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O. De Schutter and V. Van Goethem
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The Monitoring of Fundamental Rights in the Union as a Contribution to the European Legal Space (I): The added value of a systematic and regular monitoring of the situation of fundamental rights in the Member States for the evaluation of the implementation of Union laws and policies

by Olivier De Schutter and Valérie Van Goethem *

On 30 June 2005, the Commission finalised a Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights¹. The Impact Assessment Report appended to the Proposal justifies the establishment of the Agency by the finding that : 'Although the Member States have developed various strategies, policies and mechanisms to respect and mainstream fundamental rights when implementing Union law and policies, there is a lack of systematic observation of how the Member States do this. Such a lack represents a missed opportunity, as the potential for sharing of experiences and good practices and mutual learning is not met'.²

It is well-known that respect for fundamental rights conceived as general principles of Community law shaped by the European Court of Justice, was built by the Court itself in the 1960s as one of the foundations of the Community legal order. In the absence of a written catalogue of fundamental rights specific to the Union, the Court has derived the content of these principles, by taking into account various sources, especially the constitutional traditions common to the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms. This progressive recognition, by the Court, of fundamental rights understood as general principles of Community law, initially aimed at filling a gap in the judicial protection of individuals against Community acts. But in the late 1980s, in particular under the impetus of the cases *Rutili*, *Klensch*, *Wachauf* and *ERT*³, the Court has extended its judicial review in the field of fundamental rights in order to cover, also, the measures undertaken by the Member States 'when acting in the scope of Community law'⁴. Since then, fundamental rights are imposing constantly redefined *limits* to the action of the institutions of the Community or of Union, and of the Member States when they implement Union law or when they act under the authorization of Union law. Fundamental rights however were not *ends* to be achieved.

Now, as the Treaty establishing a Constitution for Europe had sought to confirm, fundamental rights have come to fulfill also a positive role. They influence the adoption of European legislation : they direct the exercise by the institutions of the Union of the competences conferred upon them by the Member States, and therefore, they progressively shape the direction which the Union is taking. This shift, recognized at the highest political

* The authors are respectively professor of law at the Catholic University of Louvain (UCL), Member of the CPDR-UCL, and Co-ordinator of the EU Network of Independent Experts on Fundamental Rights ; and Researcher at the CPDR-UCL, Assistant to the EU Network of Independent Experts on Fundamental Rights.

¹ Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights of 30 June 2006 COM (2005) 280 final of 30.06.05. A Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union is joined to the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights of 30 June 2006 (COM (2005) 280 final of 30.06.05).

² SEC(2005)849, of 30.6.2005, at p. 8.

³ Case 36/75, *Rutili*, [1975] ECR 1219 ; Case 201/85, *Klensch*, [1986] ECR 3477 ; Case 5/88, *Wachauf / Bundesamt für Ernährung und Forstwirtschaft*, [1989] ECR 2609 ; Case C-260/89, *ERT*, [1991] ECR I-2925.

⁴ On this evolution see in particular: J.H.H. Weiler, "The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes", *Harvard Jean Monnet Paper* 2/96.

level,⁵ has been documented elsewhere, and it is not the purpose of this contribution to describe it again. Nevertheless, the transformation of the function of fundamental rights in the constitutional structure of the Union still has not been fully matched by the institutional developments which it seems to call for. In order to respect, protect and fulfil fundamental rights, an adequate institutional build-up is required. If fundamental rights are not simply legal norms which constrain the decisions of public or private actors, but also are aims to be achieved, certain mechanisms should be set up to ensure that progress is made in that direction.

The objective of this contribution is to consider the value a systematic and regular monitoring of the situation of fundamental rights in the Member States may add to the evaluation mechanisms already adopted in the framework of the common area of freedom, justice and security and, more generally, to the devising, the implementation and the application of Union laws and policies. In this perspective, a systematic and rigorous monitoring of the evolutions occurring in the various Member States and in the policies of the Union itself must enable the challenges which these developments pose from the point of view of fundamental rights to be anticipated in order to avoid the establishment of the internal market and the achievement of the area of freedom, justice and security leading to an erosion of fundamental rights protection – in particular, under the pressure of ‘negative’ integration processes and of the use in those processes of the technique of mutual recognition. The lack of general competence of the Community or the Union in the field of fundamental rights does not in any way call into question the legitimacy of monitoring the policy followed by the Member States in the field of fundamental rights.

Just like the fundamental rights included among the general principles of Union law from which it is in part inspired, the Charter of Fundamental Rights of the European Union only applies to the institutions and bodies of the Union, and to the Member States insofar as they implement Union law. In fact, the Charter of Fundamental Rights adopts an even more restrictive approach to the role of fundamental rights in the European Union legal order than the Court of Justice in its case-law. Under this case-law, which has now been constitutionalized in Article 6(2) EU,⁶ the EU Member States are to comply with fundamental rights as general principles of Union law in the scope of application of Union law. This extends not only to situations where the Member States implement Union law (for instance, by transposing a directive or a framework decision or by applying a regulation), but also to situations where they restrict a fundamental freedom guaranteed under Community law in

⁵ The Preamble of the Proposal of the Commission for a Council Decision establishing for the period 2007-2013 the specific programme ‘Fundamental Rights and Citizenship’ as part of the General Programme ‘Fundamental Rights and Justice’ notes : ‘As stated in The Hague Programme adopted by the European Council at its meeting in Brussels on 4 and 5 November 2004, the incorporation of the Charter into the Treaty establishing a Constitution for Europe and the accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms will place the European Union under a legal obligation to ensure, subject to respect of the principle of subsidiarity, that in all areas of its activity, fundamental rights are not only respected but also actively promoted’.

⁶ See, however, the limited jurisdiction of the European Court of Justice with respect to this provision, as defined in Article 46, d), EU (stating that the provisions of the EC Treaty concerning the powers of the Court of Justice and the exercise of those powers shall apply only to the certain provisions of the EU Treaty, including Article 6(2) ‘with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty’. Strictly speaking, this formulation would not allow the Court of Justice to take into account fundamental rights recognized as general principles of law with regard to measures adopted by the Member States under Title VI of the EU Treaty. However, because the European Court of Justice developed its case-law on the general principles of law without any explicit mandate – although it occasionally has referred to Article 220 EC which entrusts the Court of Justice (and, now, the Court of First Instance) with ‘ensur[ing] that in the interpretation and application of this Treaty the law is observed’, the restrictive formulation of Article 46 EU should not constitute an obstacle to reviewing the acts of the Member States which, for instance, would implement a framework decision, taking into account the requirement that when doing so, they comply with fundamental rights.

accordance with the EC Treaty or the case-law of the European Court of Justice.⁷ By contrast, Article 51 of the Charter of Fundamental Rights only refers to the Member States implementing Union law. While this is a more restrictive notion than that of the scope of application of Union law, it may also be more workable. A number of academic commentators have noted that the notion of ‘scope of application of Union law’ has borders difficult to define, which in certain cases may make it difficult to identify whether or not the European Court of Justice would consider it is competent to ensure the respect of fundamental rights included among the principles of law, where measures adopted by the Member States are concerned.⁸

In this contribution, we argue that, whether it is limited to the situations where the Member States are implementing Union law or whether it is conceived more broadly as including situations where the Member States act in the scope of application of Union law, a monitoring limited in its scope where the acts adopted by the Member States are concerned may not be sufficient : it may be in the interest of the Union and of the future of European integration to develop forms of monitoring which ensure that the Member States comply with fundamental rights, even in fields which are not under the remit of Union law. First, for political reasons, it would be unacceptable to pursue forms of cooperation with a State seriously and persistently violating fundamental rights, even where these violations take place outside the field of application of Union law (I). Second, ‘monitoring’ should be conceived not only as a tool to remedy, *post hoc*, instances of fundamental rights violations, but also as a means to ensure that the requirements of fundamental rights will be adequately taken into account during all the stages of the development of Union law and policy, and that the Union will effectively exercise its competences to contribute to the promotion and protection of human rights, by remaining fully informed of the need to take action in this regard (II). Third, monitoring by the Union of the situation of fundamental rights in the Member States may be justified in the new context created by the enlargement of the Union. In a Union of 25 Member States – soon to become 27 –, where the harmonization or approximation of national laws becomes more difficult even than previously to achieve, there is a tendency, in the establishment of both the internal market and the area of freedom, security and justice, to rely instead on the techniques of mutual recognition and cooperation between the national administrations and jurisdictions. However, for this to be effective, a strong mutual trust must exist between the national administrations and national jurisdictions of the Member States. But mutual recognition borrows from the techniques of private international law. Instead of erasing the differences between the national legislations, it recognizes those differences, and organizes their coexistence. This implies, however, that these legislations comply with certain basic rules, which include the requirements of fundamental rights. Similarly, judicial and administrative cooperation, and even more so police cooperation, require that all the Member States trust one another’s judicial and administrative systems. Monitoring, then, becomes a confidence-building mechanism, ensuring the effectiveness of administrative, judicial and police cooperation (III).

