



## The Implementation of the Charter by the Institutions of the European Union

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# **The Implementation of the Charter by the Institutions of the European Union**

**by Olivier De Schutter**

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## 1. Introduction

The proclamation of the Charter of Fundamental Rights at the Nice European Council of December 2000 was not a legal event: it was a political moment.<sup>1</sup> It brought about a significant change in the way the European Union institutions came to conceive of themselves. A "fundamental rights culture" was born then. In comparison, the entry into force of the Treaty of Lisbon on 1 December 2009,<sup>2</sup> though it affirms the legally binding nature of the Charter in its slightly amended form,<sup>3</sup> is of relatively more minor significance.

How could the Charter play that role? Of course, the entry of fundamental rights in the legal order of the European Union predated the adoption of the Charter by thirty years. The European Court of Justice (now the Court of Justice of the European Union) has been treating fundamental rights as part of the general principles of law it applies and ensures respect for in the scope of application of the treaties, since the early 1970s.<sup>4</sup> But the case-law that resulted was neither visible nor particularly predictable in its application. It failed to provide the required guidance to either the institutions of the European Union or to the Member States implementing EU law.

Providing guidance and improving predictability, as well as strengthening legitimacy, were the key concerns of the Heads of State and Government when, at the Cologne European Council of 3-4 June 1999, they decided that a charter should be prepared, in order to make more visible the *acquis* of the European Union in the area of fundamental rights. When, eighteen months later, the Charter of Fundamental Rights was proclaimed in Nice, it was in the form of a political declaration. Although it could be argued even then that the charter formed an interinstitutional agreement obligatory for the institutions concerned,<sup>5</sup> none of the individuals involved in drafting the charter saw the question of its legal value as an immediate priority. The charter was not to replace the case-law of the Court. Nor was it to serve, as had the Community Charter of Fundamental Social Rights for Workers adopted at the Strasbourg European Council in December 1989, as the springboard for a legislative programme of the European Commission. Rather, its purpose was for the institutions to affirm that they would be acting henceforth in accordance with a set of core values that all the actors having participated in the drafting process shared, and were pledging to uphold. The Charter was of course perceived as highly legitimate, both because it essentially was a restatement in a codified form of the existing *acquis* of the EU legal order in the area of fundamental rights,<sup>6</sup> and because the "convention" which had been tasked

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<sup>1</sup> OJ C 364 of 18.12.2000, p. 1.

<sup>2</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, of 17 December 2007, p. 1).

<sup>3</sup> Article 6 § 2 of the EU Treaty now refers to the EU Charter of Fundamental Rights in the revised form it has been proclaimed, in a revised form, on 12 December 2007 (OJ C 303 of 14.12.2007, p. 1). It states that "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

<sup>4</sup> See, e.g., Case C-29/69, *Stauder v Ulm* [1969] ECR 4119; Case C-11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125; Case C-4/73, *Nold v Commission* [1974] ECR 491; Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219; Case 44/79, *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; Case 5/88, *Wachauf v Germany* [1989] ECR 2609. This case law developed on the basis of what was initially Article 220 of the EEC Treaty (Article 164 of the EC Treaty, now corresponding to Art. 19(1), second sentence, of the EU Treaty), which requires the Court to ensure that the law is observed in the interpretation and application of the Treaty.

<sup>5</sup> See Olivier De Schutter and Emmanuelle Bribosia, "La Charte des droits fondamentaux de l'Union européenne", *Journal des tribunaux*, 24 mars 2001, pp. 281-293.

