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Fundamental Rights

**The EU Fundamental Rights Agency: Genesis and
Potential**

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The EU Fundamental Rights Agency: Genesis and Potential

by Olivier De Schutter*

I. Introduction

‘On voit que l’histoire est une galerie de tableaux où il y a peu d’originaux et beaucoup de copies’¹... Alexis de Toqueville, with his usual lucidity, understood that our institutional imagination was limited: whatever we call new, generally is made up of bits and pieces from earlier constructions, which we assemble in ways often already familiar. The Fundamental Rights Agency of the European Union is no exception. The Agency is in existence, formally, since March 1st, 2007. It is 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 fundamental rights’.² It thus constitutes a pole of expertise, which the institutions of the European Union³ and the EU member States may rely upon in order to improve compliance with fundamental rights, as part of EU law.

A brief look at the genesis of the Fundamental Rights Agency, and at the context in which it was set up, is perhaps more instructive than a description of its structure and mandate, since it allows us to identify what it replicated, and which alternatives, present in the discussions in 2003-2005, its creators deliberately steered away from. This contribution recalls the context in which the Agency was set up (II.). It then examines the genesis of the Agency, highlighting particularly the two models from which it was inspired (III.). Since the need to ensure a harmonious cooperation with the Council of Europe – rather than risking to undermine the position of the latter as the primary human rights organization on the European continent – constituted a decisive factor in the debates on both the definition of the mandate of the Agency and its geographical remit, a separate section is devoted to this issue (IV.). This chapter closes with a brief epilogue. It is too early to evaluate the added value of the Fundamental Rights Agency to the promotion and protection of fundamental rights in the EU. But it may be safely predicted that this development, while institutional in nature, will deeply affect the exercise by the EU of its competences in order to promote fundamental rights, and lead in time to a more proactive fundamental rights policy in the Union (V.).

II. The context : the rise of human rights in the EU (1998-2003)

In a report prepared for the ‘Comité des Sages’ responsible for drafting *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000*, Philip Alston and Joseph. H. Weiler had proposed setting up a monitoring centre for human rights within the Union, which could serve to

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¹ Alexis de Toqueville, *L’Ancien régime et la révolution*, XXX

² Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53, 22.2.2007, p. 1 (Art. 2). Hereafter this Regulation shall be referred to as ‘the founding Regulation’.

³ In this chapter, the expression ‘European Union (EU)’ will be used to design either the EU or the European Community, although these remain, until the entry in force of the Treaty of Lisbon, two separate organizations.

improve the coordination of the fundamental rights policies pursued by the Member States.⁴ The main argument in favour of the creation of such a body, modeled on the then recently established European Union Centre on Racism and Xenophobia,⁵ was that it could encourage the Union to adopt a more preventive approach to human rights. ‘Systematic, reliable and focused information’, it was then argued, ‘is the starting point of a clear understanding of the nature, extent, and location of the problems that exist and for the identification of possible solutions’. The suggestion was retained by the ‘Wise persons’ report. At the time though, the institutions appeared reluctant to follow the idea. In their conclusions adopted at the Cologne European Council of 3-4 June 1999, the Heads of State and Government did suggest that ‘the question of the advisability of setting up a Union agency for human rights and democracy should be considered’.⁶ That sentence went almost unnoticed, however, overshadowed as it was by the decision, adopted at the same meeting, to launch the work on the drafting of the Charter of Fundamental Rights.⁷ And when, in a communication of May 2001 on the EU’s role in promoting human rights and democracy in third countries, the European Commission had seemed to dismiss the idea⁸ – albeit at the price of misinterpreting it⁹ –, the idea was considered buried for long.

And yet, almost ten years after their initial proposal, the Regulation establishing the Fundamental Rights Agency of the European Union largely corresponds to the idea initially expressed by Alston and Weiler.¹⁰ In the meantime however, the context had radically changed, and it is only in the light of these changed circumstances that we can understand both the apparent turnaround of the institutions on this idea, and the obstacles they faced in the debate about the Agency. In 1999-2000, two developments took place which significantly transformed the role of fundamental rights in the Union. On 7 December 2000, the Charter of Fundamental Rights of the European Union was proclaimed at the Nice European Summit.¹¹ Inspired by the fundamental rights recognized by the European Court of Justice among the general principles of law it ensures respect for, and by the international human rights instruments binding upon the EU member States, the Charter was the single most authoritative restatement of the *acquis* of the Union in the field of fundamental rights. But its main impact was not as a legal document – indeed, the Charter had no binding force when it was initially proclaimed¹² – ; it

⁴ See P. Alston and J.H.H. Weiler, ‘An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights’, in P. Alston, with M. Bustelo and J. Heenan (eds.), *The European Union and Human Rights*, Oxford, Oxford University Press, 1999, p. 3.

⁵ This Monitoring Centre, sometimes referred to as the Vienna Observatory, was created by the Council Regulation (EC) 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151 of 10.6.1997, p. 1 (since amended by Regulation (EC) No 1652/2003, OJ L 245, 29.9.2003, p. 33).

⁶ Cologne European Council, Presidency Conclusions, para. 46.

⁷ *Id.*, paras. 44-45.

⁸ Communication from the Commission to the Parliament and the Council, *The European Union’s Role in Promoting Human Rights and Democracy in Third Countries*, COM(2001) 252 final of 8.5.2001, at 20 (where the Commission takes the view that ‘the European Union does not lack for sources of advice and information. It can draw on reports from the United Nations, the Council of Europe and a variety of international NGOs. Furthermore there is no monopoly of wisdom when it comes to analysing human rights and democratisation problems, or their implications for the European Union’s relations with a country. The real challenge for any institution is to use the information in a productive manner, and to have the political will to take difficult decisions. An additional advisory body would not overcome this challenge. The Commission does not therefore intend to pursue this suggestion, nor the related one which has been occasionally been made that the Commission should produce, or subcontract an organisation to produce, a world-wide overview of the human rights situation by country, as is done by the US State Department’).

⁹ Indeed, the initial proposal was not focused on the establishment of an Observatory in order to guide the external human rights policy of the Union ; instead, as the analogy to the EUMC clearly indicates, the idea was also, and perhaps mainly, to guide the EU’s internal human rights policies.

¹⁰ See the founding Regulation, above, n. XX.

¹¹ OJ C 364 of 18.12.2000, p. 1.

¹² The Reform Treaty, signed at Lisbon on 13 December 2007 and expected to enter into force in 2009 or 2010, will contain a reference to the Charter, thus confirming its status as a legally binding instrument for the institutions of the Union and for the Member States when they implement Union law. See Article 6(2) of the Treaty on European Union as amended by the Treaty

resided in the transformation it brought about in the culture and the practice of the institutions. On the basis of the Charter, it became possible for the European Parliament to systematically check whether the legislative proposals on which it deliberates comply with the rights, freedoms, and principles which had been proclaimed in Nice.¹³ The Commission too announced its intention to verify the compatibility of its proposals with the Charter in 2001,¹⁴ a practice which, in more recent years, it has significantly improved.¹⁵ Invoking fundamental rights within the EU thus became routine in the work of the institutions, now that there existed a document, prepared under conditions which guaranteed it a high degree of legitimacy, which listed the said rights.

The second development was the entry into force on 1 May 1999 of the Treaty of Amsterdam. This Treaty not only formulated in Article 6(1) EU the values on which the Union was founded, which include human rights and fundamental freedoms. It also backed up this affirmation by a mechanism provided for in Article 7 EU, allowing for the adoption of sanctions against a State committing a serious and persistent breach of these values. In addition, following the crisis opened by the entry into the Austrian ruling governmental coalition of Jörg Haider's Freedom Party of Austria (FPÖ),¹⁶ this mechanism was improved by the Treaty of Nice, which introduced the possibility of recommendations being adopted preventively, where a 'clear risk of a serious breach' of those values is found to be present.¹⁷

The inclusion of such a mechanism soon raised the question whether these provisions of the Treaty on the European Union should lead to a permanent monitoring of the situation of fundamental rights in the Member States of the European Union. The European Parliament, through its Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee), took the leading role in this matter. As it noted itself, the Treaty of Nice 'acknowledges Parliament's special role as an advocate for European citizens' by granting the European Parliament the right to call for a procedure to be opened in the event of a clear risk of a serious breach.¹⁸ But even before that Treaty entered into force, the European

of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, of 17 December 2007, p. 1) (referring to the EU Charter of Fundamental Rights in the revised form it has been proclaimed on 12 December 2007 (OJ C 303 of 14.12.2007, p. 1)).

¹³ See Article 34 of the Rules of Procedure of the European Parliament, 16th Edition, July 2006, available on: <http://www.europarl.europa.eu/omk/sipade3?PUBREF=-//EP//NONSGML+RULES-EP+20060703+0+DOC+PDF+V0//EN>.

¹⁴ SEC(2001) 380/3.

¹⁵ In 2005, the Commission adopted a Communication clarifying the methodology it would use in order to assess the compatibility with the Charter of Fundamental Rights of its legislative proposals (Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring, COM(2005) 172 final of 27.4.2005). In addition, when they were revised in 2005, the guidelines for the preparation of impact assessments paid greater attention to the potential effects of different policy options on the guarantees in the Charter: see SEC(2005)791, 15.6.2005. Although the new guidelines are still based, as the former impact assessments (see Communication of 5 June 2005 on Impact Assessment, COM(2002)276), on a division between economic, social and environmental impacts, the revised set of guidelines, fundamental rights are included under these different rubrics. Indeed, a specific report was commissioned by the European Commission (DG Justice, Freedom and Security) to EPEC (European Policy Evaluation Consortium) in preparation of the revised guidelines: see EPEC, *The Consideration of Fundamental Rights in Impact Assessment. Final Report*, December 2004, 61 pages.

¹⁶ On this crisis, see M. Happold, 'Fourteen against One : The EU Member States' Response to Freedom Party Participation in the Austrian Government', 49 *International and Comparative Law Quarterly* 953 (2000); and E. Bribosia, O. De Schutter, T. Ronse and A. Weyembergh, 'Le contrôle par l'Union européenne du respect de la démocratie et des droits de l'homme par ses Etats membres : à propos de l'Autriche', *Journal des tribunaux – Droit européen*, March 2000, pp. 61-65. On the insertion of Article 7(1) EU by the Treaty of Nice, see G. de Búrca, 'Beyond the Charter: How Enlargement has enlarged the Human Rights Policy of the EU', in O. De Schutter and S. Deakin (eds), *Social Rights and Market Forces: Is the open coordination of employment and social policies the future of social Europe?*, Bruxelles, Bruylant, 2005, pp. 245-278, at pp. 259-262.

¹⁷ This preventive mechanism is now described in Article 7(1) EU.

¹⁸ See the Report on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)) (rapp. J. Voggenhuber), para. 6 of the proposal for a resolution; this passage has been maintained without amendment in the

Parliament inaugurated the practice of adopting annual reports on the situation of fundamental rights in the Union, a practice which was facilitated – by providing a clearer grid of analysis – by the adoption of the EU Charter of Fundamental Rights at the Nice Summit of 2000.¹⁹ This practice was justified by the consideration that, ‘following the proclamation of the Charter, it is [...] the responsibility of the EU institutions to take whatever initiatives will enable them to exercise their role in monitoring respect for fundamental rights in the Member States, bearing in mind the commitments they assumed in signing the Treaty of Nice on 27 February 2001, with particular reference to new Article 7(1)’, and that ‘it is the particular responsibility of the European Parliament (by virtue of the role conferred on it under the new Article 7(1) of the Treaty of Nice) and of its appropriate committee [the LIBE Committee] to ensure [...] that both the EU institutions and the Member States uphold the rights set out in the various sections of the Charter’.²⁰

Since it soon appeared that the resources of the LIBE Committee and the expertise and time it had at its disposal were not sufficient to enable it to conduct this monitoring function in an entirely satisfactory manner, the European Parliament requested that

a network be set up consisting of legal experts who are authorities on human rights and jurists from each of the Member States, in order to ensure a high degree of expertise and enable Parliament to receive an assessment of the implementation of each of the rights laid down in the Charter, taking account of developments in national laws, the case law of the Luxembourg and Strasbourg Courts and any notable case law of the Member States' national and constitutional courts.²¹

That network was set up in September 2002.²² In October 2003, the European Commission adopted a communication in which it set out its views about the implementation of Article 7 EU.²³ Referring to the work of the EU Network of independent experts on fundamental rights, it took the view that the information collected by the network ‘should make it possible to detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty. Through its analyses the network can also help in finding solutions to remedy confirmed anomalies or to prevent potential breaches. Monitoring also has an essential

European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), adopted on 20 April 2004 (see para. 6 of the operative part of the resolution).

¹⁹ See the Report on the situation as regards fundamental rights in the European Union (2000) (rapp. Th. Cornillet), PE 302.216/DEF, EP doc. A5-0223/2001 (2000/2231(INI)); the Report on the human rights situation in the European Union (2001) (rapp. J. Swiebel), PE 311.039/DEF, EP doc. A5-0451/2002 (2001/1414(INI)) (and Resolution of 15 January 2003 on the situation concerning fundamental rights in the European Union (2001), OJ C 38 E, 12.2.2004, p. 174); Report on the situation as regards fundamental rights in the European Union (2002) (rapp. F. Sylla), PE 329.881/DEF, EP doc. A5-0281/2003 (2002/2013(INI)) (and Resolution of 4 September 2003 on the situation as regards fundamental rights in the European Union (2002), P5_TA(2003)0376); Report on the situation as regards fundamental rights in the European Union (2003) (rapp. A. Boumediene-Thiery), PE 329.936/DEF, EP doc. A5-0207/2004 (2003/2006(INI)). The resolution proposed on the basis of the report by Ms A. Boumediene-Thiery was rejected by the European Parliament. The Cornillet Report was the first one to use the EU Charter of Fundamental Rights as its template. However, the practice of preparing an annual report on the situation of fundamental rights of the Union predated the adoption of the Charter : see Resolution on the annual report on human rights in the EU (1998-1999), (rapp. Haarder) of 16 March 2000 (EP doc. A5-0050/2000).

