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Fundamental Rights

A New Direction for the Fundamental Rights Policy of the EU

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1. Introduction

This report identifies a number of policy recommendations based on the exploratory work done within the fundamental rights network of the research programme on reflexive governance.¹ The report is essentially forward-oriented. It does not recapitulate the conclusions reached on the various themes that were explored within the network.² Rather, it looks to the future, asking how governance in the EU could seize upon the opportunity that the introduction of a ‘fundamental rights culture’ within the institutions could represent.

Our understanding of the shape that the fundamental rights policy of the EU could take in the future is guided by the perspective adopted on reflexive governance in the broader research project. That research is based on a number of premises which may be worth recalling. First, it is based on the view that innovation – the emergence of new solutions to apparently intractable problems, that cannot be resolved by a simple appeal to ‘the facts’ – can only emerge from actors’ engagement with concrete controversies. Learning is therefore not a theoretical enterprise, and it is not an abstract calculation of the pros and the cons of different scenarios. It is necessarily embedded : linked to problem-solving in specific settings. The procedural implication is that instead of being imposed top-down, on the basis of expert knowledge, policies aimed at promoting fundamental rights should be co-designed with those most directly concerned – the grassroots organisations and civil society, not only as spokespersons of those whose rights are at stake, but also because the kind of knowledge they possess could significantly improve the effectiveness and legitimacy of such policies.

Second, we acknowledge the open-ended nature of the inquiry into new solutions : ‘the policy dialectic’, Schön and Rein write, ‘is inherently open-ended. New solutions tend to generate new problems. The pragmatic resolution of existing controversies tends to set the stage for new controversies’.³ In that sense, learning is a continuous process, and theories therefore are permanently revised and tested. Here, the procedural implication is that the setting up of evaluation processes, the use of indicators to measure process and redirect policies that fail to produce the expected outcomes, have a key role to play.

Third, and most crucially, we posit that true learning can only occur by a revision of the very presuppositions that guide us in action, and that we fall back upon and make explicit when we have to defend our choices against external critiques. True learning, or ‘double loop’ learning in the vocabulary of Argyris and Schön, must be distinguished from mere adaptation of policies to changing environments, without questioning of our background assumptions or mental maps : it occurs ‘when error is detected and corrected in ways that involve the modification of an organization’s underlying norms, policies and objectives’.⁴ Encouraging learning, in that sense, means encouraging actors becoming aware of their tacit assumptions and the frames guiding their engagement in action, in order to provide them with an incentive to revise them. This will not happen by chance, however. It can only

¹ The Reflexive governance (REFGOV project (n° CIT3-CT-2005-513420)) is funded under the 6th EC Framework Programme on Research and Development. It is coordinated by the CPDR-UCL.

² This research is summarized in Olivier De Schutter and Violeta Moreno Lax (eds), *Human Rights in the Web of Governance. A Learning-Based Fundamental Rights Policy for the EU*, Bruxelles, Bruylant, 2010.

³ Donald A. Schön and Martin Rein, *Frame Reflection. Toward the resolution of intractable policy controversies*, Basic Books, New York, 1994, p. 81.

⁴ Chris Argyris, and Donald A. Schön, *Organizational learning: A theory of action perspective*, Reading, Mass: Addison Wesley, 1978, pp. 2-3.

happen by design : specific procedures must be devised to ensure that actors involved in collective action and problem-solving will be encouraged to revise the assumptions guiding both their description of the problem, and their choice of solutions.⁵ For this reason, learning-based theories of governance may have to be complemented by an approach focussed on the capacities of the actors. For the ability of actors to engage in such processes cannot be merely postulated : it must be affirmatively created. And this can only occur from within : it requires not simply an environment that is empowering and facilitative, but also a transformation in the understanding of the actors themselves of how they should redefine their roles. Again, important procedural implications follow for the setting up of policies that aim at the realisation of fundamental rights : instead of various stakeholders having to 'defend' fundamental rights with a meaning that is fully defined, these stakeholders should be seeking to work towards the identification of solutions that can best satisfy the normative requirements of fundamental rights, in the specific settings in which they find themselves, and they should be explicitly asked to propose transformations of the institutional settings in which they operate where this would help attaining this objective. Of course, for these stakeholders to be effective in this search, they must have the required capabilities, and they must have access to the required normative and organizational resources, although such resources should not be seen as some sort of minimum set of entitlements that would ensure the success of collective action, but can only be identified in particular contexts, and the list must necessarily be open to revision. But, in addition, these actors must be prepared to question their very representation of their role or their 'positioning' and, ultimately, of their identity.

A crucial implication of this approach typical of the genetic approach to reflexive governance is that, turning its attention to the future – the actors' expectations, rather than their inherited preferences, identities or representations –, it emphasizes the need to broaden political imagination. It does so by encouraging actors to reflect upon possible futures by getting rid of institutional fetishism : by re-imagining ways to act collectively that are not constrained by the existing institutional frameworks and by the narrow range of possibilities such frameworks allow. In a complex and fast-changing world, realism commands to broaden this inventive capacity, and it is unrealistic to expect that all problems can be solved appropriately within institutions as they are given.

A fundamental rights policy thus conceived should be seen as a permanent learning process, in which actors seek to question their routine representations of what rights require for their defense and in which they seek to broaden their repertoire of institutional solutions. Moving towards such a view of fundamental rights in the EU requires the merger of two efforts, which hitherto have remained almost entirely separate from one another. One effort has been to improve the protection of fundamental rights in the law- and policy-making of the EU. Another effort has been to make governance more open and participatory, and in order to improve transparency and accountability. Like the effort to increase the visibility of fundamental rights in the EU, this second effort was launched since 2000 especially, when the European Commission took a series of initiatives in order to improve European governance⁶. A White Paper on European Governance was adopted in July 2001, which proposes a number of ways to improve the involvement of stakeholders in the shaping of the policy and legislation of the Union, as well as the openness and accountability of the institutions⁷. In two later communications, the Commission examined how legislation making could be improved and be made more responsive to the diversity of contexts in which it is to apply,⁸ and defined the general principles

⁵ Jacques Lenoble and Marc Maesschalck, *Democracy, Law and Governance*, Aldershot, Ashgate, 2010.

⁶ It would seem that, in the eyes of the public and some commentators, this development was in immediate response to the fraud and mismanagement scandals which led in March 1999 to the fall of the Santer Commission. In fact, the reflection on the reform of European governance has been launched since 1996-1997 within the European Commission, especially under the Forward Studies Unit created by J. Delors. See for a set of consultation papers collected after a seminar held in 1996-1997 O. De Schutter, N. Lebessis and J. Paterson (eds.), *Governance in the European Union*, O.O.P.E.C., Luxembourg, 2000.

⁷ COM(2001) 428 final, of 25.7.2001.

⁸ Communication from the Commission, « European Governance : Better Lawmaking », COM(2002) 275 final of 5.6.2002

of impact assessment, which seeks to impose, since 2003, to all major initiatives.⁹ Following one of the proposals made in the White Paper on European Governance, the Commission also adopted a communication defining the general principles and minimum standards for the consultation of interested parties by the Commission.¹⁰

Although participation, transparency and accountability are values traditionally associated with the improved protection of fundamental rights, these two efforts – improvement of the protection of fundamental rights and improvement of governance – have been led through distinct processes, actors and instruments, and no serious attempt has been made to ensure their complementarity. It is this bridge that this report seeks to build.

Section 2 below describes the emergence of a new culture within the EU institutions, particularly since the adoption in 2000 of the EU Charter of Fundamental Rights. While this shift is promising, creating important avenues for change, it remains incomplete. The understanding of fundamental rights is still that these impose limits to EU action, when in fact they could be empowering and a stimulus both for institutional innovations and for advances at the level of substantive policies. Therefore, after describing the rise of fundamental rights in the EU particularly since 1999-2000 (2.1. and 2.2.), this section examines the potential significance of a shift from the ‘negative’ function of fundamental rights to the ‘positive’ function they could fulfil (2.3.), as well as the impact this could have on the way the allocation of competences between the EU and its Member States is examined (2.4.).

Fundamental rights are currently perceived, by the actors within the EU institutions and by most external observers alike, as a technocratic restriction imposed on the EU, limiting its power to act. But they can become, instead, empowering and democratizing, if they encourage participation and if they are an incentive to for the EU to exercise its competences in order to further the full realization of fundamental rights, taking into account the pressures they are subjected to in the internal market and in the area of freedom, security and justice. With this objective in mind, sections 3 to 5 then explore different tools that could be used in order to operate this shift from a ‘negative’ role of fundamental rights to a ‘positive’ role.

Section 3 discusses impact assessments and compatibility checks. It argues that these two tools that the European Commission has developed in order to ensure that its legislative proposals are consistent with fundamental rights should be more carefully distinguished, and that properly conceived, impact assessments should be a tool to improve participation and accountability, rather than merely a device to inform the political judgment of the College of Commissioners. It also argues that, thus understood, impact assessments could serve to ensure the mainstreaming of fundamental rights in the various policy areas influenced by the EU. The question should not be merely whether, in exercising its competences, the EU is not violating fundamental rights or negatively affecting them ; it should be whether the competences are exercised in a way that allows fundamental rights to make progress, and where different courses of action are envisageable, it is the course that presents the most benefits for fundamental rights that should be preferred.

Section 4 expands this line of reasoning by emphasizing the usefulness of the EU regularly adopting action plans, either on fundamental rights generally, or on each of the rights of the EU Charter of Fundamental Rights. Such action plans are not bureaucratic exercises : they are an opportunity to broaden our political imagination, and to ensure that we travel from the present point to another, where fundamental rights are more fully realized.

⁹ Communication from the Commission, « Impact Assessment », COM(2002) 276 final of 5.6.2002. This communication has been completed a few months later by a set of practical guidelines relating to impact assessment.

¹⁰ Communication from the Commission, « Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission », COM(2002) 704 final, of 11.12.2002.

Finally, section 5 notes that the relationship of the EU to international human rights law remains relatively undefined and unclear, and that this could be improved. The proposals under this section and the proposals concerning impact assessments, mainstreaming, or action plans, are linked in two ways : first, by relating more explicitly the *acquis* of the EU law to international human rights, the gaps in the achievements of the EU in the field of human rights will become more visible, and a range of possibilities to fill this gap will appear, constituting a powerful stimulus for action ; second, by strengthening its reference to international human rights as codified in instruments adopted, for instance, in the framework of the Council of Europe or of the United Nations, the EU will not simply be binding itself to the values enshrined in these instruments – it will also be encouraged to develop the various procedural tools – including the use of indicators and benchmarks, and the adoption of action plans developed in participatory settings – that these instruments encourage adopting.