⁷ See Case 353/89, *Commission v. Netherlands*, [1991] ECR 4089 (Recital 30); Case 288/89, *Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media*, [1991] ECR 4007 (Recital 23); Case 148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR 513 (Recitals 9 and 10); Case C-368/95, *Familiapress*, [1997] ECR I-3689 (Recital 24); Case C-112/00, *Schmidberger*, [2003] ECR I-5659 (Recital 81).

⁸ On the precise delineation of the situations in which the Member States are bound by fundamental rights as general principles of EC or EU law, see esp. J. 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, p. 821; J. Temple Lang, “The Sphere in Which Member States are Obligated to Comply with the General Principles of Law and Community Fundamental Rights Principles”, *L.I.E.L.*, 1991/2, p. 23; J. Weiler, “Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights”, in N. Neuwahl et A. Rosas, *The European Union and Human Rights*, Martinus Nijhoff Publ., Kluwer, The Hague-Boston-London, 1995, p. 56 ; and K. Lenaerts, “Le respect des droits fondamentaux en tant que principe constitutionnel de l’Union européenne”, *Mélanges en hommage à Michel Waelbroeck*, Bruxelles, Bruylant, 1999, p. 423.

While these three reasons are generally put forward to justify ensuring a systematic evaluation of the Member States' judicial and administrative systems, and a monitoring of the general situation of fundamental rights in the Member States, they should not be recognized an equal weight. The first argument is not in our view particularly compelling. The latter two arguments in favor of the Union monitoring the situation of fundamental rights in the Member States are both more convincing and more closely bound to the current developments of the Union and the modalities through which the cooperation between its Member States has been evolving.

I. The implementation of Article 7 EU

Article 7 EU was inserted with the Treaty of Amsterdam of 1997. It was originally conceived as a signal addressed to the countries then preparing their accession to the Union. Originally, this provision allowed for the adoption of sanctions towards a Member State in serious and persistent breach of the values on which the Union is founded, including human rights. In 1999-2000, the crisis which resulted from the accession to governmental power of the Liberal Party FPÖ in Austria demonstrated the need to include a preventive mechanism in this provision, allowing for certain recommendations to be addressed to a State where there exists a clear risk of a serious violation of those values. The current version of Article 7 EU, as amended in the Treaty of Nice, reflects this dual concern. Indeed, since the entry into force of the Nice Treaty on 1 February 2003,⁹ Article 7 EU gives the Council the possibility to determine that there exists a clear risk of a serious breach by a Member State of the common values on which the Union is based. This preventive mechanism, provided for in Article 7(1) EU, now complements the possibility of adopting sanctions against a State which, according to the determination made by the Council, has seriously and persistently breached the principles mentioned in Article 6 (1) EU.¹⁰

Thus, monitoring the behavior of Member States even outside the scope of application of Union law would be justified both in order to build trust between the States and in order to allow for an informed use of Article 7 EU, in the exceptional circumstances where the conditions for relying on this clause would be present. Such monitoring of fundamental rights exists, but in a form which is still modest and insufficient. The European Parliament, through its Committee on Civil Liberties, Justice and Home Affairs, has been adopting reports on the situation of fundamental rights in the Union since 1999 – based, since 2000, on the template provided by the Charter of Fundamental Rights of the European Union –. Although it has abandoned this practice since 2003, it regularly adopts reports on thematic issues under which the situation of fundamental rights in the different Member States is examined. By its Resolution of 5 July 2001 on the situation as regards fundamental rights in the European Union (2000)¹¹, the European Parliament requested, and obtained from the Commission, that a network of legal experts be set up to ensure a more systematic and professional monitoring of fundamental rights in the Member States – this led, in September 2002, to the establishment of the EU Network of Independent Experts on Fundamental Rights. The EU Network of Independent Experts on Fundamental Rights, which consists of one independent expert per Member State, essentially took over from the rapporteur annually appointed within the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament the task of preparing an annual report on the situation of fundamental in the Union. The Network however regularly reports to that Committee. Besides its annual reports, the Network may

⁹ OJ C 180, of 10.3.2001.

¹⁰ Article 7(2) to (4) EU (Article I-59 of the Treaty establishing a Constitution for Europe) (“Suspension of certain rights resulting from Union membership”) and, for the implementation of these sanctions in the framework of the EC Treaty, Article 309 EC.

¹¹ Resolution of 5 July 2001 on the situation as regards fundamental rights in the European Union (2000), Cornillet report, OJEU C 65 14 March 2002, p. 350.

also be called on to deliver specific information and opinions regarding the situation of fundamental rights in the European Union and in the Member States¹².

The EU Network of Independent Experts on Fundamental Rights is the only group currently performing a monitoring function on the basis of the EU Charter of Fundamental Rights, which constitutes the most authoritative embodiment of the common values shared by the Member States. Although it has attracted significant interest from Member States and from European human rights non-governmental organisations with whom the Network had a number of exchanges, the impact of the Network has been especially significant within the institutions of the Union – in particular within the European Commission and within the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs where its conclusions and recommendations are regularly discussed –, and with respect to developments in Union law. The impact of this mechanism has been more limited however with respect to initiatives which may be taken to address the situation of fundamental rights in the EU Member States, with respect to developments which are still outside the field of application of Union law. Moreover although the experts members of the Network have frequent exchanges with the national administrations of their home countries and consult broadly in the preparation of their reports, there is no systematic attempt to bring the Member States’ representatives together in order to discuss their strategies to promote fundamental rights, on the basis of the comparative reports which are prepared, and in order to encourage a sharing of experiences.

One reason for this is that the legal basis for such ‘monitoring’, by either the European Parliament or by the EU Network of Independent Experts, is fragile, and thus its legitimacy still open to question. Although the European Parliament considered that it had “the particular responsibility (...) by virtue of the role conferred on it under the new Article 7(1) EU (...) to ensure (in cooperation with the national parliaments and the parliaments in the applicant countries) that both the EU institutions and the Member States uphold the rights set out in the various sections of the Charter”,¹³ that provision only envisages that a situation occurring in a Member State becomes a matter of concern for the Union where there exists either “a serious and persistent breach by a Member State” of the principles on which the Union is founded, or at least – following the amendment to Article 7 EU by the Treaty of Nice – where there appears “a clear risk of a serious breach by a Member State” of those principles. Only the most serious situations of human rights violations, thus, are envisaged on the face of that provision. Moreover, when the European Commission adopted an approach towards Article 7 EU which identified this article as requiring a permanent form of human rights monitoring of the Member States,¹⁴ the Parliament responded with a resolution which appears to oppose the idea.¹⁵ Despite the presence of some otherwise encouraging language, the resolution ended with the identification of four principles which, in its view, should guide a responsible use of that provision, including the principle of confidence :

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,

¹² All the reports and opinions of the EU Network of Independent Experts on Fundamental Rights are available on the following website : http://europa.eu.int/comm/justice_home/cfr_cdf/members_en.htm

¹³ Report on the situation as regards fundamental rights in the European Union in 2000, EP doc. A-5 223/2001 (rapp. Th. Cornillet).

¹⁴ Communication of the Commission to the Parliament and the Council, ‘Article 7 of the TEU : Respect for and promotion of the Values on which the Union is based’, COM(2003)606, of 15.10.2003.

¹⁵ Respect for and promotion of the Values on which the Union is based, EP doc. P5_TA(2004)0309.

- 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.