²⁰ Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000) (rapp. Thierry Cornillet) (2000/2231(INI)) (OJ C 65 E, 14.3.2002, pp. 177-350), paras. 2-3.

²¹ Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000), cited above, para. 9.

²² The EU Network of Independent Experts on Fundamental Rights is composed of 25 experts and monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the EU Charter of Fundamental Rights. See the website: http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm See also: Ph. Alston and O. De Schutter (eds), *Monitoring Fundamental Rights in the EU – The Contribution of the Fundamental Rights Agency*, Hart publ., Oxford, 2005.

²³ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final of 15.10.2003.

preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded'. That language was practically borrowed from the first report of the Network, published in March 2003, which presented the situation of fundamental rights in the EU and its member States in 2002. In that report, the Network had also proposed that it should act as a clearinghouse for the identification and dissemination of best practices identified in the field of fundamental rights, thus inaugurating what it was then fashionable to refer to as an 'open method of coordination' in that area. The Commission considered that this required a more active contribution from the Member States. It wrote in its 2003 communication : 'It is important for the Member States to be involved in the exercise of evaluating and interpreting the results of the work of the network of independent experts. With a view to exchanging information and sharing experience, the Commission could organise regular meetings on the information gathered with the national bodies dealing with human rights'.²⁴

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

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

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

Union intervention pursuant to Article 7 of the EU Treaty must therefore be confined to instances of clear risks and persistent breaches and may not be invoked in support of any right to, or policy of, permanent monitoring of the Member States by the Union. Nevertheless, the Member States, accession countries and candidate countries must continue to develop democracy, the rule of law and respect for fundamental rights further and, where necessary, implement or continue to implement corresponding reforms.²⁵

Thus, little by little, a 'fundamental rights culture' was being established within the EU institutions in the early 2000s. But a number of different directions were being explored at the same time. First, the idea had taken root that neither the EU institutions, nor the EU member States when they implemented EU law, could afford to ignore the requirements of fundamental rights in the course of their activities. The adoption of the Charter of Fundamental Rights, by the large visibility it soon gained, served essentially that purpose : it provided guidance and legal certainty, thus facilitating self-monitoring by

²⁴ At para. 2.2. of the communication, pp. 9-10.

²⁵ European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), adopted on 20 April 2004, para. 12.

the institutions. Secondly, the role performed on the basis of Article 7 EU by the European Parliament and by the Network of Independent Experts on fundamental rights, although the two acted as a relatively dysharmonious tandem,²⁶ gave birth to the idea that the EU might progressively develop a monitoring role, in order to identify at an early stage whether certain member States might be adopting a conduct which would threaten the mutual trust on which the area of freedom, security and justice, was to be built. Third, finally, was the idea that such a systematic comparison could constitute a condition for the development of an active ‘fundamental rights policy’ of the EU. This was linked to the idea that a systematic comparison of the developments of fundamental rights in the Member States might lead to identify the situations where an initiative from the EU is required, or the emerging good practices which could be diffused ; it was expressed most explicitly in the ‘open method of coordination’ proposed by the EU Network of Independent Experts on fundamental rights.

After the European Council of December 2003 had decided that the EU should establish a ‘Human Rights Agency’ in Vienna, and despite two particularly active presidencies of the Council of the EU on this subject,²⁷ three more years of discussions were necessary in order to arrive at an agreement on the tasks, structure, and relationships to other bodies or organizations of the Fundamental Rights Agency for the European Union. In large part, this is to be explained by the coexistence in the discussions of these three distinct rationales, to which correspond different tools, different degrees of independence, and different institutional balances.

III. The birth of the Agency and the initial debate (2003-2005)

The relatively long period of time which was required to find an agreement on the final Regulation may also be explained, in part, by the circumstances in which the initial decision was made to set up the Agency. When the Heads of States and Governments of the Member States announced at their Brussels European Council of 13 December 2003 their intention to extend the mandate of the EU Monitoring Centre on Racism and Xenophobia (EUMC) in order to create a ‘Human Rights Agency’²⁸ entrusted with the mission to collect and analyse data in order to define the policy of the Union in this field, most observers were taken by surprise. The announcement was made without any feasibility study being prepared, and essentially, it would seem, to reinforce the presence of the Union in Vienna and to find a dignified solution to the need to reform the EU Monitoring Centre on Racism and Xenophobia. Indeed, understandable in retrospect, the very choice of the European Council to create the Human Rights Agency by enlarging the competences of the EU Monitoring Centre on Racism and Xenophobia (EUMC)²⁹ was not necessarily obvious when that option was proposed. At the time when

²⁶ During two years following the establishment of the EU Network of Independent Experts on fundamental rights in September 2002, there was a relatively close cooperation between the network’s activities and the LIBE Committee of the European Parliament. However, when, in July 2004, the resolution proposed on the basis of the Report on the situation as regards fundamental rights in the European Union (2003) prepared by MEP A. Boumediene-Thiery failed to be adopted, the LIBE Committee apparently drew the conclusion that it should not continue replicating the work of the network, whose reports in any event, thanks to the structure of the network (with one expert covering each EU member State, allowing for a detailed examination of that State and systematic comparisons of the 15, and then the 25 States), it would hardly be able to improve upon. The network pursued its activities for two further years, with the LIBE Committee using the information collected in the reports, or the opinions prepared by the network, in a more selective mode.

²⁷ The Austrian presidency of the first semester 2006, for obvious reasons, was particularly eager to achieve an agreement, and mostly effective in moving towards finding a consensus. Germany was due to succeed Austria in 2006 but stepped aside in favor of Finland, the next in line, as general elections were scheduled in Germany for that period. Agreement on the Fundamental Rights Agency was thus reached under the Finnish presidency of the second semester 2006, again, thanks to an effective presidency.

²⁸ The expression ‘Human Rights Agency’ was also used in the Hague Programme on the strengthening of Freedom, Security and Justice in the Union appended to the conclusions of the European Council of 4-5 November 2004.

²⁹ This Monitoring Centre, sometimes referred to as the Vienna Observatory, was created by the Council Regulation (EC) 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151 of 10.6.1997, p. 1.

the European Council announced its decision, the European Commission had already concluded, on the basis of an external evaluation of the activities of the EUMC between its creation in 1998 and end 2001,³⁰ that ‘the Centre should continue to concentrate on racism and that an extension to other fields would be an unwelcome distraction within the limits of the resources likely to be available to the Centre and that it would lead to a weakening of the emphasis on racism’.³¹ The choice to broaden the mandate of the EUMC by transforming it into a Human Rights Agency seemed to go in the exact opposite direction, although that expansion was to be accompanied, obviously, with a significant increase in the resources.

Thus, when the European Council requested that the European Commission make a proposal on the establishment of a ‘Human Rights Agency’ for the EU, the Commission had no preconceived opinion about the structure such an Agency should be given, nor even about its precise mandate. Understandably, the Commission chose, prior to making a formal proposal, to organize a wide-ranging consultation in order to identify more precisely where the added value of a Fundamental Rights Agency for the European Union might reside, how it should be structured, and how its tasks should be defined. The Commission presented a public consultation document on 25 October 2004.³² In reply to this consultation document, the Commission received contributions from a wide range of actors and, in order to discuss the modalities of the proposed institution, a public hearing was held on 25 January 2005.³³ The proposals made by the Commission on 30 June 2005³⁴ thus reflected the result of more than a full year of debate, which involved a remarkably large number of stakeholders. As illustrated by the different positions expressed in the course of these consultations, the expectations were varied. Three basic models were opposed. The two first models were inspired by the idea of independent national human rights institutions. A third model was more in line with the classical mode of organisation of EU agencies. They are examined in turn.

1. The relevance of the Paris Principles on national institutions for the promotion and protection of human rights

The national human rights institutions have been developing particularly since the mid 1990s, following the adoption in 1991 of the so-called ‘Paris Principles’ defining the characteristics they should present³⁵ and the call made by the World Conference on Human Rights held in Vienna in June

According to Article 2(1) of its instituting Regulation, the EUMC must ‘provide the Community and its Member States (...) with objective, reliable and comparable data at European level on the phenomena of racism, xenophobia and anti-Semitism in order to help them when they take measures or formulate courses of action within their respective spheres of competence’.

³⁰ http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/origin/eumc_eval2002_en.pdf

³¹ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Activities of the European Monitoring Centre on Racism and Xenophobia, together with proposals to recast Council Regulation (EC) 1035/97, COM(2003)483 final of 5.8.2003.

³² COM(2004) 693 final.

³³ The response from the academic world and from civil society organizations was remarkably high. See, for a collection of contributions submitted in the course of the consultation, XXX. In addition, see P. Alston and O. De Schutter (eds), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Hart Publ., Oxford, 2005.

³⁴ Proposal for a Council Regulation establishing a European Agency for Fundamental Rights and 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, COM(2005)280, 30.6.2005.

³⁵ The Paris Principles on national institutions for the promotion and protection of human rights were approved by the United Nations General Assembly in 1993 in resolution 48/134 of 20 December 1993 (A/RES/48/134, adopted by the 85th plenary meeting of the UN General Assembly, ‘National institutions for the promotion and protection of human rights’). After having been initially adopted in 1991, at a conference convened by the French Commission nationale consultative des droits de l’homme – the earliest of such institutions to be established, in 1947 – and the Office of the High Commissioner for Human Rights, these principles were approved by the Commission on Human Rights in resolution 1992/54 of 3 March 1992 before being submitted to the UN General Assembly. They are further explained in *National human rights institutions: a handbook on the establishment and strengthening of national institutions for the promotion and protection of human rights* (New York/Geneva, 1995), see :

1993, in the Declaration and Programme of Action, for the establishment of such institutions. The World Conference on Human Rights reaffirmed ‘the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights’. It also encouraged ‘the establishment and strengthening of national institutions, having regard to the ‘Principles relating to the status of national institutions’ and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level’.³⁶ The Committee of Ministers of the Council of Europe followed suit, adopting in 1997 a recommendation addressed to the Council of Europe Member States requesting that they set up such institutions.³⁷ The same recommendation was made by a number of UN human rights treaty bodies.³⁸ These recommendations have been complemented by compendiums of best practices for the establishment of such institutions.³⁹ It was quite natural therefore for the European Commission, in the public consultation document it presented on 25 October 2004, to refer to the Paris Principles as a potential ‘source of inspiration’ for the establishment of the EU Fundamental Rights Agency.⁴⁰ That model was also seen as attractive because, according to its proponents, it would allow the Agency to be part of a network of existing NHRIs in the Member States, and thus to rely on those NHRIs in order to prepare its reports and recommendations, following the model of ‘regulation by information’ which had characterized the development of EU agencies in recent years.⁴¹

There were two ways in which the Paris Principles could have inspired the establishment of the EU Fundamental Rights Agency, corresponding to the first two models which were explored.⁴² One model was that of a Fundamental Rights Agency conceived as a ‘national human rights institution’ for the EU. A related yet distinct model would see the Agency as not necessarily established itself, in the definition of its mandate and in its organizational structure, on the Paris Principles, but as based on the existing network of European NHRIs, and as a forum in which the existing NHRIs (or the equivalent institutions in the Member States which have no NHRI in the sense of the Paris Principles) could exchange their experiences and work together in order to contribute, through reports, recommendations and opinions, towards improving the protection of fundamental rights in the Union.

While analytically distinct, these two approaches could be combined to take into account the specificities of an independent human rights institution having to be established at EU level, but which could be expected also to cooperate closely with actors at the member State level in monitoring the

<http://www.ohchr.org/english/about/publications/training.htm>.

³⁶ Vienna Declaration and Programme of Action of 25 June 1993, UN doc. A/CONF.157/23, at para. 36.

³⁷ Recommendation No R(97)14 of the Committee of Ministers of the Council of Europe on the establishment of independent national institutions for the promotion and protection of human rights, adopted on 30 September 1997.

³⁸ See particularly General Comment No. 10 of the Committee on Economic, Social and Cultural Rights of 14 December 1998: *The role of national human rights institutions in the protection of economic, social and cultural rights* (UN Doc E/C.12/1998/25) ; General Comment No. 2 of the Committee on the Rights of the Child (2002): *The role of independent national human rights institutions in the protection and promotion of the rights of the child*, HRI/GEN/1/Rev. 6, p. 295; and General Comment No. 5 of the Committee on the Rights of the Child, of 27 November 2003: *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, para. 65.

³⁹ See, apart from the United Nations *Handbook* referred to above : Council of Europe, *Non-judicial means for the protection of human rights at the national level* (Strasbourg, 1998); Commonwealth Secretariat, *National Human Rights Institutions - Best Practice* (London, 2001).

⁴⁰ COM(2004) 693 final, 25.10.2004, at p. 4.

⁴¹ See, in particular, for an excellent discussion of this form of regulation by networking, Giandomenico Majone, ‘The new European agencies : regulation by information’, *Journal of European Public Policy*, vol. 4, No. 2 (1997), pp. 262-275.

⁴² On this distinction between these two ways the Paris Principles on national institutions for the promotion and protection of human rights could influence the establishment of the Fundamental Rights Agency, see Manfred Nowak, ‘The Agency and National Institutions for the Promotion and Protection of Human Rights’, in Philip Alston and Olivier De Schutter (eds), *Monitoring Fundamental Rights in the EU*, cited above, chap. 4.

compliance with fundamental rights of the implementation of EU law by the member States. This, indeed, was the approach of the European Group of national human rights institutions.⁴³ Referring to the Paris Principles, which identify pluralism, alongside independence, as critical to the establishment of national human rights institutions, they argued that such pluralism required from the Agency that it closely cooperate ‘with the already existing institutions, particularly NHRIs and other national independent bodies. The EU’s subsidiarity requirement and the need for local input should guarantee the Agency’s legitimacy and efficiency’.⁴⁴ They proposed, then, that the Agency’s management board be composed of the representatives of the different existing NHRIs or other independent institutions of the EU Member States, and that there be a formal link between the Agency and the European Group of NHRIs as a whole : ‘Through the European network of NHRIs, the Agency will benefit from a solid human rights base within the member states as well as strong links with local communities’. One precedent which the European Group of National Human Rights Institutions could refer to was the ‘Working Party Article 29’ established under Article 29 of the 1995 Data Protection Directive.⁴⁵ This Working Party, which has an advisory status and is to act independently, is composed of a representative of the supervisory authority or authorities designated by each Member State and of a representative of the authority or authorities established for the Community institutions and bodies, and of a representative of the Commission. Essentially, the European NHRIs were proposing that such a model be replicated in the structure of the Fundamental Rights Agency, with a formal representation within the Agency of each NHRI.

