty or can no longer be enforced because of lapse of time (Art. 35(1), b)), is justified by the consideration that a wider application of the principle of *ne bis in idem* 'would in respect of these judgments □ criminal convictions which are not enforced □ lead to the unacceptable result that the mere fact that a State happened to take criminal proceedings first would debar other States from prosecuting the offence. The interest of the States in the effective reduction of crime has to be weighed against the general consideration requiring that a person should not be prosecuted several times for the same act' (Explanatory report, para. 44).

<sup>98</sup> See Article 53.

<sup>99</sup> Article 34(2) EU provides that both the European Commission and the EU Member States may take the initiative of proposing the adoption of common positions, framework decisions, decisions or conventions, in order to promote police cooperation or judicial cooperation in criminal matters. This is in contrast with the system of the EC Treaty, where only the Commission may prepare legislative proposals.

<sup>100</sup> Article 35 EU, read in combination with Declaration n°10 on Article K.7 of the Treaty on the European Union appended to the Final Act of the Amsterdam Intergovernmental Conference, leaves a broad margin of appreciation to the Member States in the organisation of the possibility for their national courts to refer a preliminary question to the European Court of Justice. Ten Member States have decided simply to align the modalities of the cooperation between their national courts and the European Court of Justice on the model of Article 234 EC, which allows all national courts to refer a question of interpretation or of validity of EC Law to the ECJ, and imposes on the last instance courts an obligation to make such a referral. Four other States have provided for a possibility for any national court to refer a preliminary question to the ECJ, but without imposing on courts of last instance an obligation to do so. Ten Member States have not entered any declaration under Article 35 (2) EU, and their national courts therefore may not refer a question to the ECJ when confronted to an instruments adopted under Title VI EU. One Member State provides for this possibility only as regards courts of last instance, imposing an obligation on these courts of last instance to refer a question of interpretation to the ECJ.

European Court of Justice in addressing the questions of interpretation and validity of EU Law they are faced with ; they are established under national procedural rules which differ widely from state to state, which results in a situation where certain problems are made highly visible, while others will be ignored, because they never are presented to courts or never arrive at the European Court of Justice.

But, in addition, courts are ill-suited, as institutions, to effectively contribute to collective learning. The questions they are confronted with may or may not be representative of the full range of situations affected by a particular instrument or policy. Since they are focused on specific disputes, generally involving two parties (in criminal procedures, the public prosecutor and the criminal defendant), they are not suitable fora for dealing with multipolar issues – those which Lon Fuller described as ‘polycentric’<sup>101</sup> – ; and this polycentric or systemic dimension of the situations presented to them may go unnoticed. Courts are dependent, for the cases which they deal with and, therefore, for the questions they confront, on the actions brought before them, and on the order in which these actions are filed : their examination of the problems raised by the application of any particular instrument or by the implementation of any particular policy, therefore, is unsystematic, and their answers may be highly dependent on the order in which the questions are asked and on the way these questions are framed – thus adding to the path-dependency which affects decision-making in general, especially when it is a byproduct of problem-solving. Courts may occasionally be useful channels for the transmission of information concerning certain specific problems encountered in the application of instruments such as, in the cases presented above, the 1990 Convention implementing the Schengen Agreement ; but they are not a substitute for a systematic monitoring, covering all the member states, and designed to identify the areas in which the area of freedom, security and justice needs to make progress, if it is to correspond to the expectations of the citizens of the Union. It is to this monitoring that we now turn.

#### **IV. The role of evaluation mechanisms in the establishment of the area of freedom, security and justice**

As we have seen, the European Union has not engaged in a general monitoring of the situation of fundamental rights in the EU Member States, although it was presented with the opportunity to do so when the Treaty of Nice modified Article 7 EU in order to allow for a preventive approach to be adopted in this area. In addition, the mandate of the Fundamental Rights Agency has not been extended to ‘third pillar’ issues, i.e., the issues of police cooperation and judicial cooperation in criminal matters which are covered by Title VI EU. Instead, a political declaration is attached to the Regulation adopted containing a ‘rendez-vous’ clause allowing the mandate to be re-examined in 2009, ‘with a view to the possibility of extending it to cover the areas of police and judicial cooperation in criminal matters’.<sup>102</sup>