It is clear that – whether in order to address recommendations to the Member State where there exists a clear risk of a serious breach of the values on which the Union is founded, including fundamental rights, or in order to suspend certain rights of that State where it is found to have persistently committed serious breaches of those values – it will be useful for the European Commission, the European Parliament and the Council, when exercising their constitutional functions under Article 7 EU, to base themselves on assessments made by a body monitoring all the Member States according to the same standards, and whose composition and working methods guarantee the objectivity and impartiality of such an assessment. In the Communication which it presented to the Council and the European Parliament on Article 7 EU “Respect for and promotion of the values on which the Union is based”¹⁶, the Commission therefore noted that, by its reports, the Network of Independent Experts in Fundamental Rights may help 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”; and that it may “help in finding solutions to remedy confirmed anomalies or to prevent potential breaches”.

Whether such monitoring will continue in the future is at present uncertain. The Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights of 30 June 2005¹⁷ allows for the Agency to play a role under Article 7 EU. It provides that the Council may exploit the expertise of the Agency if it finds it useful during the procedure under Article 7 EU. Article 4 of the Proposal reads :

1. To meet the objective set in Article 2 [that is to say, to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect the fundamental rights], the Agency shall:

(...)

(e) make its technical expertise available to the Council, where the Council, pursuant to Article 7(1) of the Treaty on European Union, calls on independent persons to submit a report on the situation in a Member State or where it receives a proposal pursuant to Article 7(2), and where the Council, acting in accordance with the procedure set out in these respective paragraphs of Article 7 of the Treaty on European Union, has requested such technical expertise from the Agency;

(...)

The Explanatory Memorandum to the draft Council Regulation, when commenting upon this provision of the Proposal, specifies however that the Agency will not be in charge of carrying out a systematic and permanent monitoring of the Member States for the purposes of Article 7 EU. According to this approach – which is recalled in the Impact Assessment Report

¹⁶ COM (2003) 606 final, of 15.10.2003.

¹⁷ Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights of 30 June 2006 COM (2005) 280 final of 30.06.05.

A Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union is joined to the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights of 30 June 2006 (COM (2005) 280 final of 30.06.05).

appended to the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights of 30 June 2005, as one of the possible options¹⁸ –, the breach of fundamental rights warranting the activation of Article 7 EU would be so serious and extraordinary that it does not require a special mechanism to notice such a breach. Moreover – and this has been remarked, rightly in our view, by institutions of the Council of Europe in the course of the discussions around the Agency¹⁹ –, the Council of Europe bodies are well equipped to identify the most serious breaches of fundamental rights which could justify using the sanctioning mechanism of Article 7(2) EU, or even the ‘clear risk’ of such breaches which might justify addressing recommendations to the Member State concerned. The draft Council Regulation establishing the EU Fundamental Rights Agency, while providing for a role of the Agency under Article 7 EU, therefore does not envisage a systematic and permanent monitoring of the Member States for the purposes of Article 7 EU.

We believe it is important, nevertheless, that the structure of the Agency comprises a group of independent experts, covering all the Member States of the Union to which they should apply the same standards in accordance with the principle of non-selectivity, in order to monitor the situation of fundamental rights in the Member States. The need for maintaining such type of monitoring also emerges from the Communication establishing for the period 2007-2013 a framework programme on Fundamental Rights and Justice²⁰, in which the Commission proposes, in particular, the adoption by the Council of a Decision establishing for that period a specific programme ‘Fundamental rights and citizenship’, as part of the framework programme. Under the proposed decision, the ‘Fundamental rights and citizenship’ programme would comprise a series of actions, including the support for and management of networks of national experts,²¹ with the objective, *inter alia*, of ‘assess[ing] regularly the situation of fundamental rights in the European Union and its Member States, within the scope of application of Community law, using the Charter of Fundamental Rights as the guiding document and to obtain opinions on specific questions related to fundamental rights within this scope when necessary’.²²

Why should such monitoring continue ? One argument would be that the establishment of the EU Fundamental Rights Agency should improve the protection of fundamental rights in the Union, and thus build on the existing mechanisms or replace them with other mechanisms performing comparable functions, rather than lead those mechanisms to disappear. By creating the European Union Agency for Fundamental Rights with a mandate centred on improving the coherence and the consistency of the EU’s fundamental rights policies or on data collection and analysis but without being endowed with a monitoring function – or, even if endowed with such a function, without the capacity to fulfil it in a credible fashion by being assisted with such a group of independent experts –, while not ensuring that the monitoring function currently performed by the EU Network of Independent Experts on Fundamental Rights can continue on a permanent basis, the Union would be acting (so the argument goes) like the United Nations would have acted if, when establishing

¹⁸ See the Impact Assessment Report appended to the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights of 30 June 2005 (SEC(2005) 849 of 30.06.2005), pp. 8-9.

¹⁹ See the statement by Ms de Boer-Buquicchio, Deputy Secretary General of the Council of Europe, made at the Public Hearing on the Agency on Fundamental Rights of 25 January 2005, available on http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/index_en.htm. See also, in particular, Parliamentary Assembly of the Council of Europe (PACE) Resolution 1427 (2005) adopted on 18 March 2005 (rapp. McNamara), and the answer which the Committee of Ministers of the Council of Europe provided on 13 October 2005 to Recommendation 1696 (2005) of the Parliamentary Assembly (CM/AS(2005)Rec1696 final, adopted at the 939th meeting of the Ministers’ Deputies). A Memorandum was provided by the Secretariat of the Council of Europe to Vice-president F. Frattini on 8 September 2005, summarizing the need to avoid an overlap between the mechanisms of the Council of Europe and those of the Union.

²⁰ COM(2005)122 final of 6.4.2005.

²¹ Art. 4, a), of the Proposal.

²² Art. 3, b), of the Proposal.

the UN High Commissioner for Human Rights, it had decided to suspend the monitoring by the expert bodies created under the UN treaties. The establishment of the European Union Agency for Fundamental Rights should not lead to weaken the mechanisms which exist currently to monitor fundamental rights within the Union; it should instead strengthen them, especially by improving the follow-up of the findings from such mechanisms, and address in this regard the appropriate recommendations to the Member States and the institutions of the Union²³.

We do not deny that this argument may have merit. Indeed, Martin Scheinin has described in detail the added value of the Network of independent experts on fundamental rights established by the European Commission, even taking into account the other forms of monitoring to which the Member States were subjected.²⁴ The Charter of Fundamental Rights contains certain provisions which have no equivalent in other international or European treaties. On the basis of Article 18 of the Charter, the Network monitors compliance with the requirements of the Geneva Convention of 28 July 1951 on the status of refugees, which no other committee of independent experts currently does. Moreover, while the international and European human rights instruments establish a floor or rights which the Member States must respect, the undertakings of the Member States are variable : they are not bound by all the instruments, even among the most important treaties of the Council of Europe such as the Framework Convention for the Protection of National Minorities or the Revised European Social Charter ; they may have made reservations to certain instruments, or they may have accepted only a number of provisions contained in the instruments they have ratified, where such *à la carte* approach is allowed. For all these reasons, if the EU Charter of Fundamental Rights indeed embodies a core set of values which the Member States have agreed to, it may be justified to ensure that they comply with the rights, freedoms and principles contained in the Charter, and it should be presumed too easily that the mechanisms established under the human rights treaties of the United Nations or the Council of Europe will necessarily suffice in that respect.

We believe however, that there exist even more powerful arguments in favor of a systematic monitoring of the situation of fundamental rights in the Member States, using as a template the Charter of Fundamental Rights. The following paragraphs describe these arguments in more detail.

II. Mutual observation and mutual learning in the field of fundamental rights

The need for a regular evaluation of the situation of fundamental rights in the Member States should also be related to another understanding of the notion of ‘monitoring’, referring here not to a normative evaluation of compliance of certain State practices with the requirements of fundamental rights, but – rather – to the informational, or learning, value of such monitoring. Under this general phrase, we have in mind three other reasons which might call for monitoring the situation of fundamental rights in the Union, which correspond to the three moments of the *adoption*, the *implementation* and the *application* of European legislation.

- First, *the monitoring of the situation of fundamental rights in the Member States is indispensable for an informed exercise by the Union of its competences in the field of fundamental rights, in conformity with the principle of subsidiarity*. A number of competences have been conferred upon the Union which make it possible for the Union to develop a fundamental rights policy. Although there is no authoritatively agreed list of such competences, almost all of them are competences which are not exclusive to the Union or the Community, but are shared between the Union or the Community and the Member

²³ For further developments, see EU Network of Independent Experts on Fundamental Rights, Position paper on the Human Rights Agency, 16 December 2004 (ref. CFR-CDF.Agency16.12.04.doc).