There is no doubt that the Paris Principles on national institutions for the promotion and protection of human rights strongly influenced the proposals made by the European Commission on 30 June 2005, when it presented to the Council draft texts for a Council Regulation establishing a European Agency for Fundamental Rights and for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union.⁴⁶ Certain elements in the proposal of the Commission appeared to be influenced by the first of the two models distinguished here : for instance, the establishment of a fundamental rights forum was envisaged, the forum having to be composed in a way roughly similar to a NHRI constituted at the level of the Union⁴⁷; it was emphasized that the Agency should be ‘independent’⁴⁸; apart from the two representatives of the Commission, the other members of the management board were to be ‘independent persons’ appointed by each Member State (27 members thus, or more if third countries participate), by the European Parliament (1), by the Council of Europe (1); and the Agency was encouraged to undertake a close cooperation with civil society, non-governmental organisations, and social partners.⁴⁹

Other elements however may be related to the second model : in particular, the ‘independent persons’ the Member States should appoint to the management board of the Agency were to be persons ‘with high level responsibilities in the management of an independent national human rights institution or with thorough expertise in the field of fundamental rights gathered in the context of other independent institutions or bodies’,⁵⁰ which suggested a vision of the management board as a network of NHRIs

⁴³ For a description of the activities of the European Coordinating Group of national institutions for the promotion and protection of human rights, see the communication submitted to the United Nations Commission on Human Rights, UN doc. E/CN.4/2005/NI/2 (30 March 2005).

⁴⁴ See European Group of National Human Rights Institutions, *Common position regarding the European Commission’s proposals for a Council regulation establishing a Fundamental Rights Agency for the European Union*, 17 January 2006.

⁴⁵ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 , 23.11.1995, p. 31.

⁴⁶ COM(2005)280, 30.6.2005.

⁴⁷ Art. 14 of the proposal for a Regulation.

⁴⁸ Art. 15(1) of the proposal for a Regulation: ‘The Agency shall fulfil its tasks in complete independence’.

⁴⁹ Art. 4(1), i) of the proposal for a Regulation.

⁵⁰ Art. 11(1), al. 2, of the proposal for a Regulation.

and equivalent institutions which may exist in the Member States ; the two representatives of the Commission on the management board were to have a right to vote on the decisions adopted by the board, which was not in conformity with the requirement under the Paris Principles that if the government is represented, its representatives should have only a consultative voice ; furthermore, the executive board was to comprise, not only the chairperson and the vice-chairperson of the management board, but also the two representatives of the Commission, which again would not be compatible with an understanding of the EU Fundamental Rights Agency conceived as a national institution for the promotion and protection of human rights for the legal order of the Union.

Thus, while there were many nods to the Paris Principles in the proposals of the Commission, and while the composition of the management board seemed to reflect the idea of an Agency built as a network of the representatives of the NHRIs or equivalent bodies established within the member States, the proposals did not espouse any of the two models distinguished above in their pure form ; nor did they follow completely the lines suggested by the European Group of NHRIs, which were a combination of both. Indeed, the discussions revealed a number of objections made to each of these two models or to any compromise between them which would adhere firmly to the Paris Principles. Some considered that the Paris Principles could not be reconciled with the specificities of EU law and the role of agencies in the EU institutional construction. It was said, in particular, that the fact that the EU has limited competences – it may only exercise the competences which it has been attributed by the Member States – would not be reconcilable with the tasks normally entrusted to a NHRI. Second, it was added, the institutions of the Union should preserve their entire freedom of appreciation about what initiatives to take in the exercise of their competences to develop fundamental rights, and such appreciation – especially where it might involve the very delicate appreciation of the situation of fundamental rights in the Member States – could not be left to an Agency. Third, the agencies as they exist under the framework of European Community law⁵¹ would not be reconcilable with the kind of organisation required from an independent institution for the promotion and protection of human rights.

None of those arguments were really conclusive, of course. In particular, even if organized as a NHRI in conformity with the Paris Principles, it was clear that the Agency would have had to take into account the principle of conferral, and that its conclusions and opinions should not contain recommendations to the Union institutions that they exercise powers beyond those attributed to them. It was equally clear, and quite compatible with the Paris Principles themselves, that any conclusions or opinions adopted by the Agency would not be binding upon the institutions, who were to be left entirely free either to take them into account or to disregard them, in the exercise of their powers : indeed, NHRIs are normally conceived as acting on an advisory basis, i.e., as bodies with purely consultative powers. Finally, despite the apparent novelty of introducing the Paris Principles into the legal order of the EU, there were many similarities between a Fundamental Rights Agency and other agencies set up in order to provide the necessary expertise collected through independent means to the institutions in order to facilitate their work, many of which have a decentralized and ‘networked’ structure linking them to national bodies, so that the classical model of Community agencies was in fact transposable to the setting up of an EU Fundamental Rights Agency conceived along the lines of a NHRI for the Union.

The conception of the EU Fundamental Rights Agency conceived as a network of NHRIs or equivalent institutions existing in the EU Member States faced an important obstacle, however, which is the lack of uniformity among the Member States. At the time when the debate was held about the future shape of the Agency, only 13 out of 25 Member States had NHRIs considered to comply with

⁵¹ See, in particular, European Commission, *Meta-Evaluation on the Community Agency System*, Final Report of the Budget DG – Evaluation Unit, 15 September 2003.

the Paris Principles, and even among those States, strikingly different types of institutions could be identified ; while in a few of the other Member States institutions performing functions relatively similar to those of NHRIs do exist, seven Member States still had no institution even vaguely similar to a NHRI, and in certain cases – for example in the Netherlands – the government had explicitly rejected the idea of creating such an institution.⁵² In addition, establishing the EU Fundamental Rights Agency as a network of existing NHRIs, with each NHRI (or equivalent institution) being represented as such within the structure of the Agency, would have left open one important question : whereas each NHRI deals with national questions (i.e., with the promotion and protection of human rights at national level), the Agency would require an expertise about specifically European questions (i.e., which concern the development of Union legislation and policies), which are potentially very different and have their own specificities. Finally, this model could have led to some confusion as to the actual role of the EU Fundamental Rights Agency : while the Agency would in principle be entrusted with contributing to the promotion and protection of human rights within the legal order of the EU, it might be perceived, with such a structure, as a forum where the Member States' performances in the field of human rights are compared with one another, and where national institutions meet in order to share concerns they have about human rights developments at the national level.

On these different issues, the differences should not be underestimated with the Working Party created under Article 29 of the Data Protection Directive, which the European Group of NHRIs had referred to in its contributions to the consultation on the future shape of the Fundamental Rights Agency for the EU.⁵³ This Working Party, which has an advisory status and is to act independently, is composed of a representative of the supervisory authority or authorities designated by each Member State and of a representative of the authority or authorities established for the Community institutions and bodies, and of a representative of the Commission. However, under this Directive, each Member State has to set up an independent supervisory authority responsible for monitoring the application within its territory of the provisions adopted pursuant to the Directive.⁵⁴ It would probably have been unrealistic for the Commission to suggest, as part of its proposals for the establishment of the EU Fundamental Rights Agency, that all the Member States be obliged to create an independent institution for the promotion and protection of human rights, which would ensure an equivalent uniformity. Even apart from questions of subsidiarity and proportionality, this would have entailed budgetary consequences, and raised political issues, which almost certainly would have led the States to reject any such suggestion. Moreover, while the rules on which both the national supervisory authorities and the Working Party created under Article 29 of the Data Protection Directive have been harmonized throughout the Member States – so that the Working Party may ensure that the interpretations converge and that problems of interpretation are clarified in its opinions –, certainly no such harmonization can be said to have taken place in the vast fields which present a relationship to the protection of fundamental rights. Indeed, fundamental rights are not as such a 'field' : they are a set of requirements which have to be complied with in all the fields in which the public authorities act, and they cannot be circumscribed to any particular domain of activity.

2. The relevance of the Community framework for the establishment of Agencies

The decision to establish a Fundamental Rights Agency arrived at a time when such agencies had been growing significantly in the EU.⁵⁵ There were four such agencies in 1993 ; in 2003, their number had

⁵² The EU Network of Independent Experts on Fundamental Rights prepared a comparative table of NHRIs within the EU Member States in March 2004. Opinion n° 1-2004. The documents of the Network may be consulted on :

http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm

⁵³ See above, XXX.

⁵⁴ See chapter VI of the Data Protection Directive.

⁵⁵ This sparked a growth of the literature on the subject. See, inter alia, Renaud Dehousse, 'Regulation by networks in the European Community : the role of European agencies', *Journal of European Public Policy*, vol. 4, No. 2 (1997), pp. 246-

grown to fifteen, and three further agencies had been proposed only that year.⁵⁶ Since the early days of European integration, the European Court of Justice has imposed strict limitations to the delegation of powers to agencies : for reasons of ‘institutional balance’, such delegation could only concern ‘clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of criteria determined by the delegating authority’.⁵⁷ Despite this, the model was considered attractive to the Commission for a number of reasons.⁵⁸ First, the delegation to agencies of certain well-defined tasks allows the Commission to focus on its core missions, and to face the increasingly important workload the expansion of EU policies entails. Secondly, such delegation ensures a relative insulation of the policy fields concerned from political pressure, including pressure from the member States in favor of their national interests, thus also improving policy consistency across time. Third, since the agencies are to develop a highly specialized technical expertise, their creation contributes to ‘reducing asymmetries of information between the operators and the administration’⁵⁹ – although the risk is, of course, that the specialized nature of the agencies’ functions will facilitate regulatory capture by the sectors concerned.

Although few would contest the reality of these advantages, it is probably no exaggeration to say that the attempts of the Commission to provide a coherent framework for the development of agencies within the EU, each of which has been set up to respond to needs identified, at a particular moment, in a specific sector, were a complete failure. In December 2002, the Commission adopted a Communication on the Operating Framework for the European Regulatory Agencies.⁶⁰ This document

261 ; Michelle Everson, ‘Independent Agencies : Hierarchy Beaters ?’, *European Law Journal*, vol. 1 (1995), pp. 180-204 ; A. Kreher, ‘Agencies in the European Community – a step towards administrative integration in Europe’, *Journal of European Public Policy*, vol. 4, No. 2 (1997), pp. 93-118 ; Giandomenico Majone and Michelle Everson, ‘Institutional Reform : Independent Agencies, Oversight, Coordination, and Procedural Control’, in Olivier De Schutter, Notis Lebessis and John Paterson (eds), *Governance in the European Union*, OOEPC, Luxembourg, 2001; Mark Thatcher, ‘Regulation after delegation : independent regulatory agencies in Europe’, *Journal of European Public Policy*, vol. 9, No. 6 (2002), pp. 954-972 ; Ellen Vos, ‘Reforming the European Commission : What Role to Play for EU Agencies ?’, *C.M.L.Rev.*, vol. 37 (2000), pp. 1113-1134 ; Ellen Vos, ‘Agencies and the European Union’, in L. Verhey and T. Zwart (eds), *Agencies in European and Comparative Law*, Maastricht, Intersentia, 2003.

⁵⁶ Damien Geradin and Nicolas Petit, ‘The Development of Agencies at EU and National Levels : Conceptual Analysis and Proposals for Reform’, *Yearbook of European Law*, pp. 137-197, at p. 137.

⁵⁷ Case 9/56, *Meroni v. High Authority* [1957-8] ECR 133. The delegation of wide discretionary powers to an entity other than the authority designated by the treaties was ruled out by the Court on the basis of considerations of ‘institutional balance’, which the Court read into Article 7 of the EC Treaty. As illustrated by another case, an alternative argument may be found in the enumeration of the powers of the Commission by Article 211 the EC Treaty : see Case 98/80, *Giuseppe Romano v. Institut national d’assurance maladie-invalidité* [1981] ECR 1241. The Commission has adopted a quite strict reading of this case-law (see Commission of the European Communities, *European Governance. A White Paper*, COM(2001) 428 final, 25.7.2001, at p. 24 (defining the conditions for the creation of regulatory agencies at EU level)), notwithstanding the critiques addressed in scientific literature to the approach followed by the Court (see, in particular, Ellen Vos, ‘Reforming the European Commission : What Role to Play for EU Agencies ?’, cited above, who considers that under the current Treaty provisions, ‘agencies could be delegated discretionary powers provided that this is accompanied by a reinforcement of re-balancing of the existing institutions’ (at p. 1124) ; or D. Geradin and N. Petit, ‘The Development of Agencies at EU and National Levels : Conceptual Analysis and Proposals for Reform’, cited above, at pp. 148-149). Both in its 2002 contribution to the Convention on the Future of Europe and in the so-called ‘Penelope’ project prepared as a contribution to the debate on the Constitutional Treaty, the European Commission advocated inserting into the Treaty establishing a Constitution for Europe a provision allowing for the establishment of regulatory agencies, but along the lines suggested by the ‘Meroni’ doctrine of the Court (see Communication from the Commission to the European Convention on the Institutional Architecture, ‘For the European Union, Peace, Freedom, Solidarity’, COM(2002) 728 final of 11.12.2002 (proposing a clause to the effect that ‘agencies cannot be given either the responsibilities which the Treaty assigns directly to the Commission, nor decision-making powers in areas in which they would be required to arbitrate in conflicts between public interests, nor can they exercise political appraisal powers or make complex economic assessments’)).