<sup>6</sup> This is one of the reasons why the Protocol (n° 30) on the application of the Charter of Fundamental Rights to Poland and to the United Kingdom, appended to the Treaty of Lisbon (see OJ C 306 of 17.12.2007, p. 156), shall be devoid of any legal effect : although as a result of this protocol, the domestic courts in Poland and in the United Kingdom could be tempted to abstain from referring to the Court of Justice of the European Union questions of interpretation of EU law arising from the obligation to take into account fundamental rights in the implementation of EU law by the national authorities of these countries, this would be in violation of the requirement -- that the Treaty of Lisbon confirmed in Art. 6 § 3 of the EU Treaty, as amended -- that fundamental rights as part of the general principles of law applied by the Court of Justice should be complied with in the field of application of EU law. The Court of Justice of the EU has confirmed that, notwithstanding the Protocol, the rights listed in the Charter were binding on the UK in the field of application of EU law : see Case C-411/10, *N.S.* (at para. 68).

with preparing the document included representatives of the national governments and of the European Commission, as well as members of national parliaments and of the European Parliament. Indeed, soon after its proclamation, the EU Charter of Fundamental Rights was referred to by Advocates-General to the European Court of Justice,<sup>7</sup> by the Court of First Instance (now the General Court),<sup>8</sup> and by the Civil Service Tribunal.<sup>9</sup> The European Court of Justice itself moved cautiously in this direction, but its first references to the Charter predate the entry into force of the Lisbon Treaty.<sup>10</sup>

More important even than the recognition of its authority by the courts, the Charter of Fundamental Rights gradually led the institutions of the EU to integrate a concern for fundamental rights in their law- and policy-making. It is this process of integration that this contribution explores. Such integration of fundamental rights beyond the judicial process was greatly facilitated by the fact that, with the proclamation of the Charter, the *acquis* of the EU in the area of fundamental rights was now codified into a single catalogue of rights that was perceived as highly legitimate. Indeed, the proclamation of the Charter at the Nice European Council prompted the European Parliament and the European Commission to take a number of initiatives to favor such integration, already in 2000-2001: sections 2 and 3 of this contribution explore the two institutions separately. The Council of the EU was slower to move in this direction, but it has more recently followed those examples : section 4 describes the advances it has made in this regard. This process of integration of the Charter in the law- and policy-making of the EU may be further strengthened by the establishment in 2007 of the Agency for Fundamental Rights for the European Union, although the potential contribution of the Agency has remained hitherto, in part, untapped: however, since this volume includes a separate discussion of the role of the Agency, it will not be elaborated upon in this chapter. Finally, section 5 explains how further steps could be taken, beyond the current institutional practices, to ground the EU's initiatives in fundamental rights. Specifically, that section will explore whether more could be done to ensure that fundamental rights guide the exercise by the institutions of the EU of their competences, and to ensure that the EU contributes to strengthening fundamental rights in the Member States.

## **2. The integration of the Charter of Fundamental Rights in the work of the European Parliament**

### **a) The Parliament's role in monitoring the EU member States**

The Parliament had not waited for the adoption of the Charter of Fundamental Rights to assume the role of guardian of fundamental rights within the EU legal order. The Treaty of Amsterdam entered into force on 1 May 1999, just 18 months before the Charter was proclaimed. This Treaty first formulated in Article 6(1) EU the values on which the Union was founded, which include human rights and fundamental freedoms<sup>11</sup>: this provided the Parliament with a first opportunity to clearly affirm its role in this regard. At the time, the intention of the 15 Member States which had negotiated the Treaty of Amsterdam in referring to the values of the EU was to send a strong signal to the candidate countries from Eastern and Central Europe, who were scheduled to accede to the EU five

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<sup>7</sup> See, e.g., AG Tizzano, opinion of 19 February 2001 in Case C-173/99, BECTU, [2001] ECR I-4881 (on the status of the right to paid leave as a fundamental right, justifying a broad reading of the relevant instrument of EU secondary law).

<sup>8</sup> Case T-198/01, Technische Glaswerke Ilmenau [2002] II-2153, para. 115 ; Joined Cases T-377/00, T-379/00, T-380/11, T-260/01 and T-272/01, Philip Morris International e.a. v. Commission [2003].

<sup>9</sup> Case F-1/05, Landgren, [2006] II-A-1-459, para. 72.