2. The changing understanding of fundamental rights in the EU

2.1. The emergence of a fundamental rights culture within the EU institutions

In 1999-2000, two developments took place which significantly transformed the role of fundamental rights in the Union. On 7 December 2000, the Charter of Fundamental Rights of the European Union was proclaimed at the Nice European Summit.¹¹ Inspired by the fundamental rights recognized by the European Court of Justice among the general principles of law it ensures respect for, and by the international human rights instruments binding upon the EU member States, the Charter was the single most authoritative restatement of the *acquis* of the Union in the field of fundamental rights. But its main impact was not as a legal document – indeed, the Charter had no binding force when it was initially proclaimed¹² – ; it resided in the transformation it brought about in the culture and the practice of the institutions. On the basis of the Charter, it became possible for the European Parliament to systematically check whether the legislative proposals on which it deliberates comply with the rights, freedoms, and principles which had been proclaimed in Nice.¹³ The Commission too announced its intention to verify the compatibility of its proposals with the Charter in March 2001.¹⁴ In 2005, moving one step further, the Commission adopted a Communication clarifying the methodology it would use in order to assess the compatibility with the Charter of Fundamental Rights of its legislative proposals.¹⁵

The practice of impact assessments also was improved in order to better take into account the requirements of fundamental rights. The preparation of such impact assessments has become a standard practice since 2002.¹⁶ When they were revised in 2005, the guidelines for the preparation of impact assessments paid greater attention to the potential effects of different policy options on the guarantees in the Charter.¹⁷ Although the new guidelines are still based, as the former impact assessments, on a division between economic, social and environmental impacts, the revised set of guidelines incorporates fundamental rights under these different rubrics.¹⁸ This choice was confirmed

¹¹ OJ C 364 of 18.12.2000, p. 1.

¹² The Reform Treaty, signed at Lisbon on 13 December 2007 confirms the status of the Charter as a legally binding instrument for the institutions of the Union and for the Member States when they implement Union law. See Article 6(2) of the Treaty on European Union as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, of 17 December 2007, p. 1) (referring to the EU Charter of Fundamental Rights in the revised form it has been proclaimed on 12 December 2007 (OJ C 303 of 14.12.2007, p. 1)).

¹³ See Article 36 of the Rules of Procedure of the European Parliament, commented below, in section 3.1.

¹⁴ SEC(2001) 380/3.

¹⁵ Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring, COM(2005) 172 final of 27.4.2005.

¹⁶ Communication of 5 June 2002 on Impact Assessment, COM(2002)276.

¹⁷ See SEC(2005)791, 15.6.2005.

¹⁸ Indeed, a specific report was commissioned by the European Commission (what was then DG Justice, Freedom and Security) to EPEC (European Policy Evaluation Consortium) in preparation of the revised guidelines: see EPEC, *The Consideration of Fundamental Rights in Impact Assessment. Final Report*, December 2004, 61 pages.

in the most recent version of the impact assessment guidelines, adopted in 2009.¹⁹ Invoking fundamental rights within the EU thus became routine in the work of the institutions, now that there existed a document, prepared under conditions which guaranteed it a high degree of legitimacy, which listed the said rights.

2.2. Monitoring the EU Member States' compliance with fundamental rights

The second development was the entry into force on 1 May 1999 of the Treaty of Amsterdam. This Treaty not only formulated in Article 6(1) EU the values on which the Union was founded, which include human rights and fundamental freedoms. It also backed up this affirmation 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. In addition, following the crisis opened by the entry into the Austrian ruling governmental coalition of Jörg Haider's Freedom Party of Austria (FPÖ),²⁰ 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.²¹

The inclusion of such a mechanism soon raised the question whether these provisions of the Treaty on the European Union should lead to a permanent monitoring of the situation of fundamental rights in the Member States of the European Union. 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.²² 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, a practice which was facilitated – by providing a clearer grid of analysis – by the adoption of the EU Charter of Fundamental Rights at the Nice Summit of 2000.²³ This practice was

¹⁹ European Commission Impact Assessment Guidelines, 15 January 2009, SEC(2009)92.

²⁰ On this crisis, see M. Happold, 'Fourteen against One : The EU Member States' Response 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. On the insertion of Article 7(1) EU by the Treaty of Nice, see G. de Búrca, 'Beyond the Charter: How Enlargement has enlarged the Human Rights Policy of the EU', in O. De Schutter and S. Deakin (eds), *Social Rights and Market Forces: Is the open coordination of employment and social policies the future of social Europe?*, Bruxelles, Bruylant, 2005, pp. 245-278, at pp. 259-262.

²¹ This preventive mechanism is now described in Article 7(1) EU.

²² 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).

²³ 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 :

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’.²⁴

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.²⁵

That network was set up in September 2002.²⁶ In October 2003, the European Commission adopted a communication in which it set out its views about the implementation of Article 7 EU.²⁷ Referring to the work of the EU Network of independent experts on fundamental rights, it took the view that the information collected by the network ‘should make it possible to detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty. 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’. That language was practically borrowed from the first report of the Network, published in March 2003, which presented the situation of fundamental rights in the EU and its member States in 2002. In that report, the Network had also proposed that it should act as a clearinghouse for the identification and dissemination of best practices identified in the field of fundamental rights, thus inaugurating what it was then fashionable to refer to as an ‘open method of coordination’ in that area. The Commission considered that this required a more active contribution from the Member States. It wrote in its 2003 communication : ‘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’.²⁸

What the Commission was in fact suggesting, was that a permanent form of monitoring of the

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).

²⁴ 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.

²⁵ Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000), cited above, para. 9.

²⁶ The EU Network of Independent Experts on Fundamental Rights was composed of 25 experts and monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the EU Charter of Fundamental Rights. It functioned between September 2002 and September 2006. See: Ph. Alston and O. De Schutter (eds), *Monitoring Fundamental Rights in the EU – The Contribution of the Fundamental Rights Agency*, Hart publ., Oxford, 2005.

²⁷ 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.

²⁸ At para. 2.2. of the communication, pp. 9-10.

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. In its response to the European Commission, the Parliament disagreed. While deploring, in other respects, the timidity of the reading proposed by the European Commission of Article 7 EU, it insisted that the use of Article 7 EU should be based on 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.²⁹

Thus, little by little, a 'fundamental rights culture' was being established within the EU institutions in the early 2000s. But a number of different directions were being explored at the same time. First, the idea had taken root that neither the EU institutions, nor the EU member States when they implemented EU law, could afford to ignore the requirements of fundamental rights in the course of their activities. The adoption of the Charter of Fundamental Rights, by the large visibility it soon gained, served essentially that purpose : it provided guidance and legal certainty, thus facilitating self-monitoring by the institutions. Secondly, the role performed on the basis of Article 7 EU by the European Parliament and by the Network of Independent Experts on fundamental rights, although the two acted as a relatively disharmonious tandem,³⁰ gave birth to the idea that the EU might progressively develop a monitoring role, in order to identify at an early stage whether certain member States might be adopting a conduct which would threaten the mutual trust on which the area of freedom, security and justice, was to be built. Third, finally, was the idea that such a systematic comparison could constitute a condition for the development of an active 'fundamental rights policy' of the EU. This was linked to the idea that a systematic comparison of the developments of fundamental rights in the Member States might lead to identify the situations where an initiative from the EU is required, or the emerging good practices which could be diffused ; it was expressed most explicitly in the 'open method of coordination' proposed by the EU Network of Independent Experts on fundamental rights.

²⁹ 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.

³⁰ During two years following the establishment of the EU Network of Independent Experts on fundamental rights in September 2002, there was a relatively close cooperation between the network's activities and the LIBE Committee of the European Parliament. However, when, in July 2004, the resolution proposed on the basis of the Report on the situation as regards fundamental rights in the European Union (2003) prepared by MEP A. Boumediene-Thiery failed to be adopted, the LIBE Committee apparently drew the conclusion that it should not continue replicating the work of the network, whose reports in any event, thanks to the structure of the network (with one expert covering each EU member State, allowing for a detailed examination of that State and systematic comparisons of the 15, and then the 25 States), it would hardly be able to improve upon. The network pursued its activities for two further years, with the LIBE Committee using the information collected in the reports, or the opinions prepared by the network, in a more selective mode.

It is here that the question of the future of fundamental rights monitoring within the EU links with the question of the function of fundamental rights in the EU legal order. Indeed, the mutual observation of the Member States which would be made possible by an open form of coordination should permit, precisely, to identify – with respect to specific policies designed to implement certain rights – where, preferably, the implementing measures should be adopted. More generally, the institutionalization of such mutual observation might allow to reconcile a decentralized implementation of fundamental rights – i.e., the absence of harmonization at EU level – with an effort towards improving compliance with fundamental rights in the EU, and making progress towards their full realization.

2.3. The ‘negative’ and ‘positive’ functions of fundamental rights in the EU legal order

The underlying thesis is that the role of fundamental rights should be rethought radically, in two directions. First, fundamental rights hitherto have been seen as a substantive limitation to the action both of the institutions of the EU and of the EU Member States, when they act in the field of application of EU law – restricting their ability to adopt certain measures, and thus limiting the avenues for political imagination. This may be referred to as the ‘negative’ function of fundamental rights in the EU legal order. In contrast, the ‘positive’ function of fundamental rights, as guides to action, is underdeveloped. The result is that the procedural dimensions of fundamental rights have been almost entirely ignored : fundamental rights prohibited certain things from being done, but hardly influenced the way of doing things. Instead of being empowering and of provoking innovative solutions, fundamental rights have in effect served to depoliticize issues. A binary approach was adopted towards the prescriptions of fundamental rights. It was left to the experts to determine what these rights mean : whatever fundamental rights prohibited was removed from the political discussion, but any measure that did not create a risk of violation of fundamental rights, could safely ignore them as irrelevant.