⁵⁸ On these arguments, see in particular the report commissioned by the European Commission, M. Everson, G. Majone, L. Metcalfe, and A. Schout, *The Role of Specialised Agencies in Decentralising Governance*, 1999.

⁵⁹ Damien Geradin and Nicolas Petit, ‘The Development of Agencies at EU and National Levels : Conceptual Analysis and Proposals for Reform’, cited above, p. 170.

⁶⁰ COM(2002) 718 final, of 11.12.2002.

aimed to offer a typology of the different agencies operating at EU level. It resulted however in a bizarre distinction between two categories of agencies. On the one hand were the ‘executive’ agencies, to which purely managerial tasks were delegated, and which were to assist the Commission in the implementation of certain programmes. On the other hand were ‘regulatory’ agencies, who were ‘required to be actively involved in exercising the executive function by enacting instruments which contribute to regulating a specific sector’.⁶¹ But this second category itself was sub-divided into ‘decision-making’ agencies and ‘executive’ agencies, with only the former being recognized the power to adopt legal acts binding upon third parties. The reintroduction of the sub-category of ‘executive’ agencies within the category of ‘regulatory’ (i.e., ‘non-executive’) agencies – a choice deemed ‘simply absurd’ by Geradin and Petit⁶² – created, in the end, more confusion even than there existed before.

The absence of a coherent framework or typology for the establishment of agencies at EU level did not constitute a serious handicap in the discussions on the Fundamental Rights Agency, however. It was indeed clear from the outset that, since the new agency was to be built on the existing European Union Monitoring Centre on Racism and Xenophobia (EUMC), it would constitute an agency entrusted mainly with information-gathering tasks, like the European Environment Agency or the European Monitoring Centre for Drug and Drug Addiction. As already noted, the main task of the EUMC was to provide the Community and its Member States with ‘objective, reliable and comparable data at European level on the phenomena of racism, xenophobia and anti-Semitism in order to help them when they take measures or formulate courses of action within their respective spheres of competence’.⁶³ At the same time, this was not necessarily incompatible with an understanding of the Fundamental Rights Agency inspired by the Paris Principles on national institutions for the promotion and protection of human rights, since the EUMC already was authorized in its founding regulation to ‘formulate conclusions and opinions for the Community and its Member States’⁶⁴ – a power it had used only sparingly and with great caution, but which a Fundamental Rights Agency, conceivably, could have developed to a much greater extent.

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In the end, continuity prevailed. Most of the structural features of the Fundamental Rights Agency, both in the proposals put forward by the Commission in June 2005 and in the final Regulation adopted in February 2007, closely link it to the EUMC. Although some form of monitoring the situation of fundamental rights in the EU Member States had developed in 2000-2006, through the combined and partly overlapping practices of the European Parliament’s LIBE Committee and of the EU Network of Independent Experts on Fundamental Rights,⁶⁵ this task clearly was not entrusted to the Agency. The founding Regulation does not confer upon the Agency the mandate to supervise compliance with fundamental rights in the Union, even as regards the activities of the institutions or bodies of the Union or of the Member States when they implement Union law. Rather, the Agency is to be seen as a pole of expertise in human rights, which will provide advice to the institutions and the Member States, in order to improve their understanding of the requirements of fundamental rights and to better inform

⁶¹ *Id.*, at p. 4.

⁶² Damien Geradin and Nicolas Petit, ‘The Development of Agencies at EU and National Levels : Conceptual Analysis and Proposals for Reform’, cited above, p. 181.

⁶³ Article 2(1) of the Council Regulation (EC) No. 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151, 10.6.1997.

⁶⁴ Article 2(2), e), of the Council Regulation (EC) No. 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, cited above.

⁶⁵ See above, text corresponding to nn. XXX

any initiatives they adopt in this field.⁶⁶

The Paris Principles on national institutions for the promotion and protection of human rights recommend that such institutions choose freely which issues to take up, provided they relate to their role in the promotion and protection of human rights. But the Paris Principles failed to influence the proposals of the European Commission on this point. Neither the initial proposals of the Commission, nor the final Regulation, authorized the Agency to decide for itself what issues it should focus on, and whether it should address recommendations to the institutions on pending legislative discussions. Instead, it was agreed that the annual workprogramme of the Agency would be based on a Multi-Annual Framework adopted by the Council on a proposal of the Commission.⁶⁷ And the possibility for the Agency to intervene in the legislative process was severely constrained by Article 4(2) of the founding Regulation, which stated that the conclusions, opinion and reports the Agency could adopt :

may concern proposals from the Commission (...) or positions taken by the institutions in the course of legislative procedures *only where a request by the respective institution has been made* (...). They shall not deal with the legality of acts within the meaning of Article 230 of the Treaty [concerning actions for annulment of Community acts] or with the question of whether a Member State has failed to fulfil an obligation under the Treaty within the meaning of Article 226 of the Treaty [concerning infringement proceedings against member States for failure to comply with their obligations under EC law].

The latter restrictions imposed on the Agency were the combined result of a faithful replication and consolidation of what had been the practice of the EUMC during its nine years of operation, and of a desire of the institutions not to see their legislative work disrupted by interferences by the Agency – although it is clear that the European Parliament will be tempted to rely on the Agency in all cases where serious doubts are expressed about the compatibility of a legislative proposal with the requirements of fundamental rights –. As to the exclusion of any role of the Agency in the monitoring of the member States, it may be explained by two other factors. One was the desire to preserve the purely political character of the sanctions’ mechanism of Article 7 of the EU Treaty. Another was the very active role of the Council of Europe in the debate on the establishment of the Fundamental Rights Agency. These two factors combined with one another. Through various channels, the Council of Europe expressed the fear that it would risk being marginalized if the EU Fundamental Rights Agency were to duplicate the monitoring performed by the Council of Europe bodies. Those concerns were well received by the EU member States within the Council of the EU, since it provided the Council with a welcome pretext for narrowing down the competences of the Agency, and strictly restricting, in particular, its ability to examine the situation of fundamental rights in individual countries.

IV. The role of the Council of Europe in the debate on the Fundamental Rights Agency (2003-2006)

1. The reactions of the Council of Europe to the proposal to establish an EU Fundamental Rights Agency

⁶⁶ See Art. 2 of Regulation No. 168/2007 : ‘The objective of the Agency shall be 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 fundamental rights’.

⁶⁷ See Article 5 of the founding Regulation.

The initial reaction of the Council of Europe to the decision by the European Council to set up a 'Human Rights Agency' for the European Union was not openly hostile ; but it was clearly defensive. In her intervention at the public hearing organized by the European Commission on 25 January 2005,⁶⁸ the Deputy Secretary General of the Council of Europe Ms de Boer-Buquicchio sought to distinguish the function the EU Fundamental Rights Agency could fulfil – crafted along the lines of a national institution for the promotion and protection of human rights for the Union – from the tasks entrusted to the Council of Europe monitoring bodies, by emphasizing the difference between monitoring as *collection and analysis of data* on the one hand (what might be called 'advisory monitoring'), and monitoring as *evaluation of compliance* with certain standards on the other (or 'normative monitoring').⁶⁹ Although to deny to the EU Fundamental Rights Agency any role in 'normative monitoring' thus understood might seem contradictory with the idea that it should be an independent institution for the promotion and protection of human rights for the EU – indeed, under the Paris Principles, NHRIs should, *inter alia*, adopt opinions on 'situation of violation of human rights which it decides to take up'⁷⁰ –, the preoccupation behind this distinction was clear enough : the Agency should not duplicate the work of the monitoring bodies of the Council of Europe, it was suggested, since this might undermine their efforts and diminish their authority ; it should constitute a think tank, a pole of expertise on human rights issues for the EU institutions, but not some appeals tribunal for the evaluation performed by the Council of Europe.

This roughly corresponded to the views adopted simultaneously by the Parliamentary Assembly of the Council of Europe (PACE).⁷¹ Acting on the basis of the McNamara report prepared within the Committee on Legal Affairs and Human Rights,⁷² the Parliamentary Assembly adopted on 18 March 2005 a resolution in which it recalled the human rights acquis developed by the Council of Europe through intergovernmental cooperation, the monitoring by the Council of Europe of compliance with these standards by its member states,⁷³ and the practical assistance work by the Council of Europe designed to facilitate attainment of the requisite standards, as well as its activities in the field of human

⁶⁸ See above, XXX.

⁶⁹ Monitoring 'can also be understood as comprising the verification of actual compliance, identifying violations, shortcomings and best practices as well as addressing recommendations to individual states. It is in this latter sense that monitoring is understood and carried out within the Council of Europe' (Public Hearing on the Agency on Fundamental Rights of 25 January 2005, statement by Ms de Boer-Buquicchio, Deputy Secretary General of the Council of Europe, available on http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/index_en.htm).

⁷⁰ See para. 3, a), ii), of the Paris Principles (Principles Relating to the Status of National Institutions, annexed to UNGA Res. 48/134, 'National institutions for the promotion and protection of human rights', 20 December 1993).

⁷¹ It should be noted however that the president of the Parliamentary Assembly, the Dutch René Van der Linden, seemed to adopt a rather more radical attitude of opposition towards the very establishment of a Fundamental Rights Agency of the EU. As a result of his opposition, which he saw as a means of defending the monitoring bodies of the Council of Europe against the risk of marginalization, the Dutch Senate – of which Mr Van der Linden is a member – adopted by unanimity a motion in March 2006 in which it took the view that, since an agreement could be concluded between the EU and the Council of Europe in order for the EU to benefit from the monitoring systems already established in the framework of the Council of Europe, the proposal to establish a Fundamental Rights Agency for the EU did not pass the test of subsidiarity. On 31 March 2006, the President of the Dutch Senate, Ms Yvonne Timmermann-Buck, wrote to the speakers of the national parliaments of the other EU member States as well as to the speaker of the European Parliament urging them to use the tools of 'parliamentary diplomacy' in order to oppose the establishment of the Fundamental Rights Agency.

⁷² 'Plans to set up a Fundamental Rights Agency of the European Union', Doc 10241, Draft resolution and draft recommendation adopted unanimously by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe on 27 January 2005.

⁷³ Resolution 1427 (2005) notes in this regard : 'Such monitoring is carried out by several well-established independent human rights bodies with recognised expertise and professionalism, both on a country-by-country basis (including through country visits and on-the-spot investigations) and, increasingly, also thematically. Through these mechanisms, the Council of Europe monitors compliance with all the human rights obligations of its member states (including the twenty-five member states of the European Union), identifies issues of non-compliance, addresses recommendations to member states and, in the case of the European Court of Human Rights, issues judgments binding on states parties whenever these standards are not respected' (at para. 4).

rights education and awareness-raising. While welcoming the establishment of a Fundamental Rights Agency of the EU, the PACE insisted that ‘there is no point in reinventing the wheel by giving the agency a role which is already performed by existing human rights institutions and mechanisms in Europe. That would simply be a waste of taxpayers’ money’.⁷⁴ Like the Council of Europe Deputy Secretary-General, the PACE concluded that the role of the agency should be limited to ‘collect[ing] and provid[ing] to the EU institutions information about fundamental rights that is relevant to their activities, and thus contribut[ing] to mainstreaming human rights standards in the EU decision-making processes’.⁷⁵

In the view of the Parliamentary Assembly, this understanding of the role of the EU Fundamental Rights Agency had three implications. First, it should have a mandate limited to the scope of application of Union law, including the implementation by EU Member States of Union law, but should not intervene in areas outside EC/EU competence, where member states act autonomously. In other terms, although the mutual trust on which mutual recognition mechanisms within the Union are built presupposes that the EU Member States comply with fundamental rights in general rather than only in the implementation of Union law,⁷⁶ the Agency should not monitor fundamental rights beyond the situations to which the fundamental rights recognized as general principles of Union law already apply under the supervision of the European Court of Justice, and which define scope of application of the EU Charter of Fundamental Rights.⁷⁷ Second, the Agency should work on a thematic, not a country-by-country basis, focusing on certain specified themes having a special connection with EC/EU policies. While this restriction does not follow from the definition of the Fundamental Rights Agency as a ‘national institution for the promotion and the protection of human rights’ for the Union, it was put forward, presumably, to limit any risk of the Agency competing with the monitoring bodies of the Council of Europe, and in particular of the Agency arriving at different conclusions than those of these bodies as regards specific situations arising in the Member States. Indeed, in a later recommendation, the PACE therefore stated very clearly that ‘the agency should be explicitly excluded, in its mandate, from engaging in activities that involve assessing the general human rights situation in specific countries, in particular those that are members of the Council of Europe’.⁷⁸ Thirdly, the PACE considered that the future Agency should include within its reference instruments not only the European Convention on Human Rights, but also the other human rights instruments of the Council of Europe.⁷⁹ The PACE also recommended that the Council of Europe be included in the

⁷⁴ At para. 10.

⁷⁵ At para. 13.

⁷⁶ See below, part V.

⁷⁷ 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.H.H. Weiler, ‘The European Court at a Crossroads: Community Human Rights and Member State Action’, in: *Du droit international au droit de l’intégration. Liber amicorum Pierre Pescatore*, Baden-Baden, Nomos Verlagsgesellschaft, 1987, 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.I.*, 1991/2, p. 23; J.H.H. 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. The wording of the Charter of Fundamental Rights is more restrictive than what the case-law of the European Court of Justice would suggest, since it refers not in general to the scope of application of Union law – which would include situations where the Member States act under exceptions provided by EC/EU law (see, e.g., Case C-368/95, *Familiapress*, [1997] ECR I-3689 (para. 24); Case C-112/00, *Schmidberger*, [2003] ECR I-5659 (para. 81)) – but only to the situation where the EU Member States *implement* Union law (see Article 51 of the Charter).

⁷⁸ PACE Recommendation 1744 (2006), *Follow-up to the 3rd Summit: the Council of Europe and the proposed fundamental rights agency of the European Union*, adopted on 13 April 2006 on the basis of the report prepared within the Committee on Legal Affairs and Human Rights (doc. 10894, rapp. Mr Jurgens) (see para. 11.4. of the recommendation).