<sup>10</sup> The Court of Justice referred to the Charter of Fundamental Rights for the first time in a judgment of 27 June 2006, concerning an action for annulment filed by the European Parliament against the 2003 Directive on the right to family reunification (directive 2003/86/EC of 22 September 2003) : see Case C-540/03, Parliament v. Council, [2006] I-5769, para. 38. However, the reference to the Charter in that case still has a rather ambiguous status, since the Charter was referred to by the Preamble of the instrument (in that case, the Family Reunification Directive) against which the application was filed. It is only in 2007 that the Court referred to the Charter of Fundamental Rights in other situations, i.e., even in the absence of any explicit reference to the Charter in secondary legislation : see Case C-432/03, Ubinet [2007] ECR I-2271, para. 37 ; Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union [2007] ECR I-10779, paras. 43-44; Case C-341/05, Laval un Parteneri [2007] ECR I-11767, paras. 90-91; Joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation v. Council [2008] ECR I-6351, para. 335.

<sup>11</sup> See, now, Article 2 of the EU Treaty.

years later. They 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. For the first time, the EU was giving itself a tool allowing its institutions to react in situations where the conduct of one of its members would, in practice, make the continuation of cooperation with that State impossible.

The new sanctions mechanism introduced by the Treaty of Amsterdam provided that on a proposal from the Commission or one third of the member states, the Council - at the highest level, composed of the heads of state or government - could determine the existence of a "serious and persistent" breach by a Member State, after providing an opportunity to that State to submit its observations: the Council was to make such determination unanimously, though without taking into account the vote of the State concerned. Though the European Parliament had to give its assent to such finding being made (for which it was required to decide by a majority of its members and a two-thirds majority of the votes cast), it had no power to launch the sanctions procedure. Nevertheless, seizing upon the opportunity created by the Treaty of Amsterdam, the European Parliament inaugurated in 1999 the practice of adopting annual reports on the situation of fundamental rights in the Union. The following year, the adoption of the Charter of Fundamental Rights allowed this practice to be strengthened, as the Charter provided the Parliament with a clearer and more legitimate grid of analysis of the practices of the Member States in the area of fundamental rights.<sup>12</sup>

In addition to approving the Charter of Fundamental Rights as a reliable codification of the *acquis* of the EU in the area of fundamental rights, the Nice European Council of December 2000 also supported the monitoring practice of the European Parliament in another way. The new revision of the EU treaties on which the Heads of State and government reached agreement further strengthened the possibility for the institutions of the EU to take action in situations where a Member State does not comply with the values on which the EU is built: it introduced the possibility of recommendations being adopted *preventively*, where a 'clear risk of a serious breach' of those values is found to be present.<sup>13</sup> This amendment to Article 7 of the EU Treaty brought about by the Treaty of Nice was a result of the crisis opened by the entry into the Austrian ruling governmental coalition of Jörg Haider's Freedom Party of Austria (FPÖ) in February 2000, after the FPÖ had won 29 per cent of the votes in the general elections held on 3 October 1999.<sup>14</sup> With France and especially Belgium leading, the other

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

<sup>13</sup> This preventive mechanism is now described in Article 7(1) EU, which reads : "On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure". Article 2 EU, to which the sanctions mechanism of Article 7 EU refers, lists the values on which the Union is founded as including "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

<sup>14</sup> On this crisis, see Meredith Happold, "Fourteen against One: The EU Member States' Response to Freedom Party Participation in the Austrian Government", *International and Comparative Law Quarterly*, vol. 49 (2000), p. 953; and Emmanuelle Bribosia/Olivier De Schutter/Thomas Ronse/Anne 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* (2000) 61. On the insertion of Article 7(1) EU by the Treaty of Nice, see Grainne de Búrca, "Beyond the Charter: How Enlargement has enlarged the Human Rights Policy of the EU", in De Schutter/Deakin (eds), *Social Rights and*

EU member States refused any bilateral contacts with the Austrian government, in order to convey their fears of what they considered a "threat to democracy", resulting from the Austrian governmental coalition including elements of an extreme right-wing party. The crisis lasted until September 2000. Normal relationships with Austria could only resume after a *Comité des Sages* delivered a report in which it noted that none of the actions of the Austrian government could be seen as a violation of the values of the EU. But the Wise persons Committee recommended at the same time the introduction of a procedure allowing for *preventive* action to be taken where there appears such a risk. It is this recommendation that the negotiators of the Treaty of Nice included, as one of the last-minute amendments to the text finally agreed at the Nice Summit.