Our understanding of fundamental rights and of their role in European integration has been to emphasize, instead, their procedural implications, in terms of increased avenues for participation in identifying potential impacts of decisions on the level of enjoyment of fundamental rights, or of the development of tools to improve accountability of decision-makers towards the end-goal of fulfilling fundamental rights. This in turn would, we hypothesized, would be facilitated by seeing fundamental rights not as a set of requirements that are or are not complied with, but rather as a set of values that should guide law- and policy-making, and which are to be progressively realized. Conceived thus, fundamental rights are not restricting political imagination : they are, instead, an incentive to search for innovative solutions, in order to make progress towards fulfilling them. The role of participatory processes is key, in order to help identify such solutions, a search for which expert knowledge may be less well equipped. Indicators here should play a key role, in order to assess whether progress is being made towards the fulfillment of fundamental rights. And instead of fundamental rights being imposed top-down, on the basis of the jurisprudence of the highest judicial bodies, they are also to be built in a bottom-up perspective, on the basis of a comparison of what has or has not worked in specific settings. A stylized presentation of the contrast between these two understandings of fundamental rights would be the following :

	Classic approach : fundamental rights as substantive limits	New approach : fundamental rights as an aim to be achieved through appropriate procedures
Relationship of rights to political decision-making processes	Disempowering – restricting the freedom of political imagination	Empowering – stimulating the search for solutions that can best further the realization of fundamental rights
Actors	Expert determination of what fundamental rights require	Role of grassroots organisations, civil society, in identifying innovative solutions
Function of fundamental rights	Imposing substantive limits on decision-making	Incentivizing decision-making to move towards certain outcomes

It is not suggested here that a new approach to fundamental rights – more procedural, empowering rather than disempowering, and provoking the search for innovative solutions rather than removing certain areas from politics – should replace the existing one. Even if we move towards this new approach, it will remain true that fundamental rights, as defined by international courts, will have to be complied with, and that certain measures will be prohibited due to these requirements. What matters however, is that *in addition* – rather than as a substitute – to fundamental rights thus understood, we see them as an objective to be fulfilled, following a search for the solutions that are the most appropriate to that effect – a search to which a wide range of actors, rather than experts alone, should contribute –.

2.4. The positive function of fundamental rights and the question of competences

This proposed recognition of the dual role of fundamental rights in the EU has direct implications on their relationship to the question of the allocation of competences across various levels of policy-making, and particularly between the EU and its Member States. It is clear that the EU has not been attributed the competence to protect and promote fundamental rights, and that it may only take action in areas for which it has been authorized by the Member States to do so. However, there are a number of domains in which the EU shares competences with the Member States, and in which the question therefore arises at which level the competence should be exercised. In this broad subset of situations in which the EU may act, fundamental rights may serve as a tool, both (in substantive terms) in order to guide the adoption of certain initiatives, and (in procedural terms) in order to influence the way such initiatives will be designed and implemented.

It is important in this regard to implement the principles of subsidiarity and proportionality that should regulate the exercise by the EU of competences which it shares with the Member States, taking into account the fact that the relationship between the powers exercised at domestic level and the powers exercised at EU level is not one of communicating vases. On the contrary, it has been written, ‘power is increased to mutual benefit by the very fact of action in common’, so that arguments about the allocation of power cannot be framed as arguments about ‘who wins and who loses’.³¹ This is particularly relevant in the area of fundamental rights, if we consider the relationship between the contrast between the ‘negative’ and the ‘positive’ functions of fundamental rights in the EU legal order, on the one hand, and the question of competences, on the other hand.

This relationship may be expressed as follows. As explained above, fundamental rights have classically fulfilled a purely ‘negative’ function in the legal order of the European Union: they have

³¹ St. Weatherwill, ‘Competence’, in B. de Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, European University Institute, Robert Schuman Centre for Advanced Studies and Academy of European Law, 2003, p. 45, at p. 46.

been limits imposed on the institutions of the Union, or on the Member States' authorities in the field of application of Union law. When they were initially recognised by the European Court of Justice as part of the general principles of European Community law,³² they were used to ensure that the supremacy of EC law over national law would not be questioned by national courts in the name of their obligation to guarantee fundamental rights listed in national constitutions.³³ Today still, fundamental rights are primarily seen as fulfilling this 'shield' function: while they restrict both the European legislator and the national authorities acting under EU law, they are not in any way conceived of as objectives which the European legislator should seek to achieve, or as having an impact on the allocation of competences between the EU and the Member States.³⁴ The growth of EU Law should not lead to violations of fundamental rights, and in that sense these rights must be complied with in its development; but the progress of EU Law should not, in principle, be made dependent on the need to realise fundamental rights.

In contrast, fundamental rights would be fulfilling a 'positive' function in the EU legal order if they were to constitute not only an external limit on what the European legislator can do, but also an objective to be achieved by the European legislator. In this alternative conception, also referred to above, fundamental rights have to be realised proactively : instead of having no influence on the exercise of the powers attributed to the Union, they would have to guide the exercise of such attributed powers.³⁵

Our research has demonstrated that, as result of the dynamics of European integration, these 'negative' and 'positive' functions cannot be easily separated from one another. Indeed, EU law does not simply occupy certain fields, while leaving other fields to the Member States. Such a view would imply that both normative domains are separated by a shifting, yet at any point in time clearly identifiable, borderline.³⁶ However, in reality the development of EU law has an impact not only on the areas it has regulated, but also on the areas it has not (yet) colonised. Of course, in fields which EU law has not pre-empted, we have no rules (regulations, directives, etc) imposed from above; instead, States are 'free' to choose which national rules to adopt. However, this 'freedom' is severely constrained by the fact that, between the Member States, freedom of movement of capital, services, goods and persons is

³² Case C-29/69, *Stauder v Ulm* [1969] ECR 4119; Case C-11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125; Case C-4/73, *Nold v Commission* [1974] ECR 491; Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219; Case 44/79, *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; Case 5/88, *Wachauf v Germany* [1989] ECR 2609.

³³ See the decisions of the German Constitutional Court (Bundesverfassungsgericht) in *Solange I* [1974] 2 CMLRev 540 and *Solange II* [1987] 3 CMLRev 225, as well as the *Bananas II* Judgment, Order of 7 June 2000 2 BvL 1/97 or 53 *Neue Juristische Wochenschrift* 3124 (2000). The *Corte costituzionale* in Italy also threatened not to recognise the primacy of EC law where this would risk infringing fundamental rights listed in the Italian Constitution: see *Frontini v. Ministero delle Finanze* [1974] 2 CMLRev 372; Dec. 170 of 8 June 1984 in *SpA Granital v. Amministrazione delle Finanze and SpA Fragnuola v. Amministrazione delle Finanze*, Dec. 232 of 21 April 1989 (1989) 72 RDL.

³⁴ See, for an excellent discussion of the relationship between the protection of fundamental rights and the question of competences, Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', (2002) 39 CMLRev 945.

³⁵ In favour of such a development, see O De Schutter, 'Les droits fondamentaux dans le projet européen. Des limites à l'action des institutions à une politique des droits fondamentaux', in Olivier De Schutter and Paul Nihoul (eds), *Une Constitution pour l'Europe. Réflexions sur les transformations du droit de l'Union européenne* (Bruxelles, Larcier, 2004) 81.

³⁶ That is not to say that where the line is traced will always be easily determined. On the contrary, commentators have long recognised the difficulty of defining the frontier beyond which the general principles of law, including fundamental rights for which the European Court of Justice imposes respect, shall not apply. See esp. Joseph H.H. Weiler, 'The European Court at a Crossroads: Community Human Rights and Member State Action', in *Du droit international au droit de l'intégration. Liber amicorum Pierre Pescatore* (Baden-Baden, Nomos Verlagsgesellschaft, 1987) 821; John Temple Lang, 'The Sphere in Which Member States are Obligated to Comply with the General Principles of Law and Community Fundamental Rights Principles', (1991) 2 *Legal Issues of European Integration* 23; Joseph H.H. Weiler, 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights', in Nanette Neuwahl and Alan Rosas (eds), *The European Union and Human Rights* (The Hague-Boston-London, Martinus Nijhoff Publ., Kluwer, 1995), p. 56; and Koen Lenaerts, 'Le respect des droits fondamentaux en tant que principe constitutionnel de l'Union européenne', in *Mélanges en hommage à Michel Waelbroeck* (Bruxelles, Bruylant, 1999), p. 423.

progressively being ensured, and that judicial, police and administrative authorities are increasingly cooperating with one another. Where the EU has not occupied the field by the imposition of legal rules, it does so, less visibly, but sometimes just as effectively, by creating interdependencies between States that the States deserve to be called ‘semi-sovereign’.³⁷ Indeed, the much-cherished ‘autonomy’ States claim may be, in many cases, more illusory than real: instead of this autonomy being constrained by common rules set at European level, it will be constrained by regulatory competition *between* States, rather than regulation imposed upon them. Formally, the EU Member States are free to take action; in fact, however, they cannot ignore, before taking action, the impacts of their action, and where such impacts depend on the attitude of all the other States with whom they share a common area, they may in fact have very few options left open.

We may therefore say that the EU has two tools to achieve its objectives: one is to act, and to impose a common legal regime on its Member States; the other is to remain passive, and to let things develop on the basis of a decentralised approach to solving problems. Whether the EU Member States are more ‘autonomous’ under the former or the latter approach is an empirical question, at least if we rely on a measure of autonomy which is not purely formal, and defined as a function of the level at which particular rules are to be adopted, but which is substantive, and defined as the freedom of one entity to choose how any particular issue will be governed.

If we accept this view, it is easy to see that the development of the EU may threaten fundamental rights in two ways. Clearly, the adoption of certain rules by the EU may lead to such rights being violated, either by those rules themselves, or by the EU Member States’ measures of implementation.³⁸ But the failure of the EU to adopt certain rules – or its failure, when it does adopt rules in a particular field, to ensure that these rules ensure an adequate level of protection of fundamental rights – may also threaten fundamental rights, because of the pressures which, in the single area the EU Member States now share, may create obstacles to the efforts the States may wish to pursue in order to protect and fulfil fundamental rights. It is on this premise, for instance, that the adoption of directives relating to the advertising, sponsorship, manufacture, presentation and sale of tobacco products was justified:³⁹ when asked to confirm whether Article 95 EC (now Article 114 TFEU) could constitute an adequate legislative basis for the adoption of such instruments, the European Court of Justice agreed with the argument that a failure to act by the Union could result either in obstacles in the internal market, or in the absence of an adequate protection of the right to health through State regulation:

having regard to the fact that the public is increasingly conscious of the dangers to health posed by consuming tobacco products, it is likely that obstacles to the free movement of those products would arise by reason of the adoption by the Member States of new rules reflecting that development and intended more effectively to discourage consumption of those products by

³⁷ The expression is borrowed from S Leibfried and P Pierson, ‘Semi-sovereign Welfare States: Social Policy in a Multitiered Europe’, in S Leibfried and P Pierson (eds), *European Social Policy: Between Fragmentation and Integration* (Washington D.C.: Brookings Institution, 1995).