⁷⁹ PACE Resolution 1427 (2005), para. 14, ii).

management structures of the Agency, and that a cooperation agreement be concluded to that effect between the Council of Europe and the Union.⁸⁰

There were two reactions by the governments of the Member States of the Council of Europe to the position thus expressed by the Parliamentary Assembly. At their Third Summit held in Warsaw on 16-17 May 2005, the Heads of State or government of the Member States of the Council of Europe adopted a Declaration on the future relationship between the EU and the Council of Europe,⁸¹ and they agreed on a set of guidelines on the relations between the Council of Europe and the European Union, which stated in particular that : ‘The future Human Rights Agency of the European Union, once established, should constitute an opportunity to further increase cooperation with the Council of Europe, and contribute to greater coherence and enhanced complementarity’.⁸² The Heads of State or government also requested Prime Minister of Luxembourg, Jean-Claude Juncker, that he prepare, in his personal capacity, a report on the relationship between the Council of Europe and the European Union, on the basis of the decisions adopted at the Summit and taking into account the importance of the human dimension of European construction.⁸³

Second, the Committee of Ministers of the Council of Europe replied on 13 October 2005 to Recommendation 1696 (2005) of the Parliamentary Assembly.⁸⁴ After recalling the results of the Warsaw Summit, the Committee of Ministers referred to the proposals made in the meantime by the European Commission on the establishment of a Fundamental Rights Agency,⁸⁵ which (it considered) ‘take several of the recommendations made by the [Parliamentary Assembly of the Council of Europe] and the Secretary General into account. Many of the tasks foreseen for the agency would indeed be complementary to the activities carried out by the Council of Europe. As regards co-operation with the Council of Europe, the Committee of Ministers acknowledges that the draft regulation [establishing the EU Fundamental Rights Agency] provides for a close institutional relationship, including provisions that the agency shall co-ordinate its activities with those of the Council, that a bilateral co-operation agreement shall be concluded and that an independent person shall be appointed by the Council to the management board of the agency’. It also stated, in para. 4 of its reply, that it ‘agrees with the Assembly that the agency’s mandate should focus on human rights issues within the framework of the European Union, address its advice to the EU institutions and ensure that unnecessary duplication with the Council of Europe is avoided’; and it expressed its hope ‘that these points will be fully reflected in the future Community regulation’.

It is doubtful that these statements have fully reassured the Secretariat and the Parliamentary Assembly of the Council of Europe. On the contrary, after his meeting in July 2005 with Vice-President F. Frattini, in charge within the Commission of Justice, Freedom and Security, the Secretary General of the Council of Europe, Mr Terry Davis, agreed to provide the Commission with an analysis, by the Secretariat of the Council of Europe, of the proposals on the establishment of the EU

⁸⁰ Id., para. 14, iii). These elements are summarized in Recommendation 1696 (2005) adopted by the Parliamentary Assembly on the same day.

⁸¹ See the Declaration adopted at the Warsaw Summit (Third Summit of the Heads of State and Governments of the Member States of the Council of Europe), http://www.coe.int/t/dcr/summit/20050517_decl_varsovie_en.asp (last visited 15 January 2008).

⁸² Para. 8 of the guidelines.

⁸³ ‘Council of Europe – European Union; a sole ambition for the European continent’, report by Jean-Claude Juncker to the Heads of State and government of the Member States of the Council of Europe, 11 April 2006, available at: www.cor.europa.eu/document/presentation/Report%20Juncker%20CoE-EU%20cooperation.pdf (last visited 18 January 2008) (hereafter referred to as the ‘Juncker report’).

⁸⁴ CM/AS(2005)Rec1696 final, adopted at the 939th meeting of the Ministers’ Deputies.

⁸⁵ See above, n. XXX.

Fundamental Rights Agency. This memorandum was finalized on September 8th, 2005.⁸⁶ Many of the themes evoked above are reiterated, in particular the idea that, in order to avoid duplication with the missions of the Council of Europe, the Agency should not systematically monitor the human rights performance of non-EU Member States who are Member States of the Council of Europe. These concerns were again reiterated by the Parliamentary Assembly of the Council of Europe in April 2006.⁸⁷

How justified were these concerns ? The question of whether the establishment of the Fundamental Rights Agency risks undermining the efforts of the Council of Europe monitoring bodies should be put into proper perspective. The primary task of the Agency will be to provide advice to the institutions of the Union in the field of fundamental rights. This task is not fulfilled, for the moment, by the Council of Europe bodies⁸⁸ – an important lacuna which the establishment of the Agency, in part, will help compensating for. That alone would justify setting up the Agency, in order to ensure that fundamental rights are taken into account *ex ante* on a systematic basis in the legislative procedure of the European Union, rather than only *ex post*, through judicial review mechanisms.⁸⁹ However, leaving aside that important function of the Agency, the focus will be here on the role of the Agency vis-à-vis the national authorities of the Member States of the Council of Europe – since it is here, of course, that the risk of overlap with the tasks fulfilled by the Council of Europe bodies is greatest. The Agency shall ‘monitor’ the situation of fundamental rights both as regards the EU Member States insofar as they implement Community law, and as regards certain non-EU Member States. Does this create a risk of overlap, and of undermining the kind of supervision of the EU Member States’ human rights obligations performed by Council of Europe monitoring bodies ?

2. The reality of the duplication of tasks between the EU Fundamental Rights Agency and the Council of Europe bodies

The question of duplication cannot be answered without keeping in mind the strict limits imposed on the Fundamental Rights Agency by its founding regulation. First, as already mentioned,⁹⁰ the Fundamental Rights Agency is not conceived of as entrusted mainly with a monitoring mission, in the sense of ‘normative monitoring’ – evaluation of compliance on the basis of a preexisting normative

⁸⁶ This document is on file with the author. It will be referred to hereafter as the ‘Council of Europe Memorandum of 8 September 2005’.

⁸⁷ PACE, Recommendation 1744 (2006), *Follow-up to the 3rd Summit: the Council of Europe and the proposed fundamental rights agency of the European Union*, cited above n. 8.

⁸⁸ Of course, the international responsibility of the EU Member States may be engaged if they fail to ensure that human rights are respected within their jurisdiction, even in situations where the alleged violation has its source in European Union law. See, e.g., Eur. Ct. HR (GC), *Matthews v. the United Kingdom* (Appl. N° 24833/94) judgment of 18 February 1999, § 32 ; Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 154.

⁸⁹ However, as a result of Article 4(2) of the Regulation establishing the Agency (see above, n. XXX), the review by the Agency of the instruments or policies adopted by the Union will not be systematic. In addition, while both the European Commission and the European Parliament have currently included mechanisms ensuring that they will take into account the EU Charter of Fundamental Rights in making legislative proposals or in contributing to the legislative procedure (see above, text corresponding to nn. XXX), no such mechanism exists as regards legislative proposals made by the Member States according to Article 34(2) EU, which provides that the Council may, in the field of police cooperation and judicial cooperation in criminal matters (Title VI EU) adopt common positions, framework decisions, or decisions, acting unanimously on the initiative of any Member State or of the Commission. Ironically, it is precisely this field, which the current safeguards are most clearly lacking, that the Council has decided not to include among the fields to which the mandate of the Agency should extend, at least of the time being. The exclusion of Title VI EU from the fields falling under the remit of the Agency was the single most fundamental change made to the original proposals of the European Commission in the course of the discussions within the Council. A ‘rendez-vous’ clause is provided in a declaration attached to the Regulation, providing that the mandate of the Agency could be extended to judicial cooperation in criminal matters and police cooperation in 2009.

⁹⁰ See above, text corresponding to n. XXX.

grid ;⁹¹ it is, rather, to provide technical advice on the basis of its collection and analysis of information pertaining to the situation of fundamental rights in the Member States. Whether it will be possible, in practice, to maintain a watertight division between these two functions remains to be seen: even mere fact-finding, after all, necessarily consists in highlighting certain situations, and thus putting pressure on the actors concerned to remedy any deficiencies found to exist. In addition, even though the emphasis or formulations may differ – with expert bodies of the Council of Europe explicitly evaluating certain situations for their compliance with the relevant standards, and the Fundamental Rights Agency more cautiously reporting about what it has found to occur and making certain recommendations of a general nature about trends –, it remains the case that the same situations may be considered under both mechanisms. The EU Fundamental Rights Agency will publish annual reports and formulate conclusions and opinions on fundamental rights dimensions of the implementation of Community law by the Member States. Although the adoption of reports or recommendations on *individual Member States* is not defined as one of the tasks of the Agency in Article 4 of the Regulation establishing the Agency – on the contrary, Article 4(1)(d) specifically mentions that the Agency shall ‘formulate and publish conclusions and opinions *on specific thematic topics*, for the Union institutions and the Member States when implementing Community law’, a formulation which seems to be calculated to exclude conclusions and opinions on individual Member States or on specific events or measures⁹² –, it is doubtful that the Agency will fully abstain from even naming in its thematic reports or annual reports specific Member States, when the Agency will describe the situation of fundamental rights in the Union. Nevertheless, the tasks of the Agency remain distinct from those of a monitoring body in the classic meaning of the expression, such as those established under Council of Europe instruments.

Another limitation to the tasks entrusted to the Agency may play an equally decisive role. The EU Member States will only be provided assistance by the Agency and be ‘monitored’ through the opinions and reports of the Agency *in the implementation of EC Law*. The original proposals of the Commission also envisaged that the Agency could be invited to provide its ‘technical expertise’ in the context of Article 7 EU which, as we have seen, allows the Council of the EU to react to serious and persistent breaches by one Member State of the values on which the Union is founded, or to a ‘clear risk’ that such serious breaches will occur.⁹³ However, the Legal Service of the Council of the Union⁹⁴ took the view that such a possibility would ‘go beyond Community competence’, and that, moreover, it would be incompatible with Article 7 EU itself, insofar as this provision would not allow for the adoption of implementation measures and was, in that sense, self-sufficient. The Commission answered that the draft Article 4 (1)(e) it proposed ‘should be seen not as an autonomous exercise of Community competence needing a proper legal basis in the EC Treaty, but rather as a largely declaratory opening clause, admitting a possibility that the Council would arguably have anyway, while clarifying modalities and limits’.⁹⁵ Indeed, Article 7(1) EU itself refers to the possibility to ‘call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question’ in order to determine whether there exists a ‘clear risk of a serious breach by a Member State of principles mentioned in Article 6(1)’, among which principles are human rights and fundamental freedoms. The implicit view of the Commission was that the Agency could either be

⁹¹ On this distinction, see Martin Scheinin, ‘The Relationship between the Agency and the Network of Independent Experts’, in Ph. Alston and O. De Schutter (eds), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford, Hart Publ., 2005, at pp. 73-90.

⁹² In the original proposal of the Commission, this provision read : ‘[the Agency shall] formulate conclusions and opinions *on general subjects*, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council of the Commission’ (emphasis added).

⁹³ See Article 4(1) (e) of the Draft Regulation (see above, n. 41). On Article 7 EU, see above, text corresponding to nn. xxx.

⁹⁴ Doc. 13588/05JUR 425 JAI 363 COHOM 36 (26 October 2005).

⁹⁵ Note from the Commission to the Council *Ad hoc* Working Party on Fundamental Rights and Citizenship, Council doc. 14702/05, JAI 437, CATS 75, COHOM 38 COEST 202 (18 November 2005), paras. 46-52.

an ‘independent person’ for the purposes of this provision, or contribute to identifying such independent persons, in accordance with the broad margin of appreciation which Article 7(1) EU intended to leave to the Council. In the view of the Commission therefore, including Article 4(1)(e) in the proposed Regulation added nothing to Article 7 EU itself.⁹⁶ Referring to the possibility of the Agency contributing its technical expertise upon request of the Council, in particular, ‘should be distinguished from any further reaching provision that would enable other institutions to seize the [...] Agency or even an own initiative power of the latter to analyse possible Article 7 EU situations. Any such provision might indeed exceed Community competence and conflict with the exhaustive institutional setting in Article 7 EU’. The Commission was taken at its word. Within the Council *Ad hoc* Working Party on Fundamental Rights and Citizenship in charge of examining the proposal of the Commission on the Fundamental Rights Agency, a number of delegations expressed doubts as to the need to include a reference to Article 7 EU in the text of the Regulation establishing the Agency, as such a reference would, according to the Commission’s own admission, serve no useful purpose and, going beyond Community law, could moreover lack a legal basis. The compromise solution consisted therefore in appending to the Regulation establishing the Agency a Declaration of the Council confirming this possibility, without any reference being made to Article 7 EU in the text of the Regulation itself.⁹⁷ This solution also preserved the purely political character of Article 7 EU, in the sense that the mechanisms it provides for should allow for a political appreciation by the Council of the European Union and the European Parliament, without, in particular, the question of whether a State is in serious and persistent breach of the values listed in Article 6(1) EU or whether there exists a clear risk of a serious breach, being determined by the European Court of Justice, as was suggested by the European Commission on a number of occasions, or by any other independent instance such as a Fundamental Rights Agency.

But the question of any potential role the Agency might have to play under Article 7 EU remains of marginal importance, in any event, in comparison with its role in providing the Member States when implementing Community law with ‘assistance and expertise relating to fundamental rights’, as provided under Article 2 of the Regulation. This may overlap with the activities of the Council of Europe bodies. Indeed, even when they implement Union law, the Member States remain fully bound to respect their other international obligations as defined, in particular, by instruments adopted within the framework of the Council of Europe.⁹⁸ Therefore, the Council of Europe bodies (in particular, the European Court of Human Rights, the European Committee of Social Rights, the Advisory Committee of the Framework Convention for the Protection of National Minorities, or the Commissioner for Human Rights) routinely examine whether the States parties to Council of Europe instruments comply with their obligations under these instruments, even where the States concerned act in fulfilling their obligations under Union law. Whether this overlap may prove problematic depends therefore on the nature of the relationship established between the Council of Europe and the EU Agency for Fundamental Rights, and even more decisively, on the status which the findings made by the Council of Europe monitoring bodies will have in the opinions, conclusions and reports of the Agency.