Although the Treaty of Nice would only be signed on 27 February 2001 and entered into force two years later, on 1 February 2003, the European Parliament immediately saw the introduction of this new procedure, together with the proclamation of the Charter, as justifying its stronger involvement in monitoring the situation of fundamental rights in the EU Member States. Only weeks after the signature of the Treaty, it adopted a resolution, in July 2001, explaining 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 Committee on Civil Liberties, Justice and Home Affairs (LIBE)] to ensure [...] that both the EU institutions and the Member States uphold the rights set out in the various sections of the Charter'.<sup>15</sup>

In 2001, the stage was therefore set for the Parliament to assume the role of guardian of fundamental rights in the EU Member States. Indeed, the inclusion of the preventive mechanism in Article 7(1) of the EU Treaty soon raised the question whether this should lead to a permanent monitoring of the situation of fundamental rights in the Member States of the European Union. The European Parliament, through its Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee), took the leading role in this matter. As it noted itself, the Treaty of Nice 'acknowledges Parliament's special role as an advocate for European citizens' by granting the European Parliament the right to call for a procedure to be opened in the event of a clear risk of a serious breach.<sup>16</sup> However, the mismatch was soon to become apparent between the working methods of the Parliament, largely based on political groups lines, and the role it saw for itself in monitoring compliance with the values on which the Union is built. The more the Parliament wanted to be perceived as exercising a quasi-judicial role (acting, in that respect, as a sort of ombudsinstitution), and the more it wanted to avoid giving the impression of being guided by political motives, the more urgent it was for the Parliament to base its monitoring on an objective, reliable assessment of the developments concerning fundamental rights across the EU: if they were to be monitored in a way that is perceived as impartial and objective, the politicization of fundamental rights had to be avoided at all costs. In addition, the resources of the LIBE Committee were clearly insufficient to enable it to conduct a monitoring function thus conceived in an entirely satisfactory manner: the Secretariat of the LIBE Committee (not to mention the individual members of Parliament) had neither the expertise nor the time to review developments in 15 (soon to become 25) EU member States, in all the areas covered by the Charter of Fundamental Rights, in order to assess whether certain developments might threaten the cooperation between the member States based on their shared values; the diversity of legal systems concerned and of languages

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*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.

<sup>15</sup> Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000) (rapp. Thierry Cornillet) (2000/2231(INI)) (OJ C 65 E, 14.3.2002, pp. 177-350), paras. 2-3.

<sup>16</sup> See the Report on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)) (rapp. J. Voggenhuber), para. 6 of the proposal for a resolution; this passage has been maintained without amendment in the European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), adopted on 20 April 2004 (see para. 6 of the operative part of the resolution).



further increased the difficulty of doing so. The European Parliament was aware of these many limitations. It therefore requested that

a network be set up consisting of legal experts who are authorities on human rights and jurists from each of the Member States, in order to ensure a high degree of expertise and enable Parliament to receive an assessment of the implementation of each of the rights laid down in the Charter, taking account of developments in national laws, the case law of the Luxembourg and Strasbourg Courts and any notable case law of the Member States' national and constitutional courts.<sup>17</sup>

That network was set up in September 2002.<sup>18</sup> A year later, in October 2003, the European Commission adopted a communication in which it set out its intentions about the implementation of Article 7 EU.<sup>19</sup> Referring to the work of the EU Network of independent experts on fundamental rights, it took the view that the information collected by the network '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'. 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'.<sup>20</sup>

What the Commission was in fact suggesting, was that a permanent form of monitoring of the compliance with fundamental rights by the EU Member States should be established, both to contribute to the mutual trust in the establishment of an area of freedom, security and justice, and where necessary, to provide the institutions of the Union with the information they require 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. But in its response to the European Commission, adopted five months after the communication was released, 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.