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<sup>101</sup> See L. Fuller, “The Forms and Limits of Adjudication”, 92 *Harv. L. Rev.* 353 (1978); and previously “Adjudication and the Rule of Law”, 54 *Proceedings of the Amer. Soc. of International Law* 1 (1960). The notion of “polycentricity”, as a characteristic of problems which should not be solved by adjudication, is borrowed from M. Polanyi, *The Logic of Liberty. Reflections and Rejoinders*, London, 1951, pp. 170 and ff. See also, in a perspective similar to Fuller’s, H. Hart, “The Supreme Court, 1958 Term – Foreword : The Time Chart of Justices”, 73 *Harv. L. Rev.* 84 (1959). For a discussion, see J.W.F. Allison, “Fuller’s Analysis of Polycentric Disputes and the Limits of Adjudication”, *Cambridge L. J.*, vol. 53, 1994, p. 367. Whereas Fuller’s concern was with the remedies which judges could afford, which could fail if they could not beyond the resolution of the particular dispute between the parties present before the judge, our concern here is in the way the issue is framed before the judge : how the problem presents itself, of course, decisively influences the content of the solution which will be found to the problem. The core issue, however, remains the same in both cases : it consists in the contrast between the nature of the problem as presented to the court and the nature of the problem as presented to policy-maker or the legislator, in the division of tasks entailed by the separation of constitutional powers.

<sup>102</sup> According to another declaration by the Council appended to the Regulation, ‘the Union institutions may, within the framework of the legislative process and with due regard to each others’ powers, each benefit, as appropriate and on a voluntary basis, from [the expertise gained by the Agency in the field of fundamental rights] also within the areas of police and judicial cooperation in criminal matters’ ; this expertise ‘may also be of use to the Member States that wish to avail themselves thereof when they are implementing legislative acts of the Union in that area’. It can be expected that any sensitive instrument proposed under Title VI EU will be presented to the Agency for it to deliver an opinion, since it might be politically difficult to justify circumventing the Agency, once it will have gained sufficient credibility by being truly independent and, especially, by the quality of its reports.



However, 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.<sup>103</sup> 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 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 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 this Framework Decision' on the basis of a report prepared by the Commission following the receipt of this information.<sup>104</sup> Indeed, 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.<sup>105</sup> Such evaluations, however, are limited in what they may achieve.<sup>106</sup> 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 area (i.e., the general policy pursued by each Member State in that 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. These evaluations moreover are concerned only with the question whether the Member States have adopted the measures required under these instruments<sup>107</sup> : they do not examine whether these implementation measures comply

<sup>103</sup> For a general appraisal, see Anne Weyembergh and Serge de Biolley (eds), *Comment évaluer le droit pénal européen?*, Institut d'études européennes, éd. de l'ULB, 2006.

<sup>104</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 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>105</sup> See, e.g., the Report of the Commission on the Legal Transposition of the Council Decision of 28 February 2002 Setting up Eurojust with a View to Reinforcing the Fight Against Serious Crime, COM(2004)457 final, of 6.7.2004, at p. 3 : 'Although the Commission is not required to publish a report on the Decision's transposition, it has decided to do so, since a considerable number of Member States need to adapt national law provisions and since Eurojust plays a very important role for criminal justice both within the EU and for judicial cooperation with third countries'.

<sup>106</sup> See S. de Biolley and A. Weyembergh, 'L'évaluation dans le cadre du troisième pilier du traité sur l'Union européenne', in Anne Weyembergh and Serge de Biolley (eds), *Comment évaluer le droit pénal européen?*, cited above, pp. 75-98.

<sup>107</sup> More precisely, the general criteria are for the evaluation of the implementation measures adopted are practical effectiveness, clarity and legal certainty, application in full and compliance with the time limit for transposal (these criteria were defined when the Commission first had to evaluate the implementation of a framework decision adopted under Title VI EU : see COM(2001) 771, 13.12.2001, point 1.2.2.).

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 concern 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>108</sup> the uneven quality of the information on which this was based has been recognized to be a serious deficiency of the process.<sup>109</sup> And when the Commission has proposed 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 Framework Decision on certain procedural rights in criminal proceedings throughout the European Union it proposed or imposing on the national authorities an obligation to collect statistics about the impact of this instrument,<sup>110</sup> it 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.

## 2. Peer evaluation

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<sup>108</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 (Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version), COM(2006)8 final of 24.1.2006) 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.

<sup>109</sup> In its most recent report on the evaluation of the Framework Decision, the Commission acknowledges that 'the contents of this report and its annex[SEC(2004) 267] have (...) been affected by the many delays and shortcomings in transmission, the uneven quality of the information obtained and the brevity of the period examined'.