⁹⁶ Already in a Communication where it clarified its understanding of Article 7 EU, the Commission has mentioned the possibility that the Council draw up a list of independent personalities which could be called upon to assist the Council in exercising its functions under Article 7(1) EU (see COM(2003) 606 final, of 15.10.2003, at para. 1.3.).

⁹⁷ This Declaration states : ‘The Council considers that neither the Treaties nor the Regulation establishing the European Union Agency for Fundamental Rights preclude the possibility for the Council to seek the assistance of the future European Union Agency for Fundamental Rights when deciding to obtain from independent persons a report on the situation in a Member State within the meaning of Article 7 TEU when the Council decides that the conditions of Article 7 TEU are met’.

⁹⁸ See above, n. xxx.

3. *Third countries*

It is on the question of the geographical remit of the Fundamental Rights Agency that the influence of the Council of Europe was perhaps most felt in the course of the discussions which were held in 2003-2006. The initial proposals of the Commission included a possibility for the Agency to provide, at the request of the Commission, information and analysis on fundamental rights issues identified in the request, concerning third countries with which the Community has concluded association agreements or agreements containing provisions on respect of human rights, or has opened or is planning to open negotiations for such agreements, in particular countries covered by the European Neighbourhood policy (ENP).⁹⁹ The ENP was developed in the context of the EU's 2004 enlargement, with the objective of avoiding the emergence of new dividing lines between the enlarged EU and the neighbouring countries and instead strengthening stability, security and well-being for all in the countries bordering the EU.¹⁰⁰ While the ENP does not offer an accession perspective, it does offer the countries concerned a privileged relationship, building upon a mutual commitment to common values (democracy and human rights, rule of law, good governance, market economy principles and sustainable development). Originally, the ENP was intended to apply to the immediate neighbours of the European Union – Algeria, Belarus, Egypt, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, the Palestinian Authority, Syria, Tunisia and Ukraine. In 2004, it was extended to also include the countries of the Southern Caucasus with whom the then candidate countries Bulgaria, Romania and Turkey share either a maritime or land border (Armenia, Azerbaijan and Georgia).¹⁰¹

It was also envisaged that the Agency would collect information on the situation of fundamental rights in countries which have concluded an association agreement with the Community and which are recognized as candidate or potential candidate countries, where the relevant Association Council decides on the participation of these countries in the Agency.¹⁰² The Agency would then extend the remit of its activities to the concerned countries, *mutatis mutandis*. In principle, the Agency would concern itself only with the respect for fundamental rights in the implementation of the *acquis* of Union law, rather than in all fields or with respect to situation presenting no link to Union law. However the precise modalities of such an extension to these countries of the activities of the Agency remained vaguely defined in the draft Regulation, not only because the relevant Association Council was to determine the precise modalities of such participation, but also because under Articles 6(1) and 49 EU, respect for human rights and fundamental freedoms is a condition for accession,¹⁰³ which may justify that, vis-à-vis acceding countries, the Agency's remit would be broader than vis-à-vis the EU Member States.

At the time, then, when the Commission presented its proposal for the establishment of the Agency for Fundamental Rights, fourteen Member States of the Council of Europe belonged to either of these two categories of non-EU countries to which the geographical remit of the Agency could extend. These were four candidate countries : Bulgaria and Romania (which now, of course, have become full members of the EU), Croatia and Turkey ; four potential candidate countries : Albania, Bosnia and Herzegovina, Serbia and Montenegro (which then still constituted one single State), the former Yugoslav Republic of Macedonia ; and six countries either covered by the ENP or with which the EU has an agreement containing a human rights clause : Armenia, Azerbaidjan, Georgia, Moldova, Russia and Ukraine.

⁹⁹ Article 3(4) of the Proposal for a Regulation (see above, n. 41).

¹⁰⁰ See generally the Communication of the Commission, *European Neighbourhood Policy: Strategy Paper*, COM(2004) 373 final, of 12. 5.2004.

¹⁰¹ Although Russia is also a neighbour of the EU, the relations between the EU and Russia are instead developed through a Strategic Partnership covering four "common spaces".

¹⁰² Art. 27 of the Proposal for a Regulation.

¹⁰³ See below, n. -.

This raised the concern, within the Council of Europe, that the Fundamental Rights Agency for the European Union would be duplicating the work performed by the monitoring bodies of the Council of Europe, without this being justified by a sufficiently close link to the activities of the European Union. In the Recommendation it adopted on 13 April 2006 on this question, for instance, the Parliamentary Assembly of the Council of Europe took the view that ‘the agency should have no mandate to undertake activities concerning non-European Union member states. Should such a mandate nevertheless be considered absolutely necessary, it should be strictly confined to candidate countries and limited to issues arising from the accession process’.¹⁰⁴

In part as a reaction to such concerns, the discussions within the *Ad hoc* Working Group of the Council led gradually to narrowing down the geographical remit of the Agency. This led to dissociate the modalities of the possible participation as observers of candidate countries on the one hand, and of potential candidate countries with which a Stabilisation and Association Agreement has been concluded on the other hand. In the former group are Croatia and Turkey, which have started negotiations on accession on 3 October 2005, and the former Yugoslav Republic of Macedonia, which was granted candidate at the latest status in December 2005 but with whom accession negotiations have not started yet. The latter group comprises the countries of the Western Balkans whose natural vocation it is, in the future, to accede to the European Union, and for whom Stabilisation and Association Agreements are seen as an instrument to prepare themselves as candidate countries.¹⁰⁵ These countries are Albania, Bosnia and Herzegovina, Montenegro, and Serbia, all of which considered potential candidates.¹⁰⁶ For none of these countries will the extension of the remit of the Agency be automatic, since it will depend in all cases on a decision of the respective Association Council. But following the final compromise put forward by the Finnish presidency of the Council of the EU of the second semester 2006 and agreed by the Council, any potential candidate country with which a Stabilisation and Association Agreement has been concluded can only participate in the Agency as an observer following a unanimous decision by the Council inviting it to do so, a condition not imposed as regards the participation of candidate countries.¹⁰⁷

We may therefore expect that, in the immediate future at least, participation in the Agency will be envisaged only for only a limited number of third countries with candidate or pre-candidate status, and that the geographical remit of the Agency therefore will almost completely be restricted to the Member States of the European Union. In part, this choice was justified by the need to avoid an overlapping of tasks with those performed by the Council of Europe : while it does make sense to facilitate the implementation of the *acquis* of Union law by candidate countries, or by the Western Balkans countries preparing for candidate status, by ensuring that the fundamental rights dimension is taken into account in that preparation – indeed, this is the purpose of the participation of these countries in the work of the Agency, as the Regulation makes explicit¹⁰⁸ –, it would go beyond the

¹⁰⁴ PACE, Recommendation 1744 (2006), *Follow-up to the 3rd Summit: the Council of Europe and the proposed fundamental rights agency of the European Union*, cited above, at para. 11.3.

¹⁰⁵ See, in particular, the Declaration adopted in Thessaloniki on 21 June 2003, following the EU-Western Balkans Summit (doc. 10229/03 (Presse 163)), and the *Thessaloniki agenda for the Western Balkans: Moving towards European Integration*, General Affairs and External Relations Council, 2518th Council session, External Relations, Luxembourg, 16 June 2003, adopted by the European Council on 20 June 2003.

¹⁰⁶ Albania signed a Stabilisation and Association Agreement with the EU in 2006, Montenegro and Bosnia-Herzegovina in 2007.

¹⁰⁷ See Article 28(3) of the Council Regulation (EC) No. 168/2007, cited above, n. xxx.

¹⁰⁸ See Article 28(2) of the Council Regulation (EC) No. 168/2007, cited above, n. xxx (mentioning that, as regards countries participating as observers, the Agency may deal with ‘the fundamental rights issues within the scope of [European Community law] in the respective country, to the extent necessary for the gradual alignment to Community Law of the country concerned’). It will be noted that, under the new framework for the conduct of accession negotiations with candidate countries agreed upon by the Brussels European Council of 16 and 17 December 2004, the Commission may recommend,

objective of the Agency as defined in Article 2 of the Regulation (to provide Member States when implementing Community law with assistance and expertise relating to fundamental rights) to extend its tasks beyond this ; the situation of other countries may be ascertained through other means, and as regards the Council of Europe Member States in particular, by consulting the findings of the monitoring bodies of the Council of the Europe.

4. An evaluation

To the extent that the implementation of Community law includes an obligation for the States concerned to take into account the requirements of fundamental rights, the Agency will have a role in providing them advice. Even assuming such ‘monitoring’ of individual States through the Agency will bear any resemblance to the normative monitoring performed by the Council of Europe bodies,¹⁰⁹ three arguments against such ‘duplication’ of the work of the Council of Europe by the Agency are generally put forward.¹¹⁰

First, it is said that ‘the existence of such parallel mechanisms (one for the twenty-five [now twenty-seven] member states of the Union and one for the forty-six [now forty-seven] member states of the Council of Europe) would be a serious blow to the principle that there should be no dividing lines in Europe’.¹¹¹ This is a powerful rhetorical argument, but unconvincing when examined carefully. The instruments of the Council of Europe impose *minimum* standards on the States parties, and they contain provisions which allow these States to go beyond those minimal requirements either by the adoption of internal legislation, or by the conclusion of international agreements affording a more favorable protection to the individual.¹¹² It is no more a problem for the European Union to ensure a guarantee of fundamental rights under the jurisdiction of its Member States which goes beyond the requirements of the Council of Europe instruments concluded by those States, than it would be for any individual State to go beyond those requirements in its national constitutional or legislative framework. Indeed, when the European Community adopted directives on the basis of Article 13 EC,¹¹³ or when it adopted Directive 95/46/EC on the basis of Article 95 EC (then Article 100A of the EC Treaty),¹¹⁴ going beyond the protection from discrimination and the protection of private life in the processing of personal data as provided under Council of Europe instruments, this did not lead to ‘dividing lines in Europe’ in the field of fundamental rights. Quite to the contrary, it contributed to the

and the Council decide by qualified majority, the suspension of future negotiations in presence of a serious and persistent breach by a candidate State of the principles enshrined in Article 6(1) EU (para. 23 of the Presidency conclusions). Although it would be natural for the analysis of the Agency to contribute to such an evaluation as may be required for such a recommendation to be made by the Commission and for such a decision to be taken by the Council, this would go beyond the wording of Articles 2 and 28(2) of the Regulation, if read literally. Perhaps a reasoning by analogy with that which presided to the compromise on Article 7 EU (see above, text corresponding to nn. XXX) could be justified here : to the extent that the Member States may entrust the Commission to perform, in their name, tasks lying outside Community competence, a practice accepted by the Court (see Joined Cases C-181/91 and C-248/91, *European Parliament v. Council and Commission*, [1993] ECR I-3685 (concerning aid to Bangladesh), para. 20), it should be allowable for the Council to call upon the Agency to provide them with such an analysis.

¹⁰⁹ See above, text corresponding to nn. xxx.

¹¹⁰ These arguments are explicitly stated in Resolution 1427(2005) adopted by the Parliamentary Assembly of the Council of Europe.

¹¹¹ PACE Res. 1427(2005), para. 12.

¹¹² See, for example, Article 53 of the European Convention on Human Rights; Article 32 of the 1961 European Social Charter; Article H of the Revised European Social Charter; Article 11 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data; Article 22 of the Framework Convention for the Protection of National Minorities; Article 27 of the Convention on Human Rights and Biomedicine.

¹¹³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000, p. 22 ; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L. 303 of 2.12.2000, p. 16.

¹¹⁴ Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23.11.1995, p. 31.

overall progress of the protection of human rights in Europe and inspired, in turn, developments within the framework of the Council of Europe itself.¹¹⁵ Indeed, the risk of ‘dividing lines’ in Europe was also invoked when the EU Charter of Fundamental Rights was negotiated between October 1999 and October 2000, since this was perceived as an attempt of the EU, through the adoption of its own human rights charter, to dissociate itself from the instruments of the Council of Europe.¹¹⁶ But the answer made then to this objection – that nothing in the Council of Europe instruments imposes a prohibition on the EU Member States or on the Union itself to improve further the protection of human rights in their respective spheres of competence – is the same which should be made to the fears raised by the establishment of a Fundamental Rights Agency for the EU.

A second argument which is put forward against any duplication of tasks between the Council of Europe bodies and the EU Agency is that such a duplication would constitute a waste of resources.¹¹⁷ What this argument is missing however, is that to the extent the ‘monitoring’ of individual States by the EU Fundamental Rights Agency is envisaged, this monitoring is performed for reasons specific to the needs of the Union – in particular, in order to assist the EU Member States in their implementation of Union law, which should better take into account the requirements of fundamental rights, and in order to facilitate the progress of candidate countries to the EU towards meeting the accession criteria. While the findings by the Council of Europe bodies should be made fully use of in these different contexts, they nevertheless will be relied upon with these very different aims in mind, which do not correspond to the aims pursued by the bodies of the Council of Europe under their specific mandates. Indeed, it would not be thinkable to entrust those bodies, for instance, with the task of evaluating whether a country complies with the criteria laid down for accession to the Union.¹¹⁸ And it would be incompatible with the principle of autonomy of the legal order of the Union,¹¹⁹ moreover, to have such bodies decide authoritatively whether a Member State has implemented Union law in conformity with the obligation – as imposed under Union law itself – to ensure that this implementation is in

¹¹⁵ For instance, the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding Supervisory Authorities and Transborder Dataflow (CETS No. 181, opened for signature on 8 November 2001), was inspired by the chapter relating to the establishment of such supervisory authorities in the field of data protection in Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281 of 23.11.1995, p. 31). In the same vein, a number of provisions both in the 1988 Additional Protocol (CETS No. 128) to the 1961 European Social Charter (CETS No. 35) and in the 1996 Revised European Social Charter (CETS No. 163) were inspired by provisions from European Community directives adopted in the field of social rights. It may also be noted that the Racial Equality and Employment Equality Directives have influenced the case-law of the European Court of Human Rights in the interpretation of Article 14 of the European Convention on Human Rights (see, e.g., Eur. Ct. HR (GC), *Nachova and Others v. Bulgaria* (Appl. Nos 43577/98 and 43579/98), judgment of 6 July 2005, § 80).