²⁴ M. Scheinin, XXX in Ph. Alston and O. De Schutter, XXXX

States. Examples of such competences conferred upon the Union or the Community include Article 13 EC which provides that "the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" and Article 18 EC, which provides that "every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect", and which served as basis for the adoption, by the European Parliament and the Council, of Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States²⁵. It is on the bases of Articles 63 and 64 EC, which provide for the development by the Union of measures on asylum and immigration policy, that the Council adopted Directive 2003/86/EC of 22 September 2003 on the right to family reunification²⁶ and Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers²⁷. And it is on the basis of Article 31 EU regarding common action on judicial cooperation in criminal matters that the European Commission recently proposed the adoption of a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union²⁸. These examples could be multiplied.

The blurred division of competences between the Union or the Community and the Member States imposes to determine, in conformity with the principles of subsidiarity and proportionality²⁹, *at which level* the need to improve fundamental rights protection may be most effectively addressed. Indeed, the exercise by the Union of the competences it shares with the Member States in order to fulfil human rights requires to be guided by information on developments within the Member States, concerning the laws and practices of the Member States and whether such developments risk leading to the emergence of diverging standards within the Union, which would call for a better coordination. This calls for a monitoring of the situation of fundamental rights in the Member States, which would allow to identify, on a systematic basis, in which fields the unilateral action of the Member States would fail to achieve the objective of an area of freedom, security and justice in which human rights are fully respected, and in which an initiative of the Union could better achieve that objective. Such monitoring can not obviously apply to the Member States only insofar as they implement Union law. Under the current proposals, both the Fundamental Rights Agency of the Union and the expert networks which it may call upon to provide it with data – including the EU Network of Independent Experts on Fundamental Rights – have a mandate limited to the scope of application of Union law. A strict division between what is 'within' the scope of application of EU law and what is 'outside' that scope of application may be tenable where the objective is to monitor whether the institutions of the Union, or the Member States acting under Union law, comply with fundamental rights. Where however the objective is to identify where the Union may need to take action, and thus potentially expand the scope, this separation simply is not workable. Instead, this boundary should be constantly redefined,

²⁵ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158 , 30.4.2004, p. 77.

²⁶ OJ L 251 of 3/10/2003, p. 12.

²⁷ OJ L 31 of 6/2/2003, p. 18.

²⁸ COM(2004) 328 final, 28.4.2004.

²⁹ Article 5 EC provides that :

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

according to the changing circumstances, and according to what fundamental rights require for their effective protection in the Union.

- Second, *a monitoring of the situation of fundamental rights in the Member States is required at the stage of implementation of European legislation*. When a State implements Union law, it must do so in compliance with the rights codified in the Charter of Fundamental Rights of the European Union and with the rights recognized as general principles of law, as derived by the European Court of Justice from the European Convention on Human Rights or from the common constitutional traditions of the Member States. Although of course, as the guardian of the obligations of the Member States under the EC Treaty, it is for the European Commission to monitor the implementation of European legislation in national law, it can be assisted in that task by a monitoring focusing principally on the human rights dimension of that implementation, or on the implementation of instruments which are specifically adopted in order to promote fundamental rights. It is indeed in the implementation by the Member States of European legislation, and especially in the use the Member States can make of certain exceptions provided for in such legislative instruments especially where they establish minimum standards to be respected, that the risks of fundamental rights being violated is highest. By focusing on the fundamental rights dimension of the implementation by the Member States of Union law, we may identify situations where certain Member States would be found to instrumentalize the gaps remaining in European laws, by adopting measures which – without necessarily constituting violations of fundamental rights – would result in an overall lowering of the protection of fundamental rights in the Member States, if each States seeks to implement Union law by providing only the minimum safeguards required : as we see all too often in the fields of asylum and of social law, in which the EC Treaty provides only for the possibility of “minimum safeguards” being adopted at Community level³⁰, there is a tendency of States to legislate only at that minimum level as defined throughout the Union, and those States which would prefer to offer a higher level of protection of fundamental social rights or of the rights of asylum-seekers will generally be discouraged from doing so.³¹ Monitoring whether, in implementing Union law, the Member States are not thus caught in a prisoners-dilemma situation where they fear to legislate at a level more favourable to the protection of fundamental rights than the minimum required, may lead to the conclusion that Union law must be redefined in order to raise the level of protection it affords.

- Finally, *a monitoring of the situation of fundamental rights in the Member States may be justified by the need to ensure the full effectiveness of European legislation, and the full cooperation of the Member States in applying it*. Article 6 (2) EU implies that no instrument of Community or Union law can impose an obligation on a Member State to violate fundamental rights. There is, in other terms, a general safeguard clause attached to all instruments of secondary Union law which impose on States to enter into certain forms of cooperation with one another, whether in the context of the internal market or in the creation of an area of freedom, security and justice. Some instruments explicitly mention this restriction to any obligation to cooperate they may impose, or this exception to the obligation of mutual recognition; but this reservation should be considered to exist even in the absence of such explicit recognition. In order for such safeguard clause to function adequately, some form of mutual observation of the situation of fundamental rights in the Member States should be organized at the level of the Union. Indeed, only through such a monitoring may we ensure that the Member States will not be tempted to instrumentalize such a clause to refuse to cooperate with other States because of ill-founded concerns about human rights, which may

³⁰ See respectively Art. 137(2)(b) and Art. 63(1)(b), (c) and (d) EC.

³¹ O. De Schutter, “The Implementation of Fundamental Rights through the Open Method of Coordination”, 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. 279-343.

be sometimes based on lack of information or lack of familiarity with the specificities of a foreign legal system.

These are, in our view, the three essential functions an adequate monitoring of the situation of fundamental rights in the Member States may serve to fulfil. It should be noted however, that these functions may adequately be fulfilled only by a systematic comparison between the Member States. *It is not sufficient for the above purposes to examine whether each State individually complies with the requirements of fundamental rights, however those are defined ; it is required that mutual observation and mutual learning take place between the Member States on a systematic basis.* Currently, neither in the framework of the implementation of European legislation, nor in the framework of its application there is a true opportunity for the Member States to learn from one another by comparing their strategies in the protection and promotion of human rights. Even the recent tendency, in the field of Justice and Home Affairs, to establish peer review mechanisms to ensure adequate implementation of the instruments adopted by the Union does not really compensate for this (see point III.). These mechanisms partly seek to compensate the limited role the European Commission may play as a guardian of the Member States' obligations in this field.³² They also constitute an answer to the fears raised by the process of enlargement, at a moment precisely where the activities of the Union have developed in fields (such as asylum and immigration, judicial cooperation in civil and criminal matters, and police cooperation) which are the most sensitive from the point of view of civil liberties. However, apart from the fact that these mechanisms remain *ad hoc*, provided in specific instruments without being systematic, they remain based on the idea that the implementation by the Member States of their obligations needs to be monitored : their philosophy is one of compliance, rather than one of mutual learning through the comparison of experiences.

As for the EU Network of Independent Experts on Fundamental Rights, it has sought – although to a very limited extent – to facilitate mutual observation and mutual learning between the Member States, in particular, by highlighting in its annual conclusions and recommendations, examples of 'good practices' which, when experimented successfully in one Member State, could inspire similar answers in others. Indeed, the comparison of the national situations which the Network presents on an annual basis does not have as unique objective to identify the initiatives which the Union could take to preserve the unity of the area of freedom, security and justice and of the internal market. Where the Union does not have the required competences to react to emerging divergences between the Member States in the field of fundamental rights and where the comparison does not indicate a clear risk of a serious breach of fundamental rights which could justify the use of Article 7(1) EU, the comparison could be an occasion for mutual learning, by the sharing of experiences which it makes possible and more systematic.