³⁸ It is this risk that the case-law of the European Court of Justice initially sought to avoid. The fundamental rights protected by the European Court of Justice as general principles of law (and, now, by reference to Article 6(2) of the EU Treaty) apply to the acts of the EU institutions (see, e.g., Case 374/87, *Orkem v Commission* [1989] ECR 3283, para. 31), as well as to the acts of the EU Member States when they implement Union law (Case 222/84, *Johnston v Chief Constable of the RUC* [1986] ECR 1651) or when they rely on an exception allowed under Union law (see, e.g., Case C-112/00, *Schmidberger* [2003] ECR I-5659; or Case C-36/02, *Omega Spielhallen* [2004] ECR I-9609).

³⁹ Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ L 194, 18.7.2001, p. 26); Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 152, 20.6.2003, p. 16).

means of warnings and information appearing on their packaging or to reduce the harmful effects of tobacco products by introducing new rules governing their composition.⁴⁰

On the surface, the Tobacco Manufacture and Advertising Directives aim at product standardisation in the internal market; in reality, their objective is to contribute to the protection of health, an objective which could not be achieved by the Member States acting individually. The reasoning behind the use of Article 95 EC for the adoption of these directives also justified, in particular, the adoption of the Personal Data Directive in 1995, which sought to strengthen the protection of the right to respect for private life in the processing of personal data throughout the Community on the basis that ‘the difference in levels of (...) 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’. The Preamble continued that this could result in ‘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’.⁴¹

In both cases, the intervention of the European legislator is justified by the growing tension between fundamental economic freedoms, such as the free movement of goods or the freedom to provide services, which are at the basis of the establishment of the internal market, and the development of national regulations, such as those relating to tobacco products or the processing of personal data, which aim at the protection of fundamental rights (the right to health and the right to privacy, respectively). The adoption of harmonised minimum levels of protection of these fundamental rights throughout the Union serves a dual function. First, it ensures that this conflict will not result in the creation of barriers within the internal market – which the EU Member States may be tempted to justify by the need to ensure a certain level of protection of fundamental rights within their territory. Second, it ensures that the high level of protection of fundamental rights certain Member States may be seeking to ensure will not be threatened by the need to recognise the primacy of economic freedoms of movement. In the cases cited, the failure by the Community to adopt directives relating to the advertising, sponsorship, manufacture, presentation and sale of tobacco products, or to the protection of personal data, might have resulted in the Member States being pressured to lower the level of protection of the right to health or the right to privacy, either because this would be seen as a requirement of the internal market (allowing the free movement of tobacco products, or the transborder flow of personal data in the provision of services across Member States), or because maintaining high levels of protection of those rights might result in placing the undertakings established on their territory in an unfavourable position vis-à-vis competitors established in other Member States with less demanding regulations.⁴²

Nor is this reasoning limited to product or services regulation in the internal market. Consider, for example, the approach which has been taken towards asylum in the European Union. Asylum was identified as an issue of common interest once it was realised that, in the absence of a common approach, certain States may be ‘magnets’ for potential asylum-seekers arriving at the borders of the

⁴⁰ Case C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, [2002] ECR I-11453, at para. 67. This position was confirmed in two judgments of 14 December 2004: Case C-434/02, *Arnold André GmbH & Co. KG v Landrat des Kreises Herford*, [2004] ECR I-11825; Case C-210/03, *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* [2004] ECR I-11893. Comp. with Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-2247 (where the Court annulled Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 1992 L 213, p. 9) since that Directive did not ensure free movement of products which are in conformity with its provisions, and therefore could not be said to contribute to the establishment of the internal market as required for Article 95 EC (then Article 100a of the EC Treaty) to be relied upon as a legal basis).

⁴¹ Preamble, 7th Recital, of 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, 23.11.1995, p. 31). This directive too is adopted on the basis of Article 100a of the EC Treaty (now Article 95 EC).

⁴² See, in particular, on the risks of such ‘regulatory competition’, F Scharpf, *Governing in Europe. Effective and Democratic?* (Oxford, Oxford University Press, 1999), chap. 3.

Union, because of the generosity of their reception of candidates for asylum. This situation was seen to contain the risk of regulatory competition between the EU Member States, as the growth in the number of asylum-seekers imposed financial burdens on the States to which they were most attracted, thus leading those States to lower the level of protection afforded to asylum-seekers. In the regulatory competition scenario, States would be competing with one another in order to afford the lowest level of protection possible: the conditions for such a regulatory competition are present, since States are free to lower the level of protection for asylum-seekers, although the choice by any one State to do so further increases the burden on the other States, resulting in a 'race to the bottom' in this field.⁴³ It is this risk which the definition, at the level of the Union, of minimum standards in the field of asylum sought to avert. Thus, when the proposal was made for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, the development of minimum standards regarding the procedure for granting and withdrawing refugee status in the Member States was justified by the fact that the adoption of such standards 'will help to limit secondary movements of asylum applicants as resulting from disparities in procedures in Member States. Henceforth, applicants for asylum will decide on their country of destination less on the basis of the procedural rules and practices in places than before. The continued absence of standards on the procedures for granting and withdrawing refugee status would have a negative effect on the effectiveness of other instruments relating to asylum. Conversely, once minimum standards on asylum procedures are in place, the operation of, inter alia, an effective system for determining which Member State is responsible for considering an asylum application^[44] is fully justified'.⁴⁵

Many more such examples could be provided. At a minimum, they illustrate that, in certain well-defined circumstances, because of the interdependencies created between the EU Member States who share a single area in which goods, services, undertakings, and persons move freely, and in which national authorities, including police and judicial authorities, cooperate, the Union might have to adopt certain measures aimed at realising fundamental rights. The level of protection of such rights should not be left to market mechanisms, or to the blind results of regulatory competition: the implementation of these rights should not be a hostage to competition between jurisdictions, whether such competition follows from the need to attract foreign investors, or – for example – from the need not to become a magnet for asylum-seekers arriving at the borders of the Union. In such cases, some forms of coordination or even harmonization at the EU level by the development of common standards might be required.

Of course, the decentralized implementation of fundamental rights may present certain advantages. It may favour experimentation in each Member State of original solutions, most suitable to the local context. However, in many cases, which is unavoidable in a single area, decisions in one State will affect the other States: whether these externalities are positive or negative, some form of coordination would be required, either to limit the negative consequences or to avoid that States benefiting from positive externalities free ride on the efforts of others.⁴⁶ Moreover, even where local experimentation

⁴³ S Barbou des Places and B Deffains, 'Cooperation in the shadow of regulatory competition: the case of asylum legislation in Europe', (2004) 23 *International Review of Law and Economics* 345. See also S Barbou des Places, *Evolution of asylum legislation in the field of asylum. Insights from regulatory competition theory*, Working Paper of the European University Institute, Florence, RSC No. 2003/16, 37 pages.

⁴⁴ As provided for in the 'Dublin II' Regulation implementing the Dublin Convention of 15 June 1990 into European Community law: Council Regulation n° 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50 of 25.2.2003, p. 1, and Commission Regulation n° 1560/2003 laying down detailed rules for the application of Regulation n° 343/2003, OJ L 222, p. 3. For the initial proposal of the Commission, see COM(2001) 447, OJ C 304 of 10.10.2001, p. 192.

⁴⁵ Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM(2000) 578 final of 20.9.2000, OJ C 62 of 27.2.2001, p. 231. The directive has now been adopted: Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326 of 13.12.2005, p. 13).

⁴⁶ St. Weatherwill notes: '...in some circumstances, made more common by transnational economic integration, a decision taken by one bloc of citizens may have serious negative consequences for another, politically more remote bloc of

is deemed to be an objective more desirable than better coordination, experimentation in one jurisdiction is useful only to the extent that the other jurisdictions may learn from it, which requires a form of shared evaluation. The goal of the exchange of information and best practices in an open form of coordination, therefore, is both to avoid opportunistic attitudes by States – whose loyal cooperation with one another would seem to require, indeed, that they ‘take account of the effects of their actions on the Union and on other Member States’⁴⁷ – and to favour mutual learning, by the evaluation, performed in common, of the experiences launched by each State. Such a mutual observation may lead to the conclusion that some form of action may and should be taken at the level of the Union. But this is perfectly compatible with the principle of subsidiarity, insofar as the objective to be fulfilled cannot adequately be achieved by Member State action alone, and where the scale of effects of the proposed measure favour Community action.⁴⁸

Such an understanding of the allocation of competences between the Member States and the Union is *procedural*, in the sense that rather than identifying *a priori* where the competences should be exercised, the answer to this question should depend on the evaluation, in each case, of the advantages of a decentralized approach, in comparison to the advantages of an intervention at the level of the Union. The choice made by the treaties to define shared competences as the norm⁴⁹ is an important step in that direction. But there still would appear a need to identify a mechanism through which the exercise, respectively by the Union and the Member States, of the competences they share could be allocated on a basis most efficient from the point of view of the realization of fundamental rights. Moreover, the solution arrived at concerning the exercise of competences should not be set once and for all. Instead, it should be revisable and *dynamic*, according to our understanding of the requirements of fundamental rights and the level best suited for their implementation.

3. The role of fundamental rights in impact assessments

3.1. Compatibility checks and impact assessments

Since 2002, as part of its general effort to improve governance in the EU, the European Commission has defined the general principles of impact assessment, which it seeks to impose to all major initiatives.⁵⁰ When they were revised in 2005, the guidelines for the preparation of impact assessments paid greater attention to the potential effects of different policy options on the guarantees in the Charter:⁵¹ while the new guidelines are still based, as the former impact assessments, on a division between economic, social and environmental impacts, fundamental rights are included under these different rubrics.⁵² In addition to impact assessments, compliance with the EU Charter of Fundamental

citizens. So, localized decision-making may be neglectful of the full constituency of interests affected by those decisions. [...] This suggests a formula for allocating competence that will be based on ability to deliver the most efficient and most representative (of all affected interests) decisions’ St. Weatherwill, ‘Competence’, in B. de Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, European University Institute, Robert Schuman Centre for Advanced Studies and Academy of European Law, 2003, p. 45, at p. 48).