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<sup>17</sup> Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000), cited above, para. 9.

<sup>18</sup> The EU Network of Independent Experts on Fundamental Rights was composed initially of 16 experts (later to become 26 experts, in order to include experts from the 10 acceding EU member States), covering the situation of fundamental rights in the Member States and in the Union, on the basis of the EU Charter of Fundamental Rights. See [http://cridho.uclouvain.be/en/eu\\_experts\\_network/](http://cridho.uclouvain.be/en/eu_experts_network/) ; and 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 and Portland Oregon, 2005.

<sup>19</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final of 15.10.2003.

<sup>20</sup> At para. 2.2. of the communication, pp. 9-10.



Union intervention pursuant to Article 7 of the EU Treaty must therefore be confined to instances of clear risks and persistent breaches and *may not be invoked in support of any right to, or policy of, permanent monitoring of the Member States by the Union*. Nevertheless, the Member States, accession countries and candidate countries must continue to develop democracy, the rule of law and respect for fundamental rights further and, where necessary, implement or continue to implement corresponding reforms.<sup>21</sup>

In effect, the insistence of the European Parliament on the "principle of confidence" excluded the establishment of a mechanism for the permanent monitoring of fundamental rights within the EU member States, which by its very nature might instead be interpreted as a sign of distrust. Three factors may explain this change of mood of the Parliament. A first factor is relatively anecdotal and circumstantial : when the resolution was adopted on 20 April 2004, it was already becoming clear that the annual report on the situation of fundamental rights in the EU (which that year was in the hands of A. Boumediene-Thiery, a member of the French Greens Party) would be highly politicized, and that the ability for the European Parliament to act as an impartial guardian in this area was increasingly questioned even among its members.<sup>22</sup> Another factor was the establishment, in late 2002, of the network of independent experts on fundamental rights. As explained above, the network had been established at the request of the European Parliament to prepare annual reports on the situation of fundamental rights in the EU (including in the 15, and then 25, EU Member States), in order to support the Parliament in its monitoring role. But because this network prepared reports that were more detailed and better researched than what the European Parliament could hope to achieve itself, and in part because of the apparent inability of the Parliament to agree on which issues deserved to be highlighted in its annual resolutions on the situation of fundamental rights in the EU, it had become clear by early 2004 that the Parliament was not equipped to lead this exercise ; nor was it institutionally well positioned to do so. Why should it support a monitoring of fundamental rights in the EU, if it were not to be in the driving seat?

A third factor was probably even more decisive. The resolution was adopted only days before ten new States, including eight countries from Central and Eastern Europe, were scheduled to join the EU. The climate was therefore not auspicious: any indication that the EU would henceforth monitor fundamental rights would inevitably be read as extending the conditionalities and surveillance imposed on the accession countries during the process of enlargement,<sup>23</sup> when what seemed to be required at that stage was rather the expression of trust, and the fullest possible integration of these countries in the 'EU family'.

Following 2004 then, the European Parliament's practice of adopting annual reports on the situation of fundamental rights in the European Union -- supported by the reports of the network of independent experts during 2002-2004 -- was discontinued for four years.<sup>24</sup> Only at the very end of the 2004-2009

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<sup>21</sup> European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), adopted on 20 April 2004, para. 12 (emphasis added).

<sup>22</sup> Indeed, the Parliament failed to achieve consensus on a draft resolution based on the report by Ms Alima Boumediene-Thiery on the situation of fundamental rights in the EU in 2003. Though the final vote took place in July 2004, it was already clear in April 2004 that the adoption of the report would be problematic.

<sup>23</sup> On the conditions for accession related to human rights and democracy, as applied to the 2004 enlargement, see in particular Manfred Nowak, 'Human Rights "Conditionality" in Relation to Entry to, and Full Participation in, the EU', in P. Alston, M. Bustelo and J. Keenan (eds), *The EU and Human Rights*, Oxford Univ. Press, 1999, p. 687-698; Bruno de Witte and Gabriel N. Toggenburg, "Human Rights and Member of the European Union", in Steve Peers and Angela Ward (eds), *The EU Charter of Fundamental Rights. Politics, Law and Policy*, Hart Publ., Oxford and Portland Oregon, 2004, pp. 59-82; Marise Cremona, "Accession to the European Union: Membership Conditionality and Accession Criteria", *Polish Yearbook of International Law*, vol. 25 (2002), pp. 219-240.