We have identified three functions which a systematic monitoring of the situation of fundamental rights in the Member States could fulfil, in relation to improving the contribution of Union law to the promotion and protection of fundamental rights : such monitoring could prepare the ground for the exercise by the institutions of the Union of their competences in this field ; it could avoid a situation where, because Union laws would not protect fundamental rights at a sufficiently high level, the Member States may actually be under an incentive to lower the level of protection they afford to fundamental rights to the minimum level obligatory under Union law ; finally, it could ensure that the Member States would not be allowed to invoke the suspicions they may entertain about the situation of fundamental

³² The Commission is not empowered to bring infringement proceedings against the Member States not complying with the obligations imposed on them by instruments adopted under Title VI EU in the field of police cooperation and judicial cooperation in criminal matters. On the difficulties which may result from this situation, see O. De Schutter, « La contribution du contrôle juridictionnel à la confiance mutuelle », in G. de Kerchove & A. Weyembergh (éd.), *La confiance mutuelle dans l'espace pénal européen – Mutual trust in the European Criminal Area*, Inst. d'études européennes de l'ULB, Bruxelles, 2005, at pp. 79-121.

rights in another EU Member State in order to refuse to cooperate where, in principle, such an obligation of cooperation is imposed. Whereas the two latter of these three functions, at the levels of the implementation and application of European legislation, could be performed by the EU Network of Independent Experts on Fundamental Rights in any revised form it will be given after 2006 – or, indeed, by a group of independent experts established within the broader structure of the Agency –, the first function calls for a close cooperation between the body entrusted with monitoring the situation of fundamental rights and identifying the issues on which an initiative of the Union would be opportune and justified under the principle of subsidiarity, and the body entrusted with addressing recommendations to the institutions of the Union on the basis of the findings made in the course of the monitoring. It is here that the cooperation between a Network of independent experts on fundamental rights, covering all the Member States and seeking to identify developments on the basis of commonly agreed criteria based on the Charter of Fundamental Rights, on the one hand, and an Agency which would make recommendations based on those comparisons and on the identification of the best practices in the field, as well as on the consultation of the stakeholders involved, on the other hand, would be most fruitful and welcome.

III. Mutual evaluation as a condition of mutual recognition in the area of freedom, security and justice

In an enlarged and more diverse Union, mutual recognition is becoming an essential tool both for the progressive establishment of an area of freedom, security and justice, and for the completion of the internal market. The mutual confidence which such mutual recognition presupposes should however be complemented by safeguard clauses. Such clauses should be based on adequate mechanisms of mutual evaluation. That we are moving in this direction is most visible in the construction of the area of freedom, security and justice.

Without mutual evaluation, which is capable of leading to a complementary harmonization or of encouraging the approximation of legislations where this proves necessary, mutual recognition would remain a blind mechanism, deprived of the mutual trust on which it is based. It not only weakens mutual recognition itself, since without an adequate mechanism to ensure mutual evaluation the national authorities may be led to mistrust the standards defined by other Member States and the practices for implementing those standards, and to take advantage of exception clauses that allow derogation from mutual recognition. It also weakens fundamental rights in the area which the Member States share, since, strictly defined as capable of justifying exceptions to the rule of mutual recognition, the protection which each State will ensure for fundamental rights on its territory will be limited to what is strictly necessary and proportionate to the objective pursued by such protection. A monitoring of the fundamental rights situation in the Member States of the Union through an independent and impartial mechanism ensuring a non-selective assessment of all Member States and capable of allowing comparisons between Member States, is thus more essential than ever.

The Treaty establishing a Constitution for Europe signed by the Heads of States and Governments on 29 October 2004³³ contains a clause systematizing current evaluation mechanisms laid down in discrete instruments. According to Article III-260 of the Treaty :

the Council may, on a proposal from the Commission, adopt European regulations or decisions laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Chapter [Chapter IV, Area of Freedom, Security and Justice, in Part III of the Constitution] by Member States' authorities, in particular in order to facilitate full application of the principle

³³ OJ C 310 of 16.12.2004, p. 1.

of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

The functioning of the current evaluation mechanisms is detailed in the appendix to this contribution. The question for the future is whether these evaluation processes – which, for the time being, include a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime, a mechanism for collective evaluation of the enactment, application and effective implementation by the applicant countries of the *acquis* of the European Union in the field of Justice and Home Affairs, a Standing Committee on the evaluation and implementation of Schengen and a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism³⁴ – should be systematized, and if so, according to which institutional device.

In our view, such a mechanism ensuring the ‘impartial and objective’ character of the evaluation of the implementation of the Union policies must act preventively, before the mutual confidence is disrupted, rather than reactively. It must be regular and systematic, rather than *ad hoc*. And it must not only lead to the adoption of safeguard measures where required, but also to the formulation of legislative proposals at the level of the Union where such initiatives appear to be required.

In other words, insofar as possible, it should present the following features:

- *non-selectivity*: all the Member States should be treated equally, judged on the basis of the same criteria and according to the same procedures ;
- *proactivity*: any situation which could threaten the mutual confidence on which mutual recognition is premised should be identified at an early stage, because the mutual confidence is broken; this suggests that monitoring should be permanent or at least performed on a regular basis, rather than performed on an *ad hoc* basis after a phenomenon has developed which could threaten mutual confidence;
- *independence*: although evaluation by peer review mechanisms presents its own value and, indeed, could constitute the second stage of any evaluation mechanism designed to facilitate the full application of the principle of mutual recognition by reinforcing mutual confidence, it may be useful, at least at a preliminary stage, to benefit from the findings of an independent body, in order to ensure that the exercise of scrutiny on any particular Member State shall not be seen as motivated by hostility calling for diplomatic retaliation ;
- *decentralization*: a credible monitoring of the situation of the Member States should be based on information collected in those States, rather than in a centralized fashion, on the basis of what will necessarily be secondary sources selectively treated.

Finally, despite the apparently more restrictive wording of Article III-260 of the Constitution, such evaluation should concern not only the ‘implementation of the Union policies’ referred to in Chapter IV (Area of Freedom, Security and Justice) of Part III of the Treaty establishing a Constitution for Europe, but should also concern the general context in which those policies –

³⁴ Joint Action (97/827/JHA) of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime, OJ L 344 of 15.12.1997, p. 7 ; Joint Action (98/429/JHA) of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for collective evaluation of the enactment, application and effective implementation by the applicant countries of the *acquis* of the European Union in the field of Justice and Home Affairs, OJ L 191 of 7.7.1998, p. 8 ; Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/ Com-ex (98) 26 def.), OJ L 239 of 22.9.2000, p. 138 ; Council Decision (2002/996/JHA) of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism, OJ L 349 of 24.12.2002, p. 1.

and the legislative instruments which these policies lead to – are to be applied. For example, although the Union has adopted no specific instrument on the measures to be taken by the Member States to combat delays in judicial proceedings, it is clear that in certain Member States, the situation can become such as to question the mutual trust on which judicial cooperation is based, either in civil or in criminal matters. Similarly, even in the absence of any instrument of the Union relating to the situation in prisons, for example in order to combat prison overpopulation or to improve unacceptable conditions of detention, it is useful to monitor these situations in the Member States, for instance because the full implementation of the European arrest warrant cannot ignore the justifiable reluctance certain Member States may have to cooperate with other States where these situations are not being remedied in conformity with the requirements of the European Convention on Human Rights and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatments or Punishments.

For this reason, it may be justified to consider combining the setting up of an evaluation mechanism as envisaged under Article III-260 of the Treaty establishing a Constitution for Europe in the context of the establishment of an Area of Freedom, Security and Justice with the improvement of the mechanism provided for under Article 7 EU, which is retained in slightly revised form in Article I-59 of the Constitution (Suspension of certain rights resulting from Union membership). As mentioned above (point I.), the Communication which the Commission has presented to the Council and the European Parliament on Article 7 of the Treaty on the European Union, 'Respect for and promotion of the values on which the Union is based'³⁵ notes that, by its reports, the EU Network of Independent Experts on Fundamental Rights may help 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"; and that it may "help in finding solutions to remedy confirmed anomalies or to prevent potential breaches". Consideration should be given to the possibility of building on the current organisation of the EU Network of Independent Experts on Fundamental Rights in order both to implement an evaluation mechanism as envisaged under Article III-260 of the Constitution, and to encourage a non-selective, objective and impartial evaluation of the situation of fundamental rights in the Member States of the Union in order to facilitate the exercise by the institutions of the Union of the functions assigned to them by Article 7 EU. Indeed, this is already the direction indicated by the proposal of the Commission for a Framework decision on certain procedural rights in criminal proceedings throughout the European Union, which could signal the beginning of a systematization of this form of monitoring. In the extended Impact Assessment of the proposal of the Commission on this instrument, the Commission calls for

a regular monitoring exercise on compliance. This should be on the basis of Member States themselves submitting data or statistics compiled by their national authorities and submitted to be collated and analysed by the Commission. The Commission could use the services of independent experts to analyse the data and assist with the drawing up of reports. One possible team of independent experts is the EU Network of Independent Experts on Fundamental Rights.³⁶

Such a monitoring could lead either to informal consultations between the Member States, or to recommendations being addressed to the Member State where certain difficulties have been identified which could threaten mutual confidence, or even, in most extreme cases, to the application of certain safeguard clauses such as those provided with respect to the new Member States until 1 May 2007 by Article 39 of the Act annexed to the Treaty between the Member States of the European Union and the new Member States providing for their

³⁵ COM (2003) 606 final, of 15.10.2003.