<sup>110</sup> COM(2004) 328 final, of 28.4.2004. The proposal of the Commission considered that 'it is necessary to establish a mechanism to assess the effectiveness of this Framework Decision. Member States should therefore gather and record information for the purpose of evaluation and monitoring. The information gathered will be used by the Commission to produce reports that will be made publicly available. This will enhance mutual trust since each Member State will know that other Member States are complying with fair trial rights' (Preamble, 18th recital). Article 15 of the draft Framework Decision provides for the evaluation and monitoring of the effectiveness of the Framework Decision. Most remarkably, Article 16 provides that, to this effect, the Member States shall collect the relevant data, in particular statistics, and make them available. The extended impact assessment appended to the proposal of the Commission links this evaluation mechanism to the contribution of the Framework Decision to mutual trust : 'A key condition for successful policy implementation is to improve the tools available for monitoring and evaluation. In order to develop or enhance the effectiveness and credibility of strategies to improve the existing procedural safeguards at national and EU-level, monitoring and evaluation are crucial. Without accurate and comparable data and knowledge about the effectiveness of measures and the extent of the costs, the EU and the Member States are not in a position to know if their policies have the desired outcome. The principle that 'justice must not only be done, it must be seen to be done' applies here since some Member States will be reassured by data and reports showing that Member States are complying with their obligations. Experience has shown that even one negative report in the media can prejudice the perception of the whole of a Member State's criminal justice system'. Later in its Impact Assessment, the Commission explains that 'evaluation of common minimum standards for procedural safeguards should be carried out on a continuous basis at regular intervals rather than as a once-off or on an ad hoc basis', and that it should be perceived as reliable and objective : it mentions the EU Network of Independent Experts on Fundamental Rights, established in 2002, as one possible body entrusted with this monitoring (on this network, see hereunder, sect. 2).

An alternative to this kind of evaluation, in which the European Commission plays the central role as the guardian of the Member States' obligations, are the evaluations by the peers which 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>111</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.

In the decision establishing the Schengen evaluation mechanism, the functions of this mechanism are defined as 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.<sup>112</sup> 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 that State and the experts, as well as to recommendations being addressed to the State visited about any shortcomings. Originally, the system could be summarized as follows. Each visit led to the preparation of a report, for the adoption of which by the experts the representative of the State hosting the visit only acts as an observer. The report was to show 'in which areas the objectives have been reached and those in which this is not the case, together with concrete proposals for measures to take with a view to remedying or improving the situation'. It was submitted to the host State, which may 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, are confidential.

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<sup>111</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. There exists little information available on this evaluation mechanism, in particular since it the results of the evaluation are confidential. I am indebted to R. Genson and W. van de Rijt, 'L'évaluation de Schengen dans le cadre de l'élargissement', in A. Weyembergh and S. de Biolley (eds), *Comment évaluer le droit pénal européen ?*, cited above, pp. 209-218.

<sup>112</sup> This is ensured by the preparation of a report listing the criteria to be satisfied by the candidate States and indicating the standard to be reached in all of the areas covered by the Convention ; after this list of criteria has been approved by the Executive Committee, the Standing Committee verified in another report whether a candidate State to bring the Convention into force satisfies the criteria and complies with the standard required.

Since the SCH-EVAL working group of the Council has taken over, the methodology has been modified in a number of respects.<sup>113</sup> The principles, however, remain unchanged : it is based on the organisation of a peer review mechanism, 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 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 was thus conceived as allowing the detection of ‘any problems encountered at external borders and for identifying situations which do not comply with the standard set in accordance with the spirit and objectives of the Convention’. The evaluation should allow both the State visited and the other Member States to be informed of the problems encountered, 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’,<sup>114</sup> 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>115</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>116</sup> – are taken into account in the practice of evaluations, despite these catalogues not having a binding legal effect ;<sup>117</sup> and that the reports of the inspection visits have been structured in a more harmonized way, thus ensuring the possibility to compare between evaluations.

The Schengen evaluation mechanism is not unique. Broadly similar peer assessments have developed in the fields of terrorism and of organized crime.<sup>118</sup> 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>119</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

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<sup>113</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.

<sup>114</sup> Preamble, 5th alinea.