⁴⁷ St. Weatherwill, ‘Competence’, cited above, at p. 56.

⁴⁸ Ph. Alston and J. H. H. Weiler, ‘An “Even Closer Union” in Need of a Human Rights Policy: The European Union and Human Rights’, in Ph. Alston, M. Bustelo and J. Heenan (ed.), *The EU and Human Rights*, Oxford, Oxford University Press, 1999, p. 3, at p. 27.

⁴⁹ See Article 4(1) of the Treaty on the Functioning of the European Union. This was already a proposal of the European Convention, that proposed the Draft Treaty Establishing a Constitution for the European Union : Article 14(1) of the Treaty establishing a Constitution for Europe stated that ‘The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles I-13 [exclusive competence of the Union] and I-17 [areas in which the Union may take supporting, coordinating or complementary action]’.

⁵⁰ Communication from the Commission, ‘Impact Assessment’, COM(2002) 276 final of 5.6.2002. This communication has been completed a few months later by a set of practical guidelines relating to impact assessment.

⁵¹ SEC(2005)791, 15.6.2005.

⁵² Indeed, a specific report was commissioned by the European Commission (DG Justice, Freedom and Security) to EPEC (European Policy Evaluation Consortium) in preparation of the revised guidelines: see EPEC, *The Consideration of Fundamental Rights in Impact Assessment. Final Report*, December 2004, 61 pages.

Rights is verified through processes internal to the Commission. As early as in March 2001, the Commission announced its intention to verify the compatibility of its proposals with the Charter.⁵³ In 2005, it adopted a Communication clarifying the methodology it would use in order to assess the compatibility with the Charter of Fundamental Rights of its legislative proposals.⁵⁴

These attempts to ensure a better inclusion of fundamental rights in EU lawmaking remain unsatisfactory on a number of grounds. Firstly, both impact assessments, as performed according to the procedures in place, and the verification of compliance with fundamental rights, as exercised by the European Commission under the main responsibility of DG Justice (formerly DG JLS (Justice, Freedom and Security)), are reactive in nature : while they may serve to highlight certain problematic aspects of proposals made by the services of the Commission, their purpose is not to identify areas where legislative action might be required in the areas in which the EU Member States have attributed competences to the EU. Nor do they ensure a genuine mainstreaming of fundamental rights in the policies of the EU. Under the former EC Treaty, mainstreaming was already mandatory with respect to equality between men and women⁵⁵ as well as with respect to the protection of the environment⁵⁶ and the protection of consumers.⁵⁷ The Treaty of Lisbon⁵⁸ not only confirms this, but also extends the requirement of mainstreaming to the combating of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁵⁹ Of course, there is no mandate in the current treaties to ‘mainstream’ all the provisions of the EU Charter of Fundamental Rights and the Reform Treaty shall not provide for such a mandate. But neither is there any prohibition to promote such mainstreaming: as the examples of anti-racism⁶⁰ and disability⁶¹ mainstreaming already exhibit, the institutions may choose to take into account certain legitimate objectives in all the policy areas, as long as this does not lead them to exercise powers which have not been attributed to them.

⁵³ SEC(2001) 380/3.

⁵⁴ Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring, COM(2005) 172 final of 27.4.2005.

⁵⁵ See Art. 3(2) EC (‘In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women’).

⁵⁶ See Art. 6 EC (‘Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development’).

⁵⁷ See Art. 153(2) EC (‘Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities’).

⁵⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, of 17 December 2007, p. 1).

⁵⁹ See, following the amendments made to the EU Treaty and to the EC Treaty by the Treaty of Lisbon, Art. 3/3, al. 3 of the EU Treaty (listing combating discrimination among the objectives of the EU), and Art. 10 of the Treaty on the functioning of the EU (imposing an obligation to mainstream the fight against discrimination in the policies of the EU).

⁶⁰ See COM(1998) 183 final, of 25.3.1998.

⁶¹ On the mainstreaming of the objective of integrating persons with disabilities, see the Communication of the Commission, *Equal Opportunities for People with Disabilities. A European Action Plan*, COM(2003)650 final, 30.10.2003, and Resolution of the Council of 15 July 2003 on promoting the employment and social integration of people with disabilities, OJ C 175 of 24.7.2003, p. 1 (calling upon the Member States to reinforce ‘the mainstreaming of the disability perspective into all relevant policies at the stages of policy formulation, implementation, monitoring and evaluation’, and insisting on the need for statistical information for such monitoring and evaluation as well as for the need of cooperation with bodies and civil society organisations concerned with people with disabilities). The mainstreaming of disability led the EU to include provisions in favor of the professional integration of persons with disabilities in the regime of State aids (Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment, OJ L 337 of 13.12.2002, p. 3 (determining that certain categories of State aid schemes which seek to favor employment, and especially employment of target groups, including workers with disabilities, may be considered compatible with the common market within the meaning of Article 87(3) EC and be exempted from the notification requirement of Article 88(3) EC)), in the adoption of the guidelines under the European Employment Strategy (Council Decision of 22 July 2003 on guidelines for the employment policies of the Member States, OJ L 197 of 5.8.2003, p. 13), or in the revision of the rules relating to public procurement (Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114) (which provides that contract performance conditions may seek to favor the employment of people experiencing particular difficulty in achieving integration)).

In addition, in most cases, as illustrated for instance by the Family Reunification Directive⁶² or, currently, by the debates on the proposal for a Return Directive,⁶³ the risks of fundamental rights violations under EU law have their source, not directly in the obligations imposed on the EU Member States, but in the failure of instruments of EU Law to effectively prevent fundamental rights violations in the implementation of such instruments by the national authorities. Neither impact assessments accompanying legislative proposals made by the European Commission nor compatibility checks performed by DG Justice in coordination with the lead DG and with DG RELEX serve to provide national authorities with guidance about how to implement the instruments adopted in compliance with fundamental rights. The current procedures are thus almost certainly ill-equipped to offer such advice to the EU Member States in the implementation of instruments of EU law where the measures they adopt may create a risk of violation. This could be achieved by the Fundamental Rights Agency, for instance, by the preparation of a 'list of fundamental rights issues' providing guidance to the national authorities of the Member States, as well as to the national human rights institutions, as to which fundamental rights requirements are relevant for an adequate implementation of the EU instruments which are adopted.

Thirdly, both impact assessments and compatibility checks are mechanisms set up on its own initiative by the European Commission, as part of its internal decision-making processes. Thus, legislative proposals made by the EU Member States are not subject to these mechanisms.⁶⁴ This is in part compensated for by the intent of the European Parliament to systematically check whether the legislative proposals on which it deliberates comply with the rights, freedoms, and principles of the Charter of Fundamental Rights, according to a procedure which has been strengthened in the most recent version of its Rules of Procedure. These now state (in Article 36):

1. Parliament shall in all its activities fully respect fundamental rights as laid down in the Charter of Fundamental Rights of the European Union.

Parliament shall also fully respect the rights and principles enshrined in Article 2 and in Article 6(2) and (3) of the Treaty on European Union.

2. Where the committee responsible for the subject matter, a political group or at least 40 Members are of the opinion that a proposal for a legislative act or parts of it do not comply with rights enshrined in the Charter of Fundamental Rights of the European Union, the matter shall, at their request, be referred to the committee responsible for the interpretation of the Charter. The opinion of that committee shall be annexed to the report of the committee responsible for the subject-matter.

In addition, the Stockholm Programme adopted by the European Council of 11-12 December 2009 invites the institutions of the EU and the Member States to "ensure that legal initiatives are and remain consistent throughout the legislative process by way of strengthening the application of the the

⁶² Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12). See Case C-540/03, *Parliament v Council*, [2006] ECR I-5769, where the Court states that Community law 'could... not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights' (para. 23).

⁶³ Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348 of 24.12.2008).

⁶⁴ The Fundamental Rights Agency itself will only be requested on an ad hoc basis to contribute by its expert advice to ensuring that fundamental rights are adequately taken into account in the third pillar of the activities of the EU, under the declaration of the Council of the EU accompanying the Founding Regulation according to which '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', an expertise which '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'.

methodology for a systematic and rigorous monitoring of compliance with the [European Convention on Human Rights] and the rights set out in the Charter of Fundamental Rights'.⁶⁵ It is therefore hoped that, in this respect, the current weakness of the methodology followed for assessing compliance of EU legislation with the Charter of Fundamental Rights will be remedies.

One major weakness of the current system resides in its failure to distinguish clearly between the respective functions of the assessment of compliance with the Charter of Fundamental Rights (and other fundamental rights binding in the EU) and human rights impact assessments. Both of course are performed in different ways in the current decision-making procedure, and by different actors. But, for the most part, they are conceived in the same way : both are devices to ensure that legislative proposals or policies shall not infringe upon fundamental rights, that are under the responsibility of the European Commission. This suffers from two limitations : first, it underestimates the importance of the participatory dimension of impact assessments, in order to allow the administration to benefit from the views of grassroots organisations and from the views of those directly affected by the adoption of certain measures; second, it underestimates the fact that certain measures, while not directly infringing upon a fundamental right and creating a risk of violation, may create obstacles to its further realisation, a problem that is particularly relevant to the fulfilment of economic and social rights.

3.2. Participation

In this regard, the approach adopted by the EU replicates what remains the dominant approach in the EU Member States. A study found in 2006 that only a minority of Member States involved national human rights institutions – bodies including, in principle, a strong representation of civil society organisations – in compatibility assessments, as such assessments are primarily done within government with no or little outside expertise, or within parliament.⁶⁶ What this seems to illustrate is that verification of compliance is perceived as a technical issue, not requiring input by an instance representative of a wide range of societal interests and, especially, of different segments of the civil society ; and requiring a purely legalistic approach, rather than an approach informed by the grass-roots knowledge civil society organizations may provide.

It is important, however, to stress the complementarity between compatibility assessments and impact assessments, each of which corresponds to different objectives and require the mobilisation of a different kind of expertise. While the appreciation of the compatibility with human rights of certain draft legislative proposals requires a legal scrutiny, to be performed, preferably, by experts, such an evaluation also should be informed by an understanding of the impact the implementation of such proposals could have, for instance, on certain communities or in certain local settings. Indeed, each of the different institutional devices for human rights proofing of legislation which have been reviewed present certain advantages. Ideally, they should be combined with one another rather than a choice having to be made between these techniques :

⁶⁵ See Conclusions of the European Council, 11-12 December 2009, and The Stockholm Programme – An open and secure Europe serving and protecting the citizens, EU doc. 17024/09, point 2.1., p. 12.