¹¹⁶ See PACE Resolution 1210 (2000), *Charter of fundamental rights of the European Union*, § 5 (in which the Parliamentary Assembly ‘draws attention to the risks of having two sets of fundamental rights which would weaken the European Court of Human Rights’).

¹¹⁷ PACE Res. 1427(2005), para. 10. This argument is also briefly mentioned in the Council of Europe Memorandum of 8 September 2005 (cited above n. XXX, at para. 12).

¹¹⁸ See Article 49 EU, which, since it was amended by the 1997 Treaty of Amsterdam, includes a reference to the fact that the European State seeking to apply for membership of the EU must respect the principles set out in Article 6(1) EU (comp. with Article O of the Treaty on the European Union signed in Maastricht, which did not contain a similar reference); and the so-called ‘political criterion’ included among the criteria defined for accession by the Copenhagen European Council of 21-22 June 1993 (Conclusions of the Presidency, p. 44), referring to the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. On the use of the Copenhagen criteria, see C. Hillion, ‘The Copenhagen criteria and their progeny’, in C. Hillion (ed.), *EU enlargement: a legal approach*, London and Portland-Oregon, Hart Publ., 2004, p. 13.

¹¹⁹ The principle of autonomy is derived from Articles 220 EC and 292 EC. See Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] ECR I-6079 (14 December 1991); Opinion 1/92, (Second) Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area [1992] ECR I-2821 (10 April 1992).

conformity with the requirements of fundamental rights.¹²⁰ The principle of autonomy of the Union legal order implies that ‘only the institutions of the particular legal order are competent to interpret the constitutional and legal rules of that order’.¹²¹ It would thus not be compatible with this principle to attribute to Council of Europe bodies tasks which would imply that they interpret and apply Union law, with results binding on the EU institutions. On the other hand, it may perfectly be envisaged that the Council of Europe bodies be entrusted with fact-finding tasks, on the basis of which the Agency could report back to the Union institutions.¹²² Such a delegation to the Council of Europe mechanisms of fact-finding tasks, not implying authoritative interpretation and application of Union law, may be seen as contributing to a more rational use of the available resources. But it does not constitute an obstacle to the Fundamental Rights Agency reporting on the situation of fundamental rights in specific countries, provided it uses any such findings as may be available from the Council of Europe monitoring bodies.

A third argument leveled by the Council of Europe institutions against the risk of duplication of tasks deserves more careful attention. This argument was best expressed by the Parliamentary Assembly of the Council of Europe where it voiced its concern that any monitoring performed by the EU Fundamental Rights Agency could result in ‘the dilution and weakening of [the] individual authority [of the findings made by the Council of Europe monitoring bodies], which in turn will mean weaker, not stronger, protection of human rights, to the detriment of the individual’.¹²³ The Council of Europe Memorandum of 8 September 2005 explained that any duplication of the role of the Council of Europe bodies by a general monitoring of the EU Member States or even, under the circumstances described above, of non-member countries, would ‘entail a real risk of undermining legal certainty. A situation where assessments made by the Agency would diverge from, or even contradict, assessments made by Council of Europe monitoring bodies would result in considerable confusion for individuals and Member States. It would also be highly detrimental to the overall coherence and effectiveness of human rights protection in Europe’.¹²⁴

It is already the case of course that the Member States of the Council of Europe are subjected to different forms of monitoring, under different human rights instruments which have set up a wide array of monitoring bodies. The clearest example is the duplication which exists between the United Nations human rights treaties and the instruments of the Council of Europe. For instance, the Human Rights Committee monitors the Member States of the Council of Europe under the International

¹²⁰ It would also be in violation of the principle of autonomy of the legal order of the Union to entrust bodies of the Council of Europe with the task of deciding whether there exists in a Member State a clear risk of a serious breach of the values on which the Union is based, or whether a Member State has been persistently in serious breach of those values, under Article 7 EU.

¹²¹ Th. Schelling, “The Autonomy of the Community Legal Order : An Analysis of Possible Foundations”, *Harvard Int'l L. J.*, vol. 37, n° 2, 1996, p. 389. In addition, the principle of autonomy of the EU legal order is only one implication of the monopoly which Articles 220 and 292 EC reserve to the European Court of Justice in the final interpretation of the EC Treaty: attributing to the Agency for Fundamental Rights the task of deciding whether a Member State complies with its human rights obligations under EU or EC law would not be compatible with this monopoly. Consistent with this requirement, Article 4(2) of the Regulation establishing the Agency states that the conclusions, opinions and reports adopted by the Agency ‘shall not deal with the legality of acts within the meaning of Article 230 or with the question whether a Member State has failed to fulfil an obligation under the Treaty within the meaning of Article 226 of the Treaty’.

¹²² Indeed, in its Memorandum of 8 September 2005, the Secretariat of the Council of Europe proposed that, ‘instead of multiplying monitoring mechanisms’, we should ‘build on the successful experience regarding the preparation of of candidate countries for EU accession. Findings of the Council of Europe human rights mechanisms have been central elements in the Commission’s assessment of the human rights situation in the candidate countries. If necessary, such findings could be presented in a more targeted way, and the details of such co-operation could be specified in an exchange of letters’ : Council of Europe Memorandum of 8 September 2005, at para. 9.

¹²³ PACE Res. 1427(2005), para. 11.

¹²⁴ *Id.*, para. 12.

Covenant on Civil and Political Rights,¹²⁵ which contains essentially the same guarantees as the European Convention on Human Rights, which clearly entails a risk of contradictory conclusions being adopted by the respective supervisory bodies¹²⁶; the UN Committee on Economic, Social and Cultural Rights monitors them under the International Covenant on Economic, Social and Cultural Rights,¹²⁷ the substantive guarantees of which largely intersect with those of the 1961 and 1996 European Social Charters ; many other examples could be given. Similarly, the European Court of Justice, which has included fundamental rights among the general principles of law which it ensures the respect of in the scope of application of Union law, routinely bases itself on the European Convention on Human Rights in situations where the European Court of Human Rights may also have to exercise its jurisdiction.¹²⁸ Indeed, even within the Council of Europe, such ‘overlapping’ takes place: the European Committee for the Prevention of Torture and Inhuman and Degrading Treatments and Punishments (CPT), in its country reports following its visits in the States parties’ places of detention, makes recommendations which contribute to the implementation of Article 3 of the European Convention on Human Rights ; the Advisory Committee created under the Framework Convention for the Protection of National Minorities has interpreted this instrument in its opinions on the States parties, although the European Court of Human Rights has read Article 8 of the European Convention on Human Rights, as well as, with respect to religious minorities, Article 9, in combination or not with Article 14, as protecting similar rights than those listed in the Framework Convention. In general, far from this ‘duplication’ resulting in a lowering of the overall level of protection of human rights, this has been beneficial. These different bodies have sought inspiration from one another. By regularly referring to one another’s interpretation of the respective instruments which they seek to ensure the compliance with by the States parties, they have ensured the progressive development of a ‘*ius commune*’ of international human rights, as the outcome of such dialogue between different jurisdictions.¹²⁹

Yet, should the ‘monitoring’ by the EU Agency for Fundamental Rights lead to conclusions which, in specific cases (for example, with respect to the compatibility of a particular legislative measure or policy with the requirements of fundamental rights), and although based on identically formulated standards, would differ from the appreciation of any competent body of the Council of Europe,¹³⁰ that might be problematic. This would create confusion, be detrimental to legal certainty, and indeed, would risk diminishing the authority of each individual organ – as feared by the Parliamentary Assembly of the Council of Europe –. This however is not the consequence of an overlapping of monitoring functions as such. Rather, it would result from such an overlapping taking place when not combined with an explicit and systematic reference to the findings of the Council of Europe bodies, in

¹²⁵ Opened for signature on 16 December 1966, 999 UNTS 171.

¹²⁶ See, for instance, Human Rights Committee, *Correia de Matos v. Portugal*, communication n° 1123/02, dec. Of 28 March 2006, CCPR/C/86/D/1123/2002 (2006), 13 IHRR 949 (2006), which offers a reading of Article 14(3)(d) of the International Covenant on Civil and Political Rights which differs from the reading offered of Article 6(3)(c) ECHR by the European Court of Human Rights (Eur. Ct. HR (3d sect.), *Correia de Matos v Portugal*, Appl. No. 48188/99, dec. (inadmissibility) of 15 November 2001, ECHR 2001-XII 161).

¹²⁷ Opened for signature on 16 December 1966, 999 UNTS 3.

¹²⁸ See O. De Schutter, ‘L’influence de la Cour européenne des droits de l’homme sur la Cour de justice des Communautés européennes’, in : G. Cohen-Jonathan and J.-Fr. Flauss (dir.), *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l’homme*, Bruxelles, Bruylant, 2005, pp. 189-242.

¹²⁹ See further on this theme Christopher McCrudden, ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’, 20 *Oxford Journal of Legal Studies* 499 (2000); Anne-Marie Slaughter, ‘A Typology of Transjudicial Communication’, 29 *University of Richmond Law Review* 99 (1994); Anne-Marie Slaughter, ‘A Global Community of Courts’, 44 *Harvard International Law Journal* 191 (2003).

¹³⁰ Perhaps ironically, the risk of confusion stems from the fact that the normative sources relied upon by the Fundamental Rights Agency (Article 6(1) EU and, in practice, the EU Charter of Fundamental Rights) include the European Convention on Human Rights which Article 6(1) EU refers to, thus leading to a situation where different bodies might arrive at different evaluations *on the basis of the same normative texts*. The risk would have been much less present if the EU had opted for an entirely different text, corresponding, for instance, to the specificities of the EU or based on the rights of the EU citizen.

the interpretation of the different provisions which together constitute the *acquis* of European human rights law. If, on the other hand, in exercising its tasks, the EU Agency for Fundamental Rights were to refer systematically to the findings of the Council of Europe bodies, this might strengthen, rather than weaken, the authority recognized to the interpretation by those bodies of the instruments they apply, and contribute to an improved follow-up of the recommendations they address to the States parties.¹³¹

Thus, whether or not the fears about the work of the Fundamental Rights Agency undermining the authority of the Council of Europe bodies were well-founded would seem to depend on the strength of the links between the EU Fundamental Rights Agency and the Council of Europe, considered both in its standard-setting and in its fact-finding functions. It is important to note, in this respect, that the debate on the EU Fundamental Rights Agency ran in parallel with another debate, concerning the organization of the future relationship between the European Union and the Council of Europe. This question was central to the Third Summit of the Heads of State or government of the Member States of the Council of Europe, held in Warsaw in May 2005.¹³² The Summit reaffirmed the determination of the Council of Europe member States to ‘ensure complementarity of the Council of Europe and the other organisations involved in building a democratic and secure Europe’, and resolved to ‘create a new framework for enhanced co-operation and interaction between the Council of Europe and the European Union in areas of common concern, in particular human rights, democracy and the rule of law’.¹³³ In an Annex to the Declaration, the Heads of State and Government called upon the Council of Europe to ‘strengthen its relations with the European Union so that the Council of Europe’s and the European Union’s achievements and future standard-setting work are taken into account, as appropriate, in each other’s activities’; they also emphasized that the new framework of enhanced co-operation and political dialogue between the Council of Europe and the European Union should focus especially on ‘how the European Union and its member states could make better use of available Council of Europe instruments and institutions, and on how all Council of Europe members could benefit from closer links with the European Union’.¹³⁴ Finally, they agreed on a set of guidelines on the relations between the Council of Europe and the European Union, which state in particular that the Council of Europe ‘will, on the basis of its expertise and through its various organs, continue to provide support and advice to the European Union in particular in the fields of Human Rights and fundamental freedoms, democracy and the rule of law’, and that ‘[c]ooperation between the European Union and specialised Council of Europe bodies should be reinforced’.¹³⁵ The EU Fundamental Rights Agency, as already mentioned, was described as a body where such cooperation could further develop.

The outcome of this process was the conclusion between the Council of Europe and the EU of a Memorandum of Understanding on 23 May 2007, providing that reference should be made by the EU to case-law elaborated in the context of the Council of Europe when developing human rights

¹³¹ As noted by the Council of Europe Commissioner for Human Rights in his first annual activity report, there is therefore no reason to fear that the EU Fundamental Rights Agency will undermine the monitoring exercised by the Council of Europe bodies: ‘the primary task of the Agency will be to provide advice to the institutions of the European Union in the field of human rights, a task which is not within the Council of Europe’s remit. If the Agency systematically refers to findings of Council of Europe bodies within its work, this may strengthen and not weaken the Council of Europe’s authority’ (Annual Activity Report 2006 of Mr. Thomas Hammarberg, Council of Europe Commissioner for Human Rights, presented to the Committee of Ministers and the Parliamentary Assembly, 1 April 2007, CommDH(2007)3, para. 3.2).

¹³² Third Summit of the Heads of State and Governments of the Member States of the Council of Europe), http://www.coe.int/t/dcr/summit/20050517_decl_varsovie_en.asp (last visited 15 January 2008).

¹³³ See para. 10 of the Declaration adopted at the Warsaw Summit.

¹³⁴ Annex, IV, 1, to the Warsaw Declaration.