<sup>115</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>116</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>117</sup> The conclusions aiming at maintaining and improving the efficiency of the Schengen evaluation mechanism , referred to above, mention in this regard : ‘Although recognizing that the Schengen catalogues do not form part of the legally binding acquis, these recommendations and best practices will serve as a tool for evaluation’.

<sup>118</sup> See S. de Biolley and A. Weyembergh, ‘L’évaluation dans le cadre du troisième pilier du traité sur l’Union européenne’, cited above,

<sup>119</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.



the Council, the MDW defines the specific subject of the evaluation<sup>120</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,<sup>121</sup> 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 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'.<sup>122</sup> The follow-up of the recommendations, according to a particularly well-placed observer, is 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>123</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>124</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>125</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

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<sup>120</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.

<sup>121</sup> These experts must have 'substantial experience of the subject to which the evaluation relates in the field of combating organized crime, in particular in a law-enforcement service such as the police, customs, a judicial or other public authority' (Article 3(1)).

<sup>122</sup> Article 8(3).

<sup>123</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>124</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>125</sup> The theme of the first evaluation cycle was the exchange of information on terrorist activities.

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 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>126</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 who fail 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 results 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 does appear 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, however. The Treaty establishing a Constitution for Europe provides that :

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<sup>126</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.

the Council may, on a proposal from the Commission, adopt European regulations or decisions 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 this Chapter □ Chapter IV: Area of Freedom, Security and Justice, in part III of the Treaty □ 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>127</sup>

While the Treaty establishing a Constitution for Europe may never enter into force in its current form, the inclusion of this provision in the text agreed upon in the Intergovernmental Conference shows the common understanding, by the Member States, that some form of monitoring of the implementation of the EU policies adopted in field of justice and home affairs is required. Indeed, as made clear by the formulation of Article III-260, which refers to evaluation conducted 'in order to facilitate full application of the principle of mutual recognition', the intention is not solely to supervise the faithful implementation by the Member States of instruments adopted in this field (something which, under the new framework established by the Constitution, 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 understandings 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.

Remarkably, while the Hague Programme adopted by the European Council on 4 November 2004, only days after the signature of the Treaty establishing a Constitution for Europe, contained a section on evaluation which clearly anticipates the entry into force of the Constitution,<sup>128</sup> it considered that this objective should be achieved immediately, as an instrument to encourage mutual recognition : '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'.<sup>129</sup> 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, as envisaged by Article III-260 of the Constitutional Treaty, was listed as the first priority.<sup>130</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.<sup>131</sup>

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<sup>127</sup> Article III-260 of the Treaty establishing a Constitution for Europe, OJ C 310 of 16.12.2004, p. 1.

<sup>128</sup> *The Hague Programme : strengthening freedom, security and justice in the European Union* (Council of the EU doc. 16054/04, 13 December 2004) contains the following paragraph in the 'general orientations' described : 'Evaluation of the implementation as well as of the effects of all measures is, in the European Council's opinion, essential to the effectiveness of Union action. The evaluations undertaken as from 1 July 2005 must be systematic, objective, impartial and efficient, while avoiding too heavy an administrative burden on national authorities and the Commission. Their goal should be to address the functioning of the measure and to suggest solutions for problems encountered in its implementation and/or application. The Commission should prepare a yearly evaluation report of measures to be submitted to the Council and to inform the European Parliament and the national parliaments' (at p. 6).

<sup>129</sup> At para. 3.2.

<sup>130</sup> Council of the EU, doc. 9778/2/05 REV 2, 10 June 2005 ; OJ C 198, 12.8.2005, p. 1.

<sup>131</sup> COM(2006) 332 final, of 28.6.2006.

This communication clearly proposes a form of systematic evaluation of the implementation of the EU policies in the fields freedom, security and justice,<sup>132</sup> which goes beyond the aim of ensuring compliance with the Member States' obligations under EU law.<sup>133</sup> Rather, in the interpretation of the Commission, by underlining the importance of evaluation, The Hague Programme aimed at '(1) further improving the way policies, programmes and instruments are set up, by identifying problems and obstacles encountered when implementing them, (2) laying down more systematic rules on the financial accountability and scrutiny of policies, (3) favouring learning and exchanges of good practice and (4) participating in developing an evaluation culture across the Union'.<sup>134</sup> 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 comparison 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'.<sup>135</sup> The information contained in these 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.<sup>136</sup> 'Strategic' evaluations thus conceived should add value to the current practices as described above, according to the Commission, notably by :

- (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).<sup>137</sup>

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

<sup>132</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.