⁶⁶ Olivier De Schutter, The Role of National Human Rights Institutions in the Human Rights Proofing of Legislation, 4th Roundtable of European National Human Rights Institutions and the Council of Europe Commissioner for Human Rights, CommDH/NHRI(2006)2, Strasbourg, 28 September 2006.

Human rights proofing performed by	Advantages
Ministerial department taking the initiative of the proposal	Ensures a better understanding of human rights implications of their legislative proposals by public servants (serves the mainstreaming of human rights within public administration and the building of a culture based on human rights)
Specialized unit within the government	Ensures an expert approach to the human rights issues raised by the proposal, and an adequate use of the existing international and European standards
Parliamentary committee	Ensures a transparency in the evaluation and facilitates control by the public opinion and the media, facilitates societal debate Opens up the possibility of consultation of external experts, including Independent national human rights institutions
Specialized, independent instance located outside both government and Parliament	Guarantees an independency in the evaluation and ensures that the evaluation will not be subordinated to the need to reach political compromises Insulates the evaluation from the pressure of public opinion
Independent national human rights institution or equivalent institution	Ensures that the impact of the proposed legislation on a wide range of interests will be taken into account, and that the existing standards of international and European human rights law will be taken into account

Human rights impact assessments differ from, and go beyond, compatibility assessments that merely examine whether a particular policy or regulatory measure is, *on its face*, compliant with the human rights obligations of the State concerned. Such compatibility exercises are regularly performed, for instance, before parliamentary committees, by the legal services of ministerial departments, or by courts. In contrast, impact assessments seek to assess compatibility not only on the basis of a conceptual analysis, but also through a sociological examination of the impacts, both intended and unintended, that a measure could have on the enjoyment of human rights or on the ability of the State to protect and fulfil human rights. While impact assessments are common since a number of years to measure the economic, the environmental, or the social impacts of specific measures, human rights impact assessments differ in significant respects from these more classical impact assessments⁶⁷ : they are based on a framework of legal obligations ; they provide an opportunity to make policy-making more coherent across departments or DGs ; they result in more effective policies because the policies will be more coherent, are backed up by legal obligations and should be adopted through human-rights respecting processes.

3.3. Rights as constraints or rights as objectives to be achieved

A second limitation of the current system is that it is still largely premised on the idea that fundamental rights are limitations to which legislative measures may be adopted, rather than an

⁶⁷ Gauthier de Beco, 'Human Rights Impact Assessments', *Netherlands Quarterly of Human Rights*, vol. 27, n° 2 (2009), p. 139 ; Todd Landman, 'Human Rights Impact Assessments', in *Studying Human Rights*, Routledge, London, 2006 ; Paul Hunt and Gillian MacNaughton, *Impact Assessments, Poverty and Human Rights : A Case Study using the right to the highest attainable standard of health*, UNESCO, 2006.

objective to be achieved. This however may be changing. The latest version of the guidelines on the preparation of impact assessments by the services of the European Commission specify that when making a legislative proposal and preparing the accompanying impact assessment, the lead DG should 'consider impacts in the context of Treaty objectives and the EU's over-arching policy goals, such as respect for Fundamental Rights, promoting sustainable development, achieving the goals of the Lisbon Strategy, and the EU energy strategy'.⁶⁸ The implication would seem to be that impact assessments should allow to examine not only whether certain measures will comply with fundamental rights, but also whether they will further the objective of realizing them, moving us closer to this goal. In order to do this, the use of indicators, allowing the measure the impact of certain measures on the level of enjoyment of the rights affected, would be required. In effect, this approach to the role of fundamental rights in impact assessments would allow the mainstreaming of fundamental rights in all policies of the EU. A number of benefits can be expected to follow⁶⁹ :

1°) *Mainstreaming is an incentive to develop new policy instruments.* Mainstreaming displaces questions which were sectorialized from the vertical to the horizontal, from the policy margins to their centre. It therefore requires from policy-makers that they ask new questions about old themes. For instance, the mainstreaming of disability issues would oblige the policy-makers to identify how, in their particular sector, they could contribute to the social and professional integration of persons with disabilities : rather than remedying the exclusion from employment of persons with disabilities, mainstreaming seeks to combat such exclusion by tackling the phenomenon at its root, in the market mechanisms which produce it. An obligation imposed on all policy-makers to identify how they could facilitate the realization of the objective which is mainstreamed, in this sense, is a first step towards identifying means by which the mechanisms producing undesirable outcomes may be modified : it therefore is a lever for political imagination.

2°) *Mainstreaming is a source of institutional learning.* To the extent that they must mainstream human rights into decision-making, policy-makers are obliged to identify issues which are present in the policies they pursue or the sectors these policies impact upon, but which would otherwise be obliterated and marginalized. As they get acquainted with the new tools mainstreaming requires, these actors will learn about these implications which previously may have gone unnoticed. They will progressively gain an expertise in the issues mainstreaming requires them to consider. The objective is that, in time, the institutional culture within the organisation will evolve, and that both awareness to fundamental rights issues and the capacity to address them will augment.

3°) *Mainstreaming improves the implication of civil society organisations in policy-making.* As decision-makers are obliged to identify the policies which best take human rights into account, although they have no specialized knowledge in the issue, they will be required to consult externally. They may of course limit that consultation to experts. But they may also be incentivized to consult more widely, within the community of stakeholders, in order not only to better evaluate the impact the proposed policies may have – as such an impact may be difficult to anticipate and often will be impossible to measure –, but also to stimulate the formulation of alternative proposals, better suited to the conciliation of the different objectives pursued and, therefore, more satisfactory in a mainstreaming perspective.

4°) *Mainstreaming improves transparency and accountability.* In formulating policies or legislative proposals, policy-makers will have to refer to the impact they may have on the realization of human rights. This will not only will incentivize them to develop alternatives they may have had no good reason previously to consider. It will also lead the proposals to be more richly justified, as the policy-maker will have to explain why a particular route was chosen and preferred above alternative

⁶⁸ At p. 38.

⁶⁹ See further O. De Schutter, 'Mainstreaming Human Rights in the European Union', in Ph. Alston and O. De Schutter (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Hart Publ., Oxford, 2005, p. 37.

possibilities, after having examined those possibilities and evaluated their potential impact. Most often, mainstreaming will therefore be combined with an assessment of the impact on human rights of the different routes available to the policy-maker, since only by measuring such impacts can an informed choice be made. In turn, this will equip the stakeholders participating with the informational resources they require for their participation to be effective.

5°) *Mainstreaming improves coordination between different services.* The sectoralization of policies, although inevitable in any large organisation, may lead to the development of policies effectively contradicting one another. For instance, States may be under an obligation to adopt regulations ensuring health and safety at work, while at the same time having to guarantee the principle of equal treatment with respect to person with disabilities in employment – although it is well documented that the two objectives may conflict with one another, and that some form of coordination between the two sets of rules may be therefore desirable. Similarly, States are encouraged to promote diversity in business, yet at the same time the rules relating to the protection of personal data may constitute an obstacle for employers seeking to develop such diversity policies by monitoring the representation of ethnic groups in the workforce. Because it is transversal and creates horizontal bridges between vertical sectors, mainstreaming may serve to identify such tensions, in order to remedy them. It is a way to restore communication between different services or departments, as one of its tools may consist in the organisation of common meetings with representatives from different services to compare the schemes they are proposing and identify potential conflicts or redundancies, or other failures in coherence.

6°) *Mainstreaming aims at the causes of the problems identified rather than at their surface manifestations.* Mainstreaming addresses the definition of policies at their initial stages and throughout their implementation. Therefore its transformative character is much more powerful than that of *post hoc* monitoring, where the impact of policies is measured. But mainstreaming is also much more powerful even than human rights impact assessments, as these are usually conceived and as they are currently practiced. Although, like mainstreaming, impact assessment may be a tool of mainstreaming and does operate *ex ante*, i.e., in the initial stages of policy-selection, mainstreaming goes one step further in that it imposes on authorities a positive duty to identify how they may contribute to achieving the objective pursued. It therefore obliges them not only to examine whether the policy they have been pursuing or which they intend to pursue adversely impacts upon human rights, but also to ask how they may positively contribute to the realization of human rights : the promotion and protection of human rights thus becomes part of the set of objectives that they are pursuing and which, in combination with other objectives, will dictate the shape of policies. Again, the mainstreaming of disability may serve to illustrate this : it is one thing to measure the impact of certain policies on persons with disabilities, and choose the policy which appears to have the least adverse impact on them – for instance, where policies are devised which seek to create incentives to work and therefore to raise the level of activity of the active segment of the population ; it is quite another to consider that employment policies should contribute actively to the professional integration of persons with disabilities, and that the absence of adverse impact on persons with disabilities – or the adoption of measures mitigating any adverse impact there may be – is therefore necessary, but not sufficient.

4. The role of human rights action plans

One tool by which both to impose the positive duty on the Commission to affirmatively promote fundamental rights, and to encourage this institutional learning – which may greatly improve the sensitivity of the members of the institution to fundamental rights issues and ensure that, progressively, their inclusion will become ‘automatic’ –, would consist in imposing on the services concerned an obligation to present at regular intervals (every two years, for instance) an action plan defining how they intend to contribute to the promotion of fundamental rights in the policy area of which they are in charge. The adoption of action plans by the services of the Commission, or even of a

consolidated action plan by the Commission as a whole, would complement this and lead a more anticipatory, or proactive, mainstreaming of fundamental rights in the legislations and policies of the Union. This would be fully in line with the idea that the European Union should begin acting as if it were bound by the international human rights instruments which are binding on the Member States, in order to pave the way to accession to those instruments.⁷⁰ The World Conference on Human Rights held in Vienna in June 1993 recommended that each State « consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights ».⁷¹

Indeed, the expert bodies created under the United Nations human rights treaties insist – both in their general comments and in the concluding observations made upon their examination of the reports submitted by States parties – on the usefulness of preparing such action plans in order to facilitate the implementation of the different rights which the States parties have undertaken to observe.⁷² The preparation of such action plans should not be considered simply as a means for States to comply with their obligation to « take steps » in order to realize the fundamental rights they have undertaken to fulfil, especially those aspects of which still have to be progressively realized.⁷³ Nor should they be seen as a purely bureaucratic process, imposing on States yet further administrative burdens adding to those already imposed on them the system of international and regional human rights treaties. Rather, the preparation of such plans should be envisaged as an opportunity for the administrations preparing them to present imaginative solutions to the problems they face in the implementation of fundamental rights, by learning from the experiences of other jurisdictions and from the outside contributions they may receive in the course of the preparation of such plans. Not only does the preparation of action plans oblige their authors to identify these problems of implementation – ideally, by developing adequate indicators in order to follow the developments in time a particular issue undergoes – ; it also offers the opportunity to consult widely with civil society organisations in order to identify which solutions can be successful ; and it may serve to highlight inconsistencies between different approaches to a same problem, thus fulfilling what has been identified above as one of the main virtues of a mainstreaming approach to the fulfilment of human rights.⁷⁴ Most importantly, action

⁷⁰ See section 5 hereafter.