¹³⁵ Paras. 6-7.

standards,¹³⁶ and encouraging consultation and cooperation between the EU and the Council of Europe, including the Commissioner for Human Rights, in order to ensure that EU law is coherent with human rights guarantees stemming from Council of Europe treaties.¹³⁷ The Memorandum of Understanding also stipulates that the EU's institutions should take into account 'decisions and conclusions of its monitoring structures... where relevant.' This follows a proposal made in the Juncker report on the future of the relationships between the European Union and the Council of Europe, released on 11 April 2006,¹³⁸ and immediately endorsed by the Parliamentary Assembly of the Council of Europe.¹³⁹ In this report, Prime Minister Jean-Claude Juncker proposed that a working rule be established, according to which 'the decisions, reports, conclusions, recommendations and opinions of [the Council of Europe] monitoring bodies: 1. will be systematically taken as the first Europe-wide reference source for human rights; 2. will be expressly cited as a reference in documents which they produce'. As noted by the report, this 'merely confirms existing practice. But it does mean taking something which today is simply a practice, and turning it into a rule for EU institutions on all levels. This explicit formula will enhance the status of the Council of Europe's human rights instruments and monitoring machinery in all its member states, both EU members and others. It will also make for more effective co-operation between the two organisations'.

Consistent with this understanding of the relationship between the two organizations, the EU Fundamental Rights Agency shall take into account, in its interpretation of fundamental rights, the human rights instruments adopted within the Council of Europe, but also the findings of the Council of Europe bodies be relied upon in any monitoring of individual Member States by the EU Fundamental Rights Agency. This is provided for by the Regulation establishing the Fundamental Rights Agency, which – anticipating in that respect on the Memorandum of Understanding, concluded formally in May 2007 but under negotiation since the Spring of 2006 –, refers to 'the findings and activities of the Council of Europe's monitoring and control mechanisms, as well as of the Council of Europe Commissioner for Human Rights'; in addition, a reference to the activities of the Organisation of Security and Co-operation in Europe (OSCE), the United Nations and unspecified 'other international organisations' has been included.¹⁴⁰ It is difficult to be more explicit.

Once the principle is agreed upon that the EU Fundamental Rights Agency should base itself on the findings of the Council of Europe bodies, what becomes crucial for the implementation of this provision is that the Council of Europe is adequately represented within the management structure of

¹³⁶ Memorandum of Understanding between the Council of Europe and the European Union, adopted at the 117th Session of the Committee of Ministers held in Strasbourg on 10-11 May 2007, CM(2007)74 (10 May 2007) (hereinafter referred to as 'Memorandum of Understanding').

¹³⁷ Memorandum of Understanding, paras. 17-19.

¹³⁸ 'Council of Europe – European Union; a sole ambition for the European continent', report by Jean-Claude Juncker to the Heads of State and government of the Member States of the Council of Europe, 11 April 2006, available at: www.cor.europa.eu/document/presentation/Report%20Juncker%20CoE-EU%20cooperation.pdf (last visited 18 January 2008) (hereafter referred to as the 'Juncker report').

¹³⁹ See PACE, Recommendation 1743 (2006), *Memorandum of understanding between the Council of Europe and the European Union*, in which the PACE recommends to the Committee of Ministers to propose to the European Union to formally acknowledge in the memorandum of understanding between the two organisations that that 'the Council of Europe must remain the benchmark for human rights, the rule of law and democracy in Europe, in particular ensuring that the European Union bodies recognise the Council of Europe as the Europe-wide reference in terms of human rights and that they systematically act in accordance with the findings of the relevant monitoring structures'. This Recommendation was adopted on 13 April 2006, immediately following the presentation by Mr Juncker of his report before the Parliamentary Assembly of the Council of Europe. It was based on a report prepared within the Political Affairs Committee by Mr Kosachev (rapp.).

¹⁴⁰ See Article 6(2), (b) and (c) of the Regulation establishing the Agency (cited above, n. 23). Article 6(2)(c) of the initial draft Regulation proposed by the Commission (cited above, n. 41) stated that the Agency shall, 'in order to avoid duplication and guarantee the best possible use of resources, take account of existing information from whatever source, and in particular of activities already carried out by (...) the Council of Europe and other international organisations'. In the final text of the Regulation, the language has thus been strengthened and made more precise.

the Agency in order to ensure that all the findings of the Council of Europe are carefully considered and that any risks of diverging approaches or duplication in fact-finding are avoided.¹⁴¹ The draft Regulation proposed by the Commission on 30 June 2005 provided in this regard that the Council of Europe shall appoint an independent person to the Management Board of the Agency, but that, in contrast to the current situation existing within the EUMC,¹⁴² that person shall not necessarily be a member of the Executive Board. As correctly pointed out by the Council of Europe Secretariat,¹⁴³ this was not satisfactory. The day-to-day business of the Agency, as well as the definition of the position of the Agency on what may be politically extremely sensitive points, will be defined within the Executive Board, rather than by the Board of Management. Therefore it was felt necessary to widen the composition of the Executive Board, in order to ensure that the independent person appointed by the Council of Europe will be in a position to contribute effectively to the coherence of the approaches adopted by the EU Fundamental Rights Agency on the one hand, and by the Council of Europe bodies on the other hand. Following the compromise solution proposed by the Austrian presidency of the Council on 9 June 2006 and agreed to by the Council, the Regulation now stipulates that, although not formally a member of the Executive Board, the person appointed by the Council of Europe in the Management Board ‘may participate in the meetings of the Executive Board’.¹⁴⁴

Finally, on the basis of Article 9 of the Regulation establishing the Fundamental Rights Agency,¹⁴⁵ an agreement will be concluded between the EU and the Council of Europe on the cooperation of both organisations within the EU Fundamental Rights Agency. At the time of writing, the European Commission has put forward a proposal for such an agreement, which it negotiated with the Council of Europe on the basis of negotiating directives from the Council.¹⁴⁶ The draft agreement, which the Council should in principle approve, provides inter alia that the Agency shall ‘take due account of the judgments and decisions of the European Court of Human Rights concerning the areas of activity of the Agency and, where relevant, of findings, reports and activities in the human rights field of the Council of Europe’s monitoring and intergovernmental committees, as well as those of the Council of Europe’s Commissioner for Human Rights’.¹⁴⁷ The ‘monitoring committees’ to which this paragraph refers include the European Committee of Social Rights, the European Committee for the Prevention of Torture, the European Commission against Racism and Intolerance, the Committee of experts of the European Charter for Regional or Minority Languages, the Advisory Committee of the Framework Convention for the Protection of National Minorities, as well as ‘any other such independent bodies that the Council of Europe might set up in the future’ ; the intergovernmental committees are those set

¹⁴¹ As already mentioned, while the duplication of monitoring is not in principle problematic, as any monitoring performed by the EU Agency would be for other purposes than the monitoring performed by the Council of Europe bodies, duplication in fact-finding and in the evaluation of specific situations should be avoided as it may be seen as an unnecessary waste of resources and as creating a risk of divergent conclusions. The EU Agency should systematically refer to the findings made within the Council of Europe, but it should then process this information, collected by the Council of Europe bodies, in order to draw the necessary conclusions which are relevant to the fundamental rights policies of the European Union.

¹⁴² Article 9(1) of Regulation No. 1035/97 establishing the EUMC (cited above, n. xxx).

¹⁴³ In the Council of Europe Memorandum of 8 September 2005 referred to above, n. xxx.

¹⁴⁴ Article 12(1) of the draft Regulation, Council of the European Union, doc. 10289/06, 9 June 2006 ; and, now, Article 13(1) of Council Regulation (EC) No. 168/2007 (cited above, n. xxx).

¹⁴⁵ This provides that : ‘In order to avoid duplication and in order to ensure complementarity and added value, the Agency shall coordinate its activities with those of the Council of Europe, particularly with regard to its Annual Work Programme [...] and cooperation with civil society [...]. To that end, the Community shall, in accordance with the procedure provided for in Article 300 of the [EC] Treaty, enter into an agreement with the Council of Europe for the purpose of establishing close cooperation between the latter and the Agency. This agreement shall include the appointment of an independent person by the Council of Europe, to sit on the Agency’s Management Board and on its Executive Board [...]’.

¹⁴⁶ Proposal for a Council Decision relating to the conclusion of an Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe, COM(2007) 478 final, of 21.8.2007. For the negotiation guidelines, see Document of the Council 6150/07 JAI 66 CATS 11 COHOM 14 COEST 37 FIN 46 (RESTREINT UE).

¹⁴⁷ Draft Agreement, para. 8.

up by the Committee of Ministers of the Council of Europe. The draft Agreement also provides, again consistent with the Memorandum of Understanding of May 2007, that ‘Whenever the Agency uses information taken from Council of Europe sources, it shall indicate the origin and reference thereof. The Council of Europe shall proceed in the same way when using information taken from Agency sources’.¹⁴⁸

It is clear, therefore, that the activism of the Council of Europe exercised a profound influence on the final shape of the EU Fundamental Rights Agency. This activism explains in part why the Regulation establishing the Agency does not define the mandate of the Agency as including any ‘monitoring’, in the classic meaning of the expression, of either the EU member States or of the institutions. It explains why the emphasis is put, rather than on country-specific reports, on thematic studies. It explains why the competences of the Agency do not extend to the EU member States beyond the implementation of EU law. And finally, it explains why third countries, particularly Council of Europe member States, in principle do not fall under the territorial scope of activities of the Agency, with the exception of candidate and pre-candidate countries, to the extent that fundamental rights are to be taken into account in the absorption by these countries of the EU *acquis*. However, the insistence of the Council of Europe on restricting the definition of the mandate of the Agency would not have been as effective if it had not been echoing certain fears of the EU member States themselves, that they were going to be subjected to yet another form of scrutiny, and that findings by the Agency identifying certain lacunae in their domestic legal systems or policies could have endangered, rather than facilitated, cooperation within the Area of freedom, security and justice.

V. Epilogue

The final issue which was raised in the negotiations leading to the establishment of the Fundamental Rights Agency concerned the extension of its mandate to ‘third pillar’ issues, i.e., the issues of police cooperation and judicial cooperation in criminal matters which are covered by Title VI EU. Despite the fact that these fields are highly sensitive from the point of view of civil liberties, certain Member States opposed the proposal made by the Commission to allow the Agency to also analyze the situation of fundamental rights under this Title of the EU Treaty. Instead, a political declaration was attached to the Regulation adopted containing a ‘rendez-vous’ clause allowing the mandate to be re-examined in 2009, ‘with a view to the possibility of extending it to cover the areas of police and judicial cooperation in criminal matters’. In addition, according to another declaration by the Council appended to the Regulation, ‘the Union institutions may, within the framework of the legislative process and with due regard to each others’ powers, each benefit, as appropriate and on a voluntary basis, from [the expertise gained by the Agency in the field of fundamental rights] also within the areas of police and judicial cooperation in criminal matters’; this expertise ‘may also be of use to the Member States that wish to avail themselves thereof when they are implementing legislative acts of the Union in that area’. Therefore, although the remit of the Agency does not extend beyond Community law, to the domains of police cooperation and judicial cooperation in criminal matters covered by Title VI EU, the future is preserved. Indeed, it can be expected that any sensitive instrument proposed under Title VI EU will be presented to the Agency for it to deliver an opinion, since it might be politically difficult to justify circumventing the Agency, once it will have gained sufficient credibility by being truly independent and, especially, by the quality of its reports. Finally, although the Agency will not be tasked with the preparation of regular reports on third pillar issues, the evaluation of the policies pursued by the Union and the Member States in this field might be conducted through other techniques – in particular peer review mechanisms, coordinated and facilitated by the Commission, on the basis of the information provided by the Member States –, as as

¹⁴⁸ Draft Agreement, para. 9.

been proposed by the Commission in June 2006.¹⁴⁹

Even taking into account all the limitations referred to above, the establishment of the Fundamental Rights Agency does not constitute merely an institutional development. It would be surprising if this institutional innovation did not produce a powerful dynamizing effect on the exercise by the Union of the competences it has been attributed, in a number of fields, to contribute to the implementation of the values enshrined in the EU Charter of Fundamental Rights. The establishment of the Fundamental Rights Agency was not intended, explicitly at least, as a means to promote a more active fundamental rights policy in the Union. The objective pursued in creating such an agency was to evaluate better, from the point of view of the fundamental rights recognized in the EU Charter of Fundamental Rights, the measures adopted by the Union and by the Member States in the implementation of Union law, and to promote mutual learning in this field. It was not to bring about a more dynamic exercise by the Union of its legal competences in this field ; nor, of course, was it to lead to a transferral of supplementary powers to the Union. At the same time, it seems almost unavoidable that, just like the adoption of the EU Charter of Fundamental Rights is already influencing the exercise by the Union of the competences it shares with the Member States, the creation of the Agency will lead to Union to move from a reactive approach to fundamental rights – focused on the obligation to avoid violating them – to a proactive approach – asking instead how it may contribute to promote them –.¹⁵⁰ This is all the more necessary in the current context, at a time when harmonization has become difficult to achieve due to enlargement and the diverse sensibilities which coexist within the Council, and when, as a result, mutual recognition (under its many incarnations) appears as a potential substitute. Not only compliance with the minimum standards imposed by fundamental rights but also the absence of too important divergences between the Member States in the implementation of fundamental rights should define the limit – or the precondition – for such mutual recognition techniques to be authorized to develop, and to function without strains. There are signs that the need for the Union to actively promote a high level of protection of fundamental rights in the Union is being recognized. The Agency, whose added value was put in doubt by many during the lengthy negotiations having led to its establishment, could in the future constitute the primary lever through which such a development might occur.

¹⁴⁹ Communication from the Commission to the Council and the European Parliament, *Evaluation of EU Policies on Freedom, Security and Justice*, COM(2006) 332 final, of 28.6.2006.

¹⁵⁰ In favour of such a development see Olivier De Schutter, 'Les droits fondamentaux dans le projet européen. Des limites à l'action des institutions à une politique des droits fondamentaux' in Olivier De Schutter and Paul Nihoul (eds) *Une Constitution pour l'Europe. Réflexions sur les transformations du droit de l'Union européenne* (Brussels, Larcier, 2004), p. 81 ; and Olivier De Schutter, 'Fundamental Rights and the Transformation of Governance in the European Union', chapter 5 of the *Cambridge Yearbook on European Legal Studies*, 2007, pp. 133-175. For an excellent discussion of the relationship between the protection of fundamental rights and the question of competences, see Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *CML Rev* 945.