³⁶ SEC(2004) 491, of 28.4.2004, p. 22.

accession to the European Union³⁷ or by specific clauses in different instruments adopted for the establishment of an area of justice, freedom and security. For example, it can be inferred from Article 1(3) of the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States³⁸ that the surrender of a person cannot take place if this person runs a serious and proven risk of being subjected to inhuman or degrading treatment or punishment in the Member State issuing the warrant³⁹. The application of this safeguard clause by the Member States could be facilitated, and the risks of instrumentalization reduced, by setting up an objective and impartial monitoring system of the situation of fundamental rights in the Member States of the Union, which could identify where such risks may be arguably said to exist, and where, therefore, the refusal to execute the European arrest warrant would be justified.

IV. Conclusion

This paper has argued in favor of the establishment, within the Union, of a mechanism ensuring a systematic monitoring of the situation of fundamental rights within the Member States. 'Monitoring' does not necessarily mean normatively evaluating. It also means identifying trends, convergences or divergences, which may call for a more active exercise by the Union institutions of the competences they have been recognized to contribute to the protection and the promotion of fundamental rights in the Member States. And it also means ensuring that, where problems emerge, they are identified at the earliest stage possible, in order to be remedied before the mutual trust between the Member States is threatened.

How could such a systematic monitoring be conceived ? The most realistic solution might consist in the establishment of a group of independent experts following the situation of fundamental rights in the different member States and reporting their findings to the institutions of the Union, including the future EU Fundamental Rights Agency. At a minimum, this group of experts could be one of the 'information networks' the Agency will be authorised to set up and to coordinate according to Article 6 (1) of the proposed Council Regulation. According to this provision, these networks "shall be designed so as to ensure the provision of objective, reliable and comparable information, drawing on the expertise of a variety of organizations and bodies in each Member State and taking account of the need to involve national authorities in the collection of data"⁴⁰. The interest of having such a monitoring network in the field of fundamental rights within the structure of the Agency is also underlined by the European Commission, in its aforementioned Impact Assessment Report. When it addresses the work currently performed by the EU Network of Independent Experts on Fundamental Rights, the European Commission notes indeed⁴¹ :

(...) In the relatively short time of its operation, the Network has made a valuable contribution in the form of its annual reports on the situation of fundamental rights in the EU and thematic opinions. However, the Network lacks a legal basis, legitimacy and continuity. When establishing an Agency, the existence of a separate Network is

³⁷ The Act of Accession of the new Member States to the Union, signed in Athens on 16 April 2003, contains a safeguard clause in the areas of justice and home affairs (Article 39). This clause provides that the Commission may – until 1 May 2007 – take "appropriate measures", including in particular temporary suspension of the application of provisions and decisions organising the mutual recognition in the criminal field (Title VI EU) or in the civil field (Title IV of the 3d part of the EC Treaty), where "there are serious shortcomings or any imminent risks of such shortcomings in the transposition, state of implementation, or the application of the framework decisions or any other relevant commitments, instruments of cooperation and decisions" in those fields. The Commission may act upon its own motion, or upon motivation request of a Member State. Before acting, the Commission consults the Member States. The measures are maintained only as long as the shortcomings persist, but where they are not remedied, they may continue beyond the 1 May 2007.

³⁸ 2002/584/JAH, OJ L 190 of 18.7.2002.

³⁹ See also recitals 12 and 13 of the Preamble.

⁴⁰ Article 6 (1) of the Proposal.

⁴¹ SEC(2005) 849 of 30.06.2005

difficult to justify, as it would entail the existence of two parallel mechanisms for fundamental rights monitoring within and for the EU. On the other hand, for the Agency to be effective, it must have access to legal expertise in the Member States to get local information and analysis. The expertise of the Network would not be lost, if the Network would be integrated in the work of the Agency. Therefore, one solution could be that the Network of independent experts would be incorporated into the structure of the Agency by becoming one of the networks operated by the Agency. In consequence, the focus of the work of a legal network would concentrate on fundamental rights within implementation of Union law.

Nevertheless, instead of relying on the general wording of Article 6 (1) of the proposed Council Regulation for establishing this monitoring mechanism, it may be preferable that a specific chapter or provision of the regulation establishing the Agency define the composition of such a group, how its members shall be nominated, and what its functions will be. It is entirely inappropriate for such a monitoring to be performed on the basis of a contractual relationship with the European Commission, as it currently is on an experimental basis with the EU Network of Independent Experts on Fundamental Rights.

Alternatively, should the Regulation establishing the Fundamental Rights Agency not provide for the creation on a permanent basis of such a group of independent experts, or if – at a minimum – a network of experts such as the EU Network of Independent Experts on Fundamental Rights is not instituted as an information network in the bosom of the Agency, it could be envisaged to establish a network equipped to monitor the situation of fundamental rights in the Member States in order to provide the institutions with the information they require in order to effectively exercise their competences, and in order to cement the mutual trust within the European Criminal Area. Trust should not be blind, or it will remain weak and may soon turn to suspicion. Neither should European policies remain blind both to the problems they are to address and to the problems they fail to effectively solve.

APPENDIX

Member State : MS

Instrument	Fight against organized crime	Fight against terrorism	Schengen acquis	JHA acquis
	<p>-----</p> <p>Joint Action (97/827/JHA) of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime.</p>	<p>-----</p> <p>Council Decision (2002/996/JHA) of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism</p>	<p>-----</p> <p>Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/ Com- ex (98) 26 def.)</p>	<p>-----</p> <p>Joint Action (98/429/JHA) of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for collective evaluation of the enactment, application and effective implementation by the applicant countries of the acquis of the European Union in the field of Justice and Home Affairs</p>

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Objectives of the evaluation</p>	<p>Peer evaluation of the <u>application and implementation at national level</u> of international undertakings in the fight against organized crime.</p> <p><i>(general objective: to strengthen mutual trust and understanding between the Member States)</i></p>	<p>Peer evaluation of the <u>legal systems and their implementation at national level</u> in the fight against terrorism.</p> <p><i>(general objective: to strengthen mutual trust and understanding between the Member States)</i></p>	<p>The <u>Standing Committee</u>, which is in charge of the evaluation, has two tasks:</p> <p>(1) when acting as the '<u>Evaluation Committee</u>': to evaluate whether all the preconditions for bringing the Schengen Convention into force in a candidate State thereto have been fulfilled.</p> <p>(2) when acting as the '<u>Implementation Committee</u>': with the view to lay the foundations so that the Executive Committee can ensure the proper application of the Schengen Convention, it evaluates the implementation of the Schengen acquis by the States already implementing the Convention.</p> <p><i>(general objectives: to ensure and optimize the application of the Schengen acquis ; to improve the Schengen acquis ; to optimize the cooperation between the Schengen partners ; to improve security)</i></p>	<p>Collective evaluation of the <u>enactment, application and effective implementation</u> by the States which are candidates for accession to the EU of the <i>acquis</i> of the Union in the field of Justice and Home Affairs.</p> <p><i>(one of the objectives is that the Commission takes this evaluation into account in the adjustment of the priorities and objectives of the Accession Partnerships)</i></p>
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<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Areas or instruments subject of evaluation</p>	<ul style="list-style-type: none"> - Union and other international acts and <u>instruments</u> in criminal matters; - the resulting <u>legislation</u> and <u>practices</u> at national level ; - <u>international cooperation actions</u> in the fight against organized crime in the Member States. <p><i>(the field of examination is not purely legal – the national practices are also scrutinized)</i></p>	<ul style="list-style-type: none"> - national '<u>arrangements</u>' in the fight against <u>terrorism</u> within the framework of international cooperation between Member States. <p><i>(the field of examination is not purely legal – the national practices are also scrutinized)</i></p>	<p>The assessments of both the Evaluation Committee and the Implementation Committee cover <u>various areas</u>, notably:</p> <ul style="list-style-type: none"> - the external borders surveillance ; - judicial and police cooperation ; - drugs ; - SIS ; - Schengen visas ; - the conditions governing the movement of aliens ; - mutual assistance in criminal matters (including extradition). <p><i>(a great part of the evaluation focuses on the practical aspects of the fields under examination)</i></p>	<ul style="list-style-type: none"> - '<u>all relevant material</u>' relating to the enactment, application and effective implementation by the candidate countries of the <u>acquis</u> of the Union in the <u>field of Justice and Home Affairs</u>. <p>The evaluation draws in particular on:</p> <ul style="list-style-type: none"> - <u>information provided individually and collectively by Member States</u> based on their direct experience of working with the candidate countries ; - <u>reports from Member States' Embassies and Commission delegations</u> in the candidate countries; - <u>information available to the Commission</u> through its role in the overall process of accession ; - <u>reports of the Council of Europe</u>.
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Obligations of the State / Member State under evaluation</p>	<p><u>Full</u> cooperation of the national authorities with the evaluation teams</p>	<p><u>Close</u> cooperation of the national authorities with the evaluation teams</p>	<p>The authorities of the visited State shall ensure that its authorities afford the Standing Committee <u>the cooperation and assistance it requires</u> to enable it to perform its tasks properly.</p> <p><i>(The visited State must provide the Committee with the relevant information on the locations to be visited and all useful statistical, factual, analytical or other information at least one month before the start of the visit).</i></p>	<p><u>Full</u> cooperation of national authorities in implementing the mechanism for collective evaluation established under this Joint Action.</p>