⁷¹ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 (UN doc. A/CONF.157/23, 12 July 1993), at para. 71.

⁷² The UN Committee on economic, social and cultural rights considers that « At a minimum, the State party is required to adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant. This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored » (General comment No. 13: The right to education (art. 13), adopted at the twenty-first session of the Committee (1999), para. 52, in *Compilation of the general comments or general recommendations adopted by human rights treaty bodies*, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, p. 71.

⁷³ See Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

⁷⁴ In recommending the adoption of a national strategy to ensure food and nutrition security, the UN Committee on Economic, Social and Cultural Rights notes that such a strategy « will facilitate coordination between ministries and regional and local authorities and ensure that related policies and administrative decisions are in compliance with the obligations under article 11 of the Covenant. The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary. Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all. Appropriate institutional mechanisms should be devised to secure a representative process towards the formulation of a strategy, drawing on all available domestic expertise relevant to food and nutrition. The strategy should set out the responsibilities and time frame for the implementation of the necessary measures » (General comment No. 12: The right to adequate food (art. 11), adopted at the twentieth session of the Committee (1999), para. 21-24 (UN doc. E/C.12/1999/5), in *Compilation of the general comments or general recommendations adopted by human rights treaty bodies*, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, p. 63). See also, with respect to national strategies – including the adoption of action plans – in order to promote the right to the highest attainable standard of health : General comment No. 14: The right to the highest attainable standard of health (art. 12), adopted at the twenty-second session of the Committee (2000), para. 53-54 and 56, in *Compilation of the general comments or general recommendations adopted by human rights treaty bodies*, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, p. 86. In the context of the Convention on the Rights of the Child, see General comment No. 5: General measures of implementation of the Convention on the Rights

plans complement impact assessments, which constitute the other tool of mainstreaming in the conception presented here : indeed, the authorities responsible for the preparation, the discussion, the adoption and the implementation of such plans are incentivized to act proactively in order to improve the protection and to promote fundamental rights, rather than to react on an *ad hoc* basis to any identified violation of fundamental rights, by remedying the situation which has led to that violation. The preparation of action plans as a component of a strategy for the implementation of fundamental rights, in sum, does not constitute an end in itself, but should be seen as an instrument furthering a number of important aims. Such plans may, in particular :

- serve to improve the coordination between different administrative bodies or departments, either because the schemes will be consolidated schemes presented jointly by these entities, or because, where each entity presents its own scheme, the preparation of the scheme and the publicity given to it will facilitate the identification of coordination problems ;
- constitute a tool in order to promote participatory processes, as the contribution the relevant stakeholders can make to the discussion of the scheme will incentivize these stakeholders to invest into the process⁷⁵ ;
- constitute a source of reflexivity within the public bodies presenting such schemes : they will be obliged to think about the definition of attainable targets, benchmarking and indicators to measure progress, and the resources required for the achievement of the stated goals.

At the same time, just like fundamental rights impact assessments discussed above, the success of action plans as a component of a broader strategy for the mainstreaming of fundamental rights in the Union requires that an entity monitors the process and ensures adequate coordination between the different services of the Commission.

5. The relationship of the EU to international human rights instruments

A final area in which significant progress could be made concerns the relationship of the EC and EU to the international law of human rights.⁷⁶ The EU is not yet party to any treaty codifying human rights standards. There are a number of treaties, however, to which the EU may become a party in the future. The EC signed the UN Convention on the Rights of Persons with Disabilities⁷⁷ on 30 March 2007, after the Commission took an active role in negotiating this instrument.⁷⁸ At the request of the EU, this Convention provides explicitly for accession by ‘regional integration organisations’ under Article 44. Among the treaties adopted in the framework of the Council of Europe, the accession of the EU to the European Convention on Human Rights is now a priority following the entry into force of the Reform Treaty, which mandates the EU to accede to the European Convention on Human Rights.⁷⁹ Furthermore the 1997 Convention on Human Rights and Biomedicine provides for the

of the Child (arts. 4, 42 and 44, para. 6), adopted at the thirty-fourth session of the Committee (2003), in *Compilation of the general comments or general recommendations adopted by human rights treaty bodies*, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, p. 332, at para. 28-34.

⁷⁵ Conversely, the action plans will be dependent for their quality on such participation, as the implementation of any plan will be greatly facilitated if both the policy-makers and the stakeholders understand what the objectives are and which steps are required to attain these objectives.

⁷⁶ See Israel de Jesus Butler and Olivier De Schutter, ‘Binding the EU to International Human Rights Law’, *Yearbook of European Law*, vol. 27 (2008) pp. 277-320.

⁷⁷ UN General Assembly resolution 61/106, 13 December 2006.

⁷⁸ On 29 August 2008, the Commission adopted and transmitted to the European Parliament and the Council two proposals concerning the conclusion by the European Community, of the CRPD (COM (2008) 530 final). On 26 November 2009, the Council of the EU adopted a decision allowing the European Community to ratify the CRPD, although with a reservation to exclude the employment of persons with disabilities in the armed forces from the scope of the Convention.

⁷⁹ The Reform Treaty amends Article 6 of the Treaty on European Union with new Article 6(2) reading: ‘The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall

accession by the European Community,⁸⁰ as do the 1999 Amendments to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.⁸¹ Once the EU ratifies or accedes to these human rights treaties⁸² it will of course be subject to the range of obligations therein in the exercise of the competences it has been attributed. Execution of the substantive obligations will be overseen to a greater or lesser extent by the supervisory mechanisms established by these instruments.

Holding the EU directly accountable to the monitoring bodies that operate under these treaties will constitute an express recognition that the extensive powers attributed by the EU Member States to the EU should be subject to review for compliance with human rights obligations by an entity that operates outside the EU's own self-referential 'system' of human rights protection. However, neither the UN Convention on the Rights of Persons with Disabilities and the Council of Europe Convention on Human Rights, nor those instruments in combination with the Council of Europe Convention on Human Rights and Biomedicine and Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data to which the EU may accede in the future, cover the entire range of international human rights protected through several other treaties elaborated under the aegis of the United Nations. The possible accession of the EU to other human rights instruments should therefore be examined further.

Indeed, were it not for the stipulations of human rights treaties, which traditionally are open to accession only of States, the precedents cited above could be imitated in other areas in which the European Union has taken legislative action, thereby exercising competences it has been attributed by its Member States. Of course, in the absence of a general power of the Community or the Union in the field of fundamental rights,⁸³ the limits imposed on the exercise of the international powers of the Community or the Union are a serious obstacle to their accession to international instruments for the protection of human rights. However, even under the present definition of the external powers of the Union, accession to a number of international instruments in the field of human rights protection may be envisaged.⁸⁴ Just as the achievements of the European Community in the field of data protection have been deemed sufficient to envisage the accession of the Community to the convention concluded on this question in the framework of the Council of Europe, similarly the *acquis* of EC Law in the field of equal treatment between women and men and in the field of non-discrimination on grounds of race or ethnic origin would appear sufficient to identify a power of the Community to accede to the United Nations Conventions on the Elimination of All Forms of Discrimination against Women

not affect the Union's competences as defined in the Treaties.' Protocol 14 to the European Convention on Human Rights (CETS No. 194, 13 May 2004), which entered into force on 1 June 2010, amends Art. 59 the Convention to expressly provide for accession by the EU. However, the negotiations that have been launched on this issue in June 2010 should lead, presumably by mid-2011, to the conclusion of a separate Protocol providing for the accession of the EU to the European Convention on Human Rights, which shall require ratification by the 47 Member States of the Council of Europe.

⁸⁰ Convention for the protection of Human Rights and dignity of the human being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine, CETS No.: 164, opened for signature in Oviedo on 4 April 1997.

⁸¹ ETS No. 108, 28 January 1981.

⁸² In addition, the European Union may accede to a number of conventions adopted within the Council of Europe, but which are not human rights instruments per se, although, by imposing on the States parties the adoption of certain measures, they may contribute to the protection of human rights. Examples are the Convention on the Protection of Children against Sexual

Exploitation and Sexual Abuse (CETS No.: 201, opened for signature in Lanzarote on 25 October 2007 (see Article 45(1))); or the Convention on Action against Trafficking in Human Beings (CETS No.: 197, opened for signature in Warsaw on 16 May 2005 (see Article 42(1))).

⁸³ See on this the opinion delivered on 28 March 1996 by the European Court of Justice: Opinion 2/94, *Accession of the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996] ECR I-1759, para. 20 (stating that the Community institutions do not have at their disposal a 'general power to enact rules on human rights or to conclude international conventions in this field').

⁸⁴ *Report on the situation of fundamental rights in the European Union in 2003*, prepared for the EU Network of Independent Experts on Fundamental Rights, January 2004, at pp. 19-20.