<sup>133</sup> Significantly, while Article III-260 of the Constitutional Treaty mentions the need for an evaluation of the *implementation of the EU policies* in the fields of freedom, justice and security – i.e., by the Member States –, this communication refers to the evaluation of the *EU policies* as such. This is in line with the mandate of The Hague Programme, which states that 'Evaluation of the implementation *as well as of the effects of all measures* is (...) essential to the effectiveness of Union action' (emphasis added). This is more than a slip of tongue ; it is a deliberate move aimed at ensuring 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'.

<sup>134</sup> At para. 3.

<sup>135</sup> At para. 35.

<sup>136</sup> The mechanism is described in para. 18-33 of the communication (section 4.1.).

<sup>137</sup> At para 33 (emphasis in the original).



civil liberties,<sup>138</sup> 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.

Moreover, the communication goes beyond what was anticipated in Article III-260 of the Treaty establishing a Constitution for Europe, since it envisages that this evaluation process will lead 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’ ;<sup>139</sup> 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’.<sup>140</sup>

The form of ‘strategic evaluation’ which is proposed should not be seen as a form of open method of cooperation.<sup>141</sup> 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

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<sup>138</sup> Fundamental rights are recognized by the Commission, in its communication, as constituting a transversal objective, to be taken into account in all the policy fields concerned (see para. 8 or the reference to fundamental rights in para. 33, cited above). The Impact Assessment appended to the proposal states : ‘The Hague programme strikes a balance between the efficiency in the fight against terrorism and organised crime more generally on the one hand, and the respect and the active promotion of the fundamental rights on the other hand. Therefore, the annual evaluation by the Commission of the implementation of this programme should also assess whether this balance has been respected’ (SEC(2006) 815, of 28.6.2006, at p. 6). Ironically, this proposal of the Commission is presented to the Council at the very moment when it was becoming clear that the Fundamental Rights Agency would not be given a mandate extending to ‘third pillar’ issues, covering police cooperation and judicial cooperation in criminal matters under Title VI EU. Such an extended mandate, which the Commission favored, met with resistance of a few Member States, who initially argued that no legal basis could be found for such a mandate in the EU Treaty. Instead, a compromise solution was found in December 2006, under which a political declaration is attached to the Regulation adopted containing a ‘rendez-vous’ clause allowing the mandate to be re-examined in 2009, ‘with a view to the possibility of extending it to cover the areas of police and judicial cooperation in criminal matters’. In addition, according to another declaration by the Council appended to the Regulation, ‘the Union institutions may, within the framework of the legislative process and with due regard to each others’ powers, each benefit, as appropriate and on a voluntary basis, from [the expertise gained by the Agency in the field of fundamental rights] also within the areas of police and judicial cooperation in criminal matters’ ; this expertise ‘may also be of use to the Member States that wish to avail themselves thereof when they are implementing legislative acts of the Union in that area’.

<sup>139</sup> At para. 21.

<sup>140</sup> At para. 16.

<sup>141</sup> Although it has many different incarnations across a variety of policy fields, the open method of coordination was provided a canonical definition by the Conclusions of the Lisbon European Council of 23-24 March 2000, which described it as ‘a means of spreading best practice and achieving greater convergence towards the main EU goals’ and as involving: ‘fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms; establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice; translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences; periodic monitoring, evaluation and peer review organised as mutual learning processes’ (para. 37 of the Presidency Conclusions).

Commission to draw political conclusions and stimulate debate about the need to revise the EU policies adopted in the field.<sup>142</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.

#### *4. 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 the successes and mistakes of the past’.<sup>143</sup> 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. Courts, as we have seen, are ill-equipped to perform this role, although certain situations presented to them may effectively alert the EU Member States and the EU institutions to the need to take action in certain fields. Neither the European Commission nor the European Parliament have all the information required from the Member States to perform such evaluations<sup>144</sup> – indeed, to make this information available in a transparent and non-selective manner is precisely what the June 2006 communication seeks to achieve –. And although the Council of the European Union has been developing a practice of peer assessment since almost ten years in certain well-defined areas, it is seriously handicapped both 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 ; and by the difficulty for the Council to question, in the light of the resistance it they meet in certain member states, the general orientations it has set, since this would risk undermining its credibility and encouraging non-compliance. 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

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<sup>142</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, both because it was considered not to be politically feasible in the present context and because it was anticipated that the Member States would resist subjecting policies as closely linked to their national sovereignty to some form of peer review; and because 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. See the Impact Assessment appended to the communication (SEC(2006) 815, of 28.6.2006, at p. 12). This is more fully discussed hereunder, see text corresponding to n. 164.