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Evaluation bodies / team</p>	<p><u>Selection of a team of experts:</u></p> <p>At the Presidency's initiative, each MS sends the General Secretariat of the Council, <u>the names of one to three experts.</u></p> <p>The Presidency draws up a <u>list of the experts</u> designated by the Member States and forwards it to the members of the 'Multidisciplinary Working Party on Organized Crime' (MDW).</p> <p>On the basis of the list of experts drawn up by the Presidency, the Presidency chooses a team of <u>3 experts</u> for each MS to be evaluated.</p> <p><u>Only criteria mentioned for the selection of the experts:</u> ensuring that they are not nationals of the MS in question.</p> <p>The names of the experts chosen shall be notified to the MDW.</p>	<p><u>Selection of a team of experts:</u></p> <p>At the Presidency's initiative, each MS sends the General Secretariat of the Council, and no later than four weeks after the date on which the Article 36 Committee decides to start an evaluation on a specific subject, <u>the names of one to three experts.</u></p> <p>The Presidency draws up a <u>list of the experts</u> designated by the Member States and forwards it to the Article 36 Committee or to the Working Party designated for the purpose.</p> <p>On the basis of the list of experts drawn up by the Presidency, the Presidency chooses a team of <u>2 experts</u> for the evaluation of each MS.</p> <p><u>Only criteria mentioned for the selection of the experts:</u> ensuring that they are not nationals of the MS in question.</p> <p>The names of the experts chosen shall be notified to the Article 36 Committee or to the Working Party designated for the purpose.</p>	<p>The <u>Standing Committee</u>, which is set up under the aegis of the Executive Committee, is in charge of performing the evaluation.</p> <p>The Standing Committee shall carry out its tasks without prejudice to the powers of the <u>Joint Supervisory Authority.</u></p> <p>The Committee shall be authorized to consult the Authority in areas within its sphere of competence.</p>	<p><u>Selection of a team of experts:</u></p> <p>A group of experts is established in <u>accordance with the Council's rules of procedure</u> under the supervision of the Committee of Permanent Representatives of the Member States (Coreper).</p>
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<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Criteria for choosing the members of the evaluation bodies / team</p>	<p>The experts shall have <u>'substantial experience</u> of the subject to which the evaluation relates in the field of combating organized crime, in particular in a <u>law-enforcement service</u> such as the police, customs, a judicial or other public authority'...</p> <p>...and shall <u>be prepared to participate</u> in at least one evaluation exercise.</p> <p><i>(criteria of independency: not mentioned)</i></p>	<p>The experts shall have <u>'substantial experience</u> of the subject to which the evaluation relates in the field of combating terrorism'...</p> <p>...and shall <u>be prepared to participate</u> in at least one evaluation exercise.</p> <p><i>(criteria of independency: not mentioned)</i></p>	<p>The Standing Committee is composed of one <u>high-ranking representative from each Signatory State</u> to the Schengen Convention or to the Cooperation Agreement.</p> <p>This high-ranking representative may be accompanied.</p> <p>The experts who can be designated by the Schengen States in order to <u>complement</u> the work of the Standing Committee must have <u>'the requisite qualifications</u> and, in general, it would be desirable for the same experts to be designated each time'.</p>	<p>The group of experts is established <u>'in accordance with the Council's rules of procedure'</u>.</p>
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Assistance of the evaluation team</p>	<p>The evaluation team shall be assisted in all its tasks by the <u>General Secretariat of the Council</u>.</p> <p>Depending on the subjects to be evaluated, the <u>Commission</u> may take part in the proceedings of the teams of experts.</p> <p><i>(assistance of the European Commission not always necessary)</i></p>	<p>The evaluation team shall be assisted in all its tasks by the <u>General Secretariat of the Council</u> and by the <u>Commission</u>.</p> <p><i>(assistance of the European Commission always necessary)</i></p>	<p>The Standing Committee shall be assisted by the <u>Secretariat</u> in connection with its meetings and various tasks.</p> <p>The <u>European Commission</u> shall participate as an <u>observer</u> in the Standing Committee's work and in the activities of the working groups which serve the Committee, the Central Group and the Executive Committee.</p>	<p><u>One or more Member States</u>, in close association with the <u>European Commission</u>, may give particular assistance in preparing and maintaining for a particular candidate country comprehensive reports which would form the basis of the evaluations.</p>

Additional evaluation bodies		Depending on the specific subject chosen for the evaluation, the Article 36 Committee shall also decide whether to designate a <u>Council Working Party</u> subordinate to it to carry out the evaluation or to carry it out itself.	For the performance of their tasks, the permanent members of the Standing Committee shall be able to call on the Schengen States to second <u>temporarily experts</u> in each of the Committee's areas of competence. Each State shall be entitled to appoint an expert to perform assignments in the framework of the Standing Committee. The Standing Committee shall, however, endeavour to maintain membership of the delegations at a level that is compatible with the technical constraints of the assignments.	If additional information is considered necessary, <u>ad hoc teams of representatives and experts of Member States and the Commission</u> shall be formed to carry out further missions on specific aspects, without overburdening the candidate countries. The decision whether to establish such missions and their composition, timing and terms of reference shall be decided by the Council, acting by qualified majority, on advice from the group of experts, in close cooperation with the Commission.
Choice of the evaluation subjects / thematic	<u>Each year</u> , the MDW defines, on a <u>proposal</u> from the Presidency, the <u>specific subject of evaluation</u> and the <u>order</u> in which Member States are to be evaluated (at a rate of at least 5 / year). <i>(no systematic evaluation of all the Member States each year)</i>	<u>For each evaluation exercise</u> (the frequency of each evaluation exercise shall be defined by the Article 36 Committee), the Article 36 Committee defines, on a <u>proposal</u> from the Presidency, the <u>specific subject of evaluation</u> and the <u>order</u> in which Member States are to be evaluated. <i>(no systematic evaluation of all the Member States each year)</i>	The Standing Committee shall, in conjunction with the respective working groups, select the locations to be visited and the information to be gathered <u>on a case-by-case basis</u> .	Not mentioned.