<sup>24</sup> Though it therefore did not contribute to annual reports of the European Parliament on the situation of fundamental rights, the EU Network of independent experts on fundamental rights itself continued to function until 2007, when the EU Agency for Fundamental Rights was established. It delivered annual reports on the situation of fundamental rights in the EU and in the EU member States, and opinions on various topics at the request of the European Commission.

legislature was the practice re-established.<sup>25</sup> In the resolution it adopted on 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008, the Parliament noted that "as the directly elected representative of the citizens of the Union and guarantor of their rights, [it] believes that it has a clear responsibility to uphold [the principles listed in Article 6 of the EU Treaty, which states that the European Union is based on a community of values and on respect for fundamental rights], in particular as the Treaties in their current form greatly restrict the individual's right to bring actions before the Community courts and the European Ombudsman".<sup>26</sup> Perhaps oblivious of its own responsibility in the abandonment of a permanent monitoring of fundamental rights in the EU member States, the Parliament "deplores the fact that the Member States continue to refuse EU scrutiny of their own human rights policies and practices and endeavour to keep protection of those rights on a purely national basis, thereby undermining the active role played by the European Union in the world as a defender of human rights and damaging the credibility of the EU's external policy in the area of the protection of fundamental rights"; noting that Article 7 of the EU Treaty "provides for an EU procedure to make sure that systematic and serious violations of human rights and of fundamental freedoms do not take place in the EU, but that such a procedure has never been used notwithstanding the fact that violations do take place in the Member States, as proven by the judgments of the [European Court of Human Rights]", the Parliament also "asks the EU institutions to establish a monitoring mechanism and a set of objective criteria for the implementation of Article 7 of the EU Treaty".<sup>27</sup>

In essence, the European Parliament was recommending in 2009 the very move it had opposed five years earlier ; and it had resumed the role it had been playing between 2000 and 2004, with the preparation of annual or biannual reports in which it screens the situation of fundamental rights in the EU member States.<sup>28</sup> Indeed, in contrast with the position adopted in 2004, the resolution adopted by the European Parliament in December 2010 on the situation of fundamental rights in the EU (2009) called for "follow-up to the 2003 Communication on Article 7 of the Treaty on European Union to define a transparent and coherent way to address possible violations of human rights and make relevant use of Article 7 TEU on the basis of the new fundamental-rights architecture".<sup>29</sup> And on 12 December 2012, confirming this new attitude, the Parliament adopted a resolution on the situation of fundamental rights in the European Union (2010-2011),<sup>30</sup> in which it noted that "the obligations incumbent on candidate countries under the Copenhagen criteria continue to apply to the Member States after joining the EU by virtue of Article 2 of the TEU [listing human rights, including the rights of persons belonging to minorities, among the values on which the Union is founded], and [...] in light of this all Member States should be assessed on an ongoing basis in order to verify their continued compliance with the EU's basic values of respect for fundamental rights, democratic institutions and the rule of law".<sup>31</sup>

Further confirming the complete change of attitude of the European Parliament since its "principle of confidence" resolution of 2004, the Parliament request from the European Commission that it update its 2003 communication discussed above, on the values on which the Union is built (in which the Commission had set out its interpretation of Article 7 EU), and that it "draw up before the end of 2012 a detailed proposal for a clear-cut monitoring mechanism and early warning system, as well as a

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<sup>25</sup> See the report on the situation of fundamental rights in the Union 2004-2008 (rapp. G. Catania) (doc. PE A6-9999/08, of 5.12.2008) ; and the Resolution of the European Parliament of 14 January 2009 on the situation of fundamental rights in the Union 2004-2008 (2007/2145(INI)). The draft report of G. Catania refers in its Preamble to "the annual reports on fundamental rights in the European Union drawn up by the European Union's network of independent experts".