<sup>143</sup> Commission of the European Communities, *European governance : a White Paper*, COM(2001) 428 final, of 25.7.2001, p. 22.

<sup>144</sup> See above, XXX.

apply them in particular settings whose dynamics could not be anticipated.

Yet, as conceived in the communication, 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 on the evaluation of EU policies in freedom, justice and security, 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.

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

Article III-260 of the Treaty establishing a Constitution for Europe refers to 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 in the presentation by the Commission of its communication on the evaluation of EU policies on freedom, security and justice, the emphasis is on a quite different aim, which is to ‘improve policy-making, by promoting systematic feedback of evaluation results into the decision-making process’.<sup>145</sup> 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 its legitimacy and efficiency 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>146</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’.<sup>147</sup> 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’.<sup>148</sup> In Kuhnian terms, one might say that policy learning seeks to question the policy paradigm itself, and not

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<sup>145</sup> COM(2006) 332 final, cited above, at para. 7, p. 3. I am not suggesting that the Commission has in any way gone beyond the mandate in what given. On the contrary, The Hague Programme adopted by the European Council on strengthening freedom, security and justice in the European Union (Council of the EU doc. 16054/04, 13 December 2004) already referred to ‘evaluation of the implementation as well as of the effects of all measures’ as both ‘essential to the effectiveness of Union action’.

<sup>146</sup> Communication to the Commission from Ms Schreyer in agreement with Mr Kinnock and the President, Focus on results: strengthening evaluation of Commission activities, SEC(2000)1051, 26 July 2000, at p. 2. The definition of evaluation is borrowed from the Glossary appended to the White Paper on Reform.

<sup>147</sup> COM(2006) 332 final, cited above, at para. 7, p. 3.

<sup>148</sup> A. Hemerijck and J. Visser, ‘How Europe’s Semi-Sovereign Welfare States Learn’, position paper ‘Governance as Learning’, 13 November 2006 (on file with the author), at p. 37.

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.

Insofar as its formulation is borrowed from the European Commission’s White paper on reform, the definition of evaluation referred to in the context of ‘strategic evaluations’ 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 (for example, massive regularization of foreigners illegally staying on the territory) are not undercutting the efforts of another Member State in the same area (for example, 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’.<sup>149</sup>

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 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.<sup>150</sup> 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.

### *Promoting mutual learning*

A third, and again distinct, aim of evaluation, is to promote mutual learning between the Member States.

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<sup>149</sup> COM(2006) 332 final, cited above, at para. 25, p. 8.

<sup>150</sup> COM(2006) 332 final, cited above, at para. 11-16, pp. 5-6.



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 experience 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, 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 overcoming 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 situation to which that solution is being transposed. In what may be seen as one version of the ‘garbage can’ logic of decision-making,<sup>151</sup> 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,<sup>152</sup> 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.

#### *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’<sup>153</sup> –, 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.

#### *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.<sup>154</sup> 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

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<sup>151</sup> M. Cohen, J. March and J. Olsen, ‘A Garbage Can Model of Organizational Choice’, *Administrative Science Quarterly*, vol. 17, 1972, pp. 1-25.

<sup>152</sup> A. Hemerijck and J. Visser, ‘How Europe’s Semi-Sovereign Welfare States Learn’, cited above, at p. 42.

<sup>153</sup> See paras. 3.2. and 3.3. of the *Hague Programme : Strengthening Freedom, Security and Justice in the European Union*, Annex I to the Conclusions of the Brussels European Council of 4-5 November 2004, EU Council doc. 14292/04.

<sup>154</sup> *European governance : A White paper*, cited above, at p. 10.

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>155</sup>

Indeed, this may be one possible result of the strategic evaluations as conceived by the Commission. 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',<sup>156</sup> 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'.<sup>157</sup> 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 general 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 the implementation of the directives adopted in the equality field<sup>158</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>159</sup> But even in the absence of such independent assessment, the

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<sup>155</sup> J. G. March and J. P. Olsen, *Democratic Governance*, New York, The Free Press, 1995, p. 227. In that sense, 'Democratic institutions (...) are both arranged to speed up and slow down learning from experience and adaptation' (J. G. March and J. P. Olsen, 'The logic of appropriateness', *ARENA Working Papers* 04/09, 2001, at p. 13).