(CEDAW)⁸⁵ and on the Elimination of All Forms of Racial Discrimination (CERD).⁸⁶ It has also been argued that the EU should accede to the 1996 Revised European Social Charter, adopted within the Council of Europe as a complement, in the field of economic and social rights, to the 1950 European Convention on Human Rights⁸⁷; or to the Geneva Convention on the status of refugees of 28 July 1951.⁸⁸

Indeed, accession to international treaties constitutes only one of the means through which the relationship of the EU to the international law of human rights could be improved. The relationship developed between the EU institutions and the UN's High Commissioner for Refugees provides one example.⁸⁹ Article 63 EC gives the EU competence to regulate matters relating to the 1951 Convention Relating to the Status of Refugees⁹⁰ and its 1967 Protocol,⁹¹ to which all the EU Member States are parties. In the context of its policy on visas and asylum, Article 63 EC obliges the Union to enact procedural and substantive provisions relating to individuals seeking asylum 'in accordance with' the 1951 Convention and its 1967 Protocol.⁹² The Council has stated that the 'aims of the Common European Asylum System... will be the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection [which] will be based on the full and inclusive application of the Geneva Convention on Refugees and other relevant Treaties'.⁹³ The institutional translation has been the development of a relationship of the EU to the UN High Commissioner for Refugees, which is charged with 'providing international protection... to refugees',⁹⁴ and which, under the 1967 Protocol, governments must cooperate with for the implementation of the two treaties, including providing information on the condition of refugees, the state of implementation and the law relating to refugees.⁹⁵ Although not making explicit reference to these obligations, Declaration No. 17 accompanying the Amsterdam Treaty states that '[c]onsultations shall be established with the United Nations High Commissioner for Refugees and other relevant international organisations on matters relating to asylum policy.'⁹⁶ The declaration has been put into

⁸⁵ 1249 UNTS 20378, adopted by UN Gen. Ass. Res. 34/180 of 18 December 1979. All the 27 Member States of the EU have ratified this instrument.

⁸⁶ 660 UNTS 9464, adopted by UN Gen. Ass. Res. 2106 A(XX) of 21 December 1965, and opened for signature at New York on 7 March 1966. All the 27 Member States of the EU have ratified this instrument.

⁸⁷ The Revised European Social Charter of 3 May 1996 (ETS, n° 163) improves upon the original European Social Charter of 18 October 1961, by extending the list of rights protected. See O. De Schutter, *L'adhésion de l'Union européenne à la Charte sociale européenne*, EUI Working Paper LAW No. 2004/11, 42 pages.

⁸⁸ 149 UNTS 2545.

⁸⁹ A further example is that of the Consultative Committee of the Convention on Personal Data created under the the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. The Committee recently addressed the EU over a recent proposal for legislation in the area of privacy expressing its concerns at the planned Council framework decision : see Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-PD), T-PD-BUR (2006) 15 E FIN, 20/3/07, Paper Outlining the T-PD's Initial Remarks Concerning a Proposal for a Council Framework Decision on the Protection of personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters. This is also available as document of the Council of Ministers (Interinstitutional File: 2005/0202 (CNS), 8274/07, 5/4/07.

⁹⁰ 189 UNTS 150.

⁹¹ Protocol Relating to the Status of Refugees, 606 UNTS 267.

⁹² See the secondary legislation: Directive 2003/9 laying down minimum standards for the reception of asylum seekers (OJ L 31/18, 6/2/03); Regulation 343/2003 establishing the criteria and mechanisms for determining the member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50/1, 25/2/03); Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304/12, 30/9/04); Directive 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326/13, 13/12/05).

⁹³ See The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53/01, 3/3/05.

⁹⁴ GA Res 428 (V), 14/12/50, Statute of the Office of the United Nations High Commissioner for Refugees, Annex, Article 1.

⁹⁵ 1967 Protocol, Articles II, III.

⁹⁶ Adopted by the Conference on the Amsterdam Treaty on then Article 73k (now Article 63) of the Treaty establishing the European Community, OJ C 340/134, 10/11/97. The Treaty of Lisbon amends Article 63 to state expressly that asylum policy 'must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.'

effect through two exchanges of letters between the Commission and the UNHCR which provide for cooperation in developing EU policy in this area.⁹⁷

Other examples exist in which the EC/EU have sought to strengthen their relationship to international human rights instruments and bodies. Thus, while not party to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data or its Protocol, the EU has participated in the formulation of recommendations as an observer to the Consultative Committee established under that Convention. The Proposal for a Council Framework Decision on the Protection of Personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters, which the European Commission presented in October 2005,⁹⁸ has taken the Data Protection Convention and relevant recommendations of the Consultative Committee as a point of reference.⁹⁹ Indeed, this practice of basing legislation proposed in the framework of the EU on the existing standards of the Council of Europe shall become a systematic practice in the future, as provided by the May 2007 Memorandum of Understanding between the Council of Europe and the European Union,¹⁰⁰ which provides for consultation and cooperation between the EU and the Council of Europe, including the Commissioner for Human Rights in order to ensure that EU law is coherent with human rights guarantees stemming from Council of Europe treaties.¹⁰¹

The EU has found other innovative solutions to ensure that its Member States can continue to cooperate with third states in the promotion and protection of human rights. In particular the Council of Ministers has authorized the Member States to ratify treaties ‘in the interest of the Community’ which contribute to the protection of the rights of the child or the rights of migrant workers.¹⁰² Such authorization is given where the subject areas covered by the agreements are considered to fall within areas of exclusive competence of the EU (thus ordinarily preventing the Member States acceding to these treaties),¹⁰³ although the treaties themselves only allowed for States to become parties.¹⁰⁴ Accession by the Member States has then been followed up by EU legislation largely giving effect to the terms of these treaties or expressly permitting the Member States to execute them in exception to

⁹⁷ The agreement between the Commission and UNHCR giving effect to Declaration No. 17 took the form of an exchange of letters of 15th February 2005. The text of the first exchange of letters of 6th July 2000 between Commissioner Vitorino and Mrs. Ogata may be requested from the Brussels office of the UNHCR.

⁹⁸ For the original text of the Commission’s proposal see Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, COM(2005) 475 final, 4 October 2005.

⁹⁹ See in the Commission’s Proposal, pages 4 and 6. See also the Commission’s Impact Assessment accompanying the proposal (SEC(2005) 1241, 4 October 2005), pages 12 and 16.

¹⁰⁰ Memorandum of Understanding between the Council of Europe and the European Union, adopted at the 117th Session of the Committee of Ministers held in Strasbourg on 10-11 May 2007, CM(2007)74 (10 May 2007).

¹⁰¹ Memorandum of Understanding, paras. 17-19.

¹⁰² See Council Decision 2003/93/CE of 19 February 2002 authorising Member States, in the interest of the Community, to sign the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children Council, OJ L 48/1, 21/2/03 (for the conclusion of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, reprinted in Hague Conference on Private International Law, Collection of Conventions (1951-2003), (2003), No. 34); and Council Decision 2005/367/EC of 14 April 2005 authorising Member States to ratify, in the interests of the European Community, the Seafarers’ Identity Documents Convention of the International Labour Organisation (Convention 185), OJ L136/1, 30/5/05 (for the conclusion of the Seafarers’ Identity Documents Convention (Revised), 2003, ILO Convention 185, 19/6/03).

¹⁰³ Exclusive in the sense that while it was shared with between the Union and the Member States, the Union has adopted measures in these areas, thereby preempting action by the Member States. The background documents cited above refer to Case 22/70, *AETR*, ECR [1971] 263.

¹⁰⁴ See: Report of the European Parliament on the proposal for a Council decision on authorising Member States to ratify in the interests of the Community the Seafarers’ Identity Documents Convention of the International Labour Organization (Convention 185) A6-0037/2005, 10/2/05, 6-7; Council Decision 2003/93/CE preamble para. 4.

the general rule established by EU law that Member States may not act in areas of exclusive EU competence.¹⁰⁵

What these various examples illustrate is the large panoply of solutions which the EU has at its disposal in order to ensure that, in the exercise of its powers, it will contribute to, rather than contradict, obligations imposed on the EU Member States by international instruments concluded for the promotion and protection of human rights, whether before or following accession of these States to the EU. But the relationship of the EU to the international law of human rights remains largely *ad hoc* and unsystematic. A more systematic approach, based on an understanding of the relationship between the attribution of competences to the EU and the international obligations of the EU Member States in the area of human rights, and taking into account the external powers of the EU, would be highly desirable.

6. Conclusion

The various proposals above are interconnected and mutually reinforcing. By making the implementation of fundamental rights into a new project for the EU – away from the current understanding of fundamental rights merely as restrictions imposed on the EU –, the EU and its Member States will have to ask how such a project can be built into the work of the institutions. They will discover then that fundamental rights are not given, but made ; that they are not impositions from above, but the result of innovations that result from comparing experiments conducted in various local settings ; that they can be empowering and a source of political imagination, rather than result in the depoliticisation of issues. They will also find out that, by expanding the use of existing tools such as impact assessments, mainstreaming, or action plans – all tools that have been tested in certain settings and that could easily be made to cover the full range of fundamental rights –, the shift towards this new, more ‘positive’ understanding of fundamental rights can be economically achieved : it would be a revolution perhaps, but a silent one, and one that would simply consist in developing further certain tools that there is no need to reinvent. In parallel, a reaffirmation of the commitment of the EU to internationally recognized human rights would lead it to find out how much it could do to contribute to their realization in the EU which, for the moment, it is not doing. And it would result in a powerful incentive to use the very same tools that it has developed for internal purposes as part of the reform of governance in the EU, to improve its contribution to the protection of human rights in the EU.

Reflexive governance, as understood in this research project, posits that innovation and learning can only be the result of radicalizing participatory procedures, so as to encourage actors to question both their understanding of the nature of the problem they face, and their role – what they stand for. Fundamental rights are concrete and precise enough to impose real constraints in certain cases, and to guide action – but at the same time, they are vague and abstract enough to function as a stimulus to political imagination, since the devices by which they should be implemented are not given, and should instead be permanently reinvented in the various settings in which they are invoked. The conviction on which this research project was based was that fundamental rights are not only about norms and standards, but also about procedures and participation. The proposals above reflect this conviction.

¹⁰⁵ Council Regulation 2201/2003 (OJ L 338/1, 23/12/03) adopts a set of rules that reflect the rules set out in the 1996 Hague Convention, as well as the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (reprinted in Hague Conference on Private International Law, Collection of Conventions (1951-2003), (2003), No. 28), to which all or most Member States were also party. For discussion of how the Regulation compares to the 1996 and 1980 Hague Conventions see Commission Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, COM(2002) 222 final/2, 2002/0110 (CNS), 17/5/02. The Member States are authorised to make arrangements for seafarers in accordance with ILO Convention 185 in Annex VII, Section 3 of Regulation 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (OJ L 105/1, 13/4/06).