<sup>26</sup> Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145 (INI)), Preamble, para. B.

<sup>27</sup> *Id.*, operational paragraphs 3 and 5.

<sup>28</sup> See Resolution of 15 December 2010 on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon, OJ C 169 E, 15.6.2012, p. 49.

<sup>29</sup> Resolution on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon (rapp. K Gal) (2009/2161(INI)), para. 17.

<sup>30</sup> Resolution of the European Parliament of 12 December 2012 on the situation of fundamental rights in the European Union (2010-2011) (2011/2069(INI)).

<sup>31</sup> *Id.*, Preamble, para. I.

freezing procedure, ... to ensure that Member States, at the request of EU institutions, suspend the adoption of laws suspected of disregarding fundamental rights or breaching the EU legal order, associating, in particular, the national fundamental rights bodies created in compliance with the Paris principles and building on the provisions of Articles 2, 6 and 7 of the TEU and Article 258 of the TFEU [concerning infringement proceedings against member States]".<sup>32</sup> The European Commission itself referred to its 2003 communication on the implementation of Article 7 of the EU Treaty in its 2010 communication setting out its strategy for the implementation of the Charter of Fundamental Rights.<sup>33</sup> It cannot be excluded, therefore, that further developments shall take place in this regard, effectively leading the European Parliament or/and the European Commission to develop a practice of systematically assessing whether the EU Member States are not acting in violation of the values on which the Union is founded, even in situations that are not related to the implementation of EU law and to which, therefore, the EU Charter of Fundamental Rights does not apply. The European Parliament would apparently support an initiative in this regard, and it may see this as a way to further strengthen its own role as a monitoring body, consistent with its attributions under the preventive mechanism established under Article 7(1) of the Treaty on the European Union.

## **b) The Parliament as guardian of legality**

The Parliament has a second tool at its disposal in order to contribute to the respect for fundamental rights in the EU. The Treaty of Nice has expanded the conditions under which it may file actions for annulment before the Court of Justice, "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers".<sup>34</sup> It is striking that these powers were first used by the European Parliament in two cases in which it considered that the Council and Commission had been acting in violation of the requirements of fundamental rights.

In a first case, the Parliament challenged the 2003 Family Reunification Directive which, it alleged, included a number of derogation clauses for the member States permitting them to apply national legislation which might not respect fundamental rights.<sup>35</sup> In its judgment of 27 June 2006, the Court for the first time invoked the Charter of Fundamental Rights, although it does so in ambiguous terms, basing itself on the consideration that the Charter merely codifies the existing *acquis* of fundamental rights in the EU legal order.<sup>36</sup> The Court rejected the action of the Parliament, however, essentially on the ground that the legislator cannot be considered to act in violation of fundamental rights simply because it leaves a broad margin of appreciation to the EU member States in the implementation of European legislation : though it acknowledges that "a provision of a Community act could, in itself, not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights",<sup>37</sup> the Court states that "while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights".<sup>38</sup> In other terms, it is not required that the EU legislation itself protects fundamental rights : it is sufficient that it does not impose on the EU member States that they adopt

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<sup>32</sup> Resolution of the European Parliament of 12 December 2012 on the situation of fundamental rights in the European Union (2010-2011), cited above, *op. para.* 31.

<sup>33</sup> COM(2010) 573 final, of 19.10.2010, at para. 1.3.3. On this communication, see further below.

<sup>34</sup> See now Art. 263, al. 2, of the Treaty on the Functioning of the European Union (formerly Art. 230, al. 2, of the EC Treaty).

<sup>35</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

<sup>36</sup> Case C-540/03, *Parliament v Council*, [2006] ECR I-5769. See para. 38 of the judgment: "The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights'."

<sup>37</sup> *Id.*, para. 23.

<sup>38</sup> *Id.*, para. 104.

measures, or refrain from adoption certain measures, in violation of such requirements.<sup>39</sup>

The second use by the Parliament of its new powers to file actions for annulment before the Court of Justice concerned the communication of PNR (Passenger Names Records) data on passengers on transatlantic flights to the American Bureau of Customs and Border Protection. Following the terrorist attacks of 11 September 2001, the United States on 19 November 2001 passed an Act on aviation and transportation security (*Aviation and Transportation Security Act*), followed on 9 May 2002 by an act on border security and visa reform (*Enhanced Border Security and Visa Entry Reform Act*). These instruments required airline companies operating flights to, from and across the territory of the United States to transmit personal data on passengers to the American customs and immigration authorities. In accordance with this new legislation, the American authorities demanded that European airline companies allow them electronic access from US territory to PNR data stored in the electronic reservation systems of the companies in question: companies that refused to comply were facing the threat of financial penalties, or even of a prohibition to fly above US territory. The result was that the European airline companies operating flights to the United States had to comply with potentially conflicting obligations, since it was doubtful whether they would be able to respond to the demands of the US authorities without violating the existing Community law on data protection.<sup>40</sup>

In order to arrive at a mutually acceptable solution, negotiations were launched in 2003 between the European Commission and the US authorities,<sup>41</sup> with the aim of defining the safeguards the US could establish to ensure that any transmission of data by airline companies having processed PNR data in the EU would be consistent with the requirements of EU law. Directive 95/46/EC of 24 October 1995 sets forth specific rules concerning the transmission of personal data to third countries<sup>42</sup>. Such transfer is in principle only authorized if the third country in question ensures an “adequate” level of protection. The “adequacy” of the level of protection must be assessed “in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations”. Article 25 of the Directive authorizes the Commission to enter into negotiations with countries that in its opinion do not ensure an adequate level of protection, preventing the transfer of personal data to those countries, in order to arrive at a satisfactory solution from the point of view of respect for the fundamental rights of the individual; Article 26 provides for a number of derogations from the principle of prohibiting the transfer of data to a country that fails to ensure an adequate level of protection.<sup>43</sup>

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<sup>39</sup> The Opinion of Advocate-General Kokott delivered on 8 September 2005 went further. Rejecting the view of the Council that the action for annulment of the European Parliament should be considered inadmissible because, in essence, it sought the challenge the compatibility with fundamental rights of the measures adopted by the national authorities implementation the Family Reunification Directive rather than the Directive itself, she stated that by putting forward this argument : “...the Council has failed to recognise that endorsement by Community law of specific options for maintaining in force or introducing provisions of national law constitutes a measure which may itself, in certain circumstances, infringe Community law. First, the options potentially restrict the scope of the entitlement to family reunification conferred by the Directive. Secondly, they formally establish that the provisions in question are compatible with Community law. If provisions establishing such a fact are not challenged in time by means of an action for annulment, the Community will be precluded from taking action itself against national measures which simply take full advantage of the various options contemplated” (para. 45). This is unconvincing. Even a measure adopted by national authorities that fully complies with the terms of the Directive could be in violation of EU law if it were adopted in violation of fundamental rights, as general principles of EU law that are binding on the member States whenever they act in the field of application of EU law.

<sup>40</sup> It should be remembered that Article 6(d) of Regulation no. 2299/89 (Council Regulation (EEC) no. 2299/89 of 24 July 1989 on a code of conduct for computerized reservation systems, OJ L 220 of 29.7.1989, p. 1, last amended by Council Regulation no. 323/1999 of 8 February 1999, OJ L 40 of 13.2.1999, p. 1) provides that “personal information concerning a consumer and generated by a travel agent shall be made available to others not involved in the transaction only with the consent of the consumer”.

<sup>41</sup> This followed the joint statement of 18 February 2003, in which the European Commission and the competent authorities of the United States announced that they endeavoured to find a solution to allow the transmission of personal data of passengers by airline companies operating transatlantic flights, using the APIS system (Advance Passenger Information System).

<sup>42</sup> On this issue, too, Convention no. 108 of 28 January 1981 concluded in the