<sup>156</sup> Presumably, this will lead to the designation, in each Member State, of one 'contact point' for each of the six policy areas concerned, in charge of preparing the factsheet containing the information requested in the template prepared by the Commission.

<sup>157</sup> Para. 24.

<sup>158</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>159</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.

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.

### *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 – 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 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 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. The European Commission initially 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. It 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’.<sup>160</sup> 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.<sup>161</sup>

These proposals were met with skepticism, however,<sup>162</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.<sup>163</sup> 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. The outcome is described thus :

A particular national measure may also be the object of an exchange of views, with the presence of the Member State whose measure is the object of an exchange of views, the Commission and all other Member States wishing to participate. The purpose of such an exchange of views is the

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<sup>160</sup> Communication from the Commission to the Council and the European Parliament on an open method of coordination for the Community Immigration Policy, COM(2001) 387 final of 11.7.2001.

<sup>161</sup> Communication from the Commission to the Council and the European Parliament on the Common Asylum Policy, introducing an open coordination method, COM(2001) 710 final, of 28.1.2001. 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>162</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. See Opinion of the Economic and Social Committee on: the Communication from the Commission to the Council and the European Parliament on an open method of coordination for the Community Immigration Policy, and (COM(2001) 387 final) the Communication from the Commission to the Council and the European Parliament on the Common Asylum Policy, introducing an open coordination method (COM(2001) 710 final), OJ C 221 of 17.9.2002, p. 49, at para. 3.6. and 5.1.1.

<sup>163</sup> See Proposal for a Council Decision on the establishment of a mutual information procedure concerning Member States’ measures in the areas of asylum and immigration, COM(2005) 480 final of 10.10.2005.

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 :

Such a mechanism appears politically – in the current situation – very difficult if not impossible to put in place. Policies in the field of FSJ are often linked with national sovereignty. This implies first, that the MS will not agree with a feedback from other MS on their policies in the field. This also means that common objectives or guidelines will be difficult to establish. Last, confidentiality of information could be an additional issue. Also, the OMC is more intergovernmental than the traditional “Community method” of policy-making in the EU. Because it is a decentralised approach implemented largely by the Member States and supervised by the Council of the European Union, the European Commission plays a primarily monitoring role and the involvement of the European Parliament and the European Court of Justice is very weak indeed.<sup>164</sup>

It may sound strange and perhaps contradictory to reject an OMC because of the fact that States would be unwilling to have common objectives or guidelines prescribed to them, on the one hand, and because, on the other hand, OMC mechanisms are intergovernmental, supervised by the Council, and thus different from the Community method – whereas the latter method is more, rather than less, a threat to the sovereignty of States. Be that as it may, the end result is clear : 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 Commission, has been preferred to the adoption of guidelines by the Council and the preparation of national plans to implement those guidelines.

The consequences of this shift (a shift, that is, at the level of intentions, if not at the level of practices) should perhaps 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). 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 as such openly discussed, 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, according to 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

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<sup>164</sup> See the Impact Assessment appended to the communication (SEC(2006) 815, of 28.6.2006, at p. 12).

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.

## V. 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. 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 (as could conceivably have been entrusted to the Fundamental Rights Agency, had its mandate been broader) clearly would enhance mutual trust between the Member States, and although the development of a more active policy in this area could greatly contribute to improving the legitimacy of the EU, 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 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.<sup>165</sup> 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*.

The fulfilment of these objectives calls for a procedure as open and transparent as possible, as well as for the development of participatory mechanisms ensuring 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

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<sup>165</sup> This, indeed, is one of the factors which could justify an intervention of the Union in accordance with the principle of subsidiarity.



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 : as demonstrated by the monitoring mechanisms based on State reporting under the United Nations human rights treaties, 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, 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 decennia in the EU should therefore not be misconstrued : although, as we have seen, these evaluations are secret,<sup>166</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 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 have been involved in this redefinition of policy. Similarly, openness and participation should contribute to ensure that the information collected from the Member States in order to feed into the orientation of EU policies will be reliable, since, as a result of such transparency, any misrepresentation by a Member States of the results it has achieved in a policy area will be the target of criticism by external observers. But, of course, 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 general 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

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<sup>166</sup> See above, part IV, sect. 2.

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.