<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Criteria of evaluation</p>	<p>Not mentioned.</p> <p><i>(the key criteria is probably the <u>efficiency</u> of the national system – it is not purely a examination of legal conformity)</i></p> <p>The Preamble provides that the Member States are to be evaluated <u>on a basis of equality and mutual confidence.</u></p>	<p>Not mentioned.</p> <p><i>(the key criteria is probably the <u>efficiency</u> of the national system – it is not purely a examination of legal conformity)</i></p>	<p>(1): Each time a State is a candidate to bring the Convention into force, the Evaluation Committee, shall draw up a report laying down a list of the <u>criteria to be satisfied</u> by the candidate States. This list shall indicate precisely <u>the standard to be reached</u> in all of the areas covered by the Convention. These criteria have to be approved by the Executive Committee.</p> <p>(2): The Implementation Committee '<u>provides the scope</u>' for detecting any problems encountered at external borders and for identifying situations which do not comply with the standard set in accordance with the spirit and objectives of the Convention.</p> <p>In doing so, it pays attention in particular to implementation of the <u>recommendations and observations</u> put forward by the visiting committees to external borders and to the follow-up of the <u>problems highlighted in the annual report</u> on the situation at the external borders of the States applying the Convention.</p>	<p>Not mentioned.</p>
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Instrument used for the evaluation	<p>The key instrument of the preparation of the evaluation is the <u>questionnaire</u>:</p> <p>the Presidency of the Council, with the assistance of the General Secretariat of the Council, draws up a questionnaire for the purposes of evaluating all Member States and submits it to the MDW for approval.</p> <p><i>(it is not provided that the selected experts shall participate in the drafting of the questionnaire)</i></p>	<p>The key instrument of the preparation of the evaluation is the <u>questionnaire</u>:</p> <p>the Presidency of the Council, with the assistance of the General Secretariat of the Council and the Commission, draws up a questionnaire for the purposes of evaluating all Member States and submits it for approval to the Article 36 Committee or to the Working Party designated for the purpose.</p> <p>In this context, <u>where appropriate</u>, the opinion of any Council Working Party with competence in the subject matter covered by the evaluation shall be requested.</p> <p><i>(it is not provided that the selected experts shall participate in the drafting of the questionnaire)</i></p> <p><i>(no specific expertise required except 'where appropriate')</i></p>	Not mentioned.	<p>Not mentioned.</p> <p>The group of experts has the task of <u>preparing and keeping up-to-date collective evaluations</u> of the situation in the candidate countries on the enactment, application and effective implementation of the <i>acquis</i> of the Union in the field of Justice and Home Affairs.</p>
Evaluation process (1)	<p>The questionnaire is sent to the MS being evaluated, which shall ensure that it replies to the questionnaire <u>in the time allowed and as fully as possible</u> and attaches where necessary all legal provisions and technical and practical data required.</p>	<p>The questionnaire is sent to the MS being evaluated, which shall ensure that it replies to the questionnaire <u>within one month and as fully as possible</u> and attaches where necessary all legal provisions and technical and practical data required.</p>		
Evaluation process (2) Country visits	<p>The evaluation team <u>shall visit</u> the MS being evaluated once it has received the reply to the questionnaire (i.e. on-the-spot evaluation).</p> <p><i>(mandatory country visit)</i></p>	<p>No later than six weeks after receiving the reply to the questionnaire, <u>where it is considered appropriate</u>, the evaluation team shall travel to that MS, with a view to clarifying the replies to the questionnaire.</p> <p><i>(optional country visit)</i></p>	<p>The Standing Committee <u>shall visit</u> all of the countries, in an order and at intervals to be laid down by the Executive Committee.</p>	

<p style="text-align: center;">Evaluation process (3) Draft Report and Final Report</p>	<p>No later than <u>one month after the evaluation visit</u>, the evaluation team draws up a draft report and <u>submit it to the MS evaluated</u> for its opinion.</p> <p><i>(no time constraints specified for receiving the opinion of the MS)</i></p> <p><i>(no obligation to amend the report substantially after the MS has given its opinion on it)</i></p> <p><u>Discussion of the draft report at a MDW meeting</u> (discussion between the evaluation team and the representatives of the MS evaluated).</p> <p>MDW adopts its <u>conclusions by consensus.</u></p>	<p><u>No later than 15 days after receiving the replies to the questionnaire or after the visit</u>, the evaluation team shall draw up a concise draft report and <u>submit it to the MS evaluated</u>, which <u>shall give its opinion within six weeks.</u></p> <p><i>(time constraints specified for receiving the opinion of the MS)</i></p> <p><i>(no obligation to amend the report substantially after the MS has given its opinion on it)</i></p> <p><u>Discussion of the draft report at meeting of Article 36 Committee or to the Working Party designated for the purpose</u> (discussion between the evaluation team and the representatives of the MS evaluated).</p> <p>Article 36 Committee or to the Working Party designated for the purpose adopts its <u>conclusions by consensus.</u></p>	<p>The report shall be drafted <u>on the basis of a standard model</u> to be laid down by the Standing Committee in consultation with the competent working groups.</p> <p>A preliminary draft of the report shall be written by the Presidency and submitted to the group of experts, who shall <u>seek a consensus on how the report should be drafted.</u> The representatives of the host State shall have observer status within this group.</p> <p>Once the report has been drawn up by the experts, it shall be <u>submitted to the host State, which may draft an opinion.</u></p> <p>The <u>report</u> and the <u>opinion</u> shall be submitted to the Standing Committee, which shall attempt to find a consensus between the two documents.</p> <p>The reports must clearly show <u>in which areas the objectives have been reached</u> and those in which this is not the case, together with <u>concrete proposals</u> for measures to take with a view to remedying or improving the situation.</p> <p>Responsibility for adopting the final decision shall in any case rest with the Executive Committee.</p>	<p>The group of experts shall, through Coreper and in close cooperation with the Committee established under former Article K.4 of the Treaty and with other Council bodies involved in the enlargement process, <u>report to the Council on the progress and results of the evaluations.</u></p>
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<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Outcome of the evaluation</p>	<p>The Council may, where it sees fit, address any <u>recommendations</u> to the MS concerned and may invite it to <u>report back to the Council</u> on the progress it has made by a deadline to be set by the Council.</p> <p><i>(follow-up of the recommendations: not mentioned)</i></p>	<p>The Council may, where it sees fit, address any <u>recommendations</u> to the MS concerned and may invite it to <u>report back to the Council</u> on the progress it has made by a deadline to be set by the Council.</p> <p><i>(follow-up of the recommendations: not mentioned)</i></p>		<p>The Commission is <u>invited to take account</u> of the collective evaluations in its proposals for significant adjustment of the priorities and objectives of the Accession Partnerships.</p> <p>These evaluations shall <u>also be taken into consideration</u> within the established structures of the European Union in the context of future discussions on enlargement.</p>
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Follow-up of the evaluation</p>	<p>Once a year, the Presidency shall inform the Council of the results of the evaluation exercises.</p> <p><i>(provision of intermediate reports)</i></p> <p>The Presidency shall inform the European Parliament <u>each year</u> of the implementation of the evaluation mechanism.</p> <p><u>At the end of a complete evaluation exercise</u>, the Council shall take the appropriate measures.</p>	<p><u>At the end of a complete evaluation exercise</u>, the Presidency shall inform the Council by the appropriate means of the results of the evaluation exercises.</p> <p><i>(provision of intermediate reports)</i></p> <p>The Presidency shall inform the European Parliament <u>at the end of a complete evaluation exercise</u> of the implementation of the evaluation mechanism.</p>	<p>Not mentioned.</p>	<p>Not mentioned.</p>
<p style="writing-mode: vertical-rl; transform: rotate(180deg);">Confidentiality / Publicity of the evaluation</p>	<p>The report drawn up within the framework of this Joint Action shall be <u>confidential</u>.</p> <p>However, the Member State evaluated may publish the report on its own responsibility.</p> <p>It must obtain the Council's consent if it wishes to publish only parts of it.</p> <p><i>(confidentiality of the questionnaire and of the replies of the MS to the questionnaire: not mentioned)</i></p>	<p>The report drawn up within the framework of this Decision shall be <u>at least a restricted document</u>.</p> <p>However, the Member State evaluated may publish the report on its own responsibility.</p> <p>It shall obtain the Council's consent if it wishes to publish only parts of it.</p> <p><i>(confidentiality of the questionnaire and of the replies of the MS to the questionnaire: not mentioned)</i></p>	<p>The Committee members and the experts shall regard as <u>confidential</u> the information they acquire in the course of performing their duties.</p> <p>The reports drawn up pursuant to this Decision shall be regarded as <u>confidential</u>.</p>	<p>Not mentioned.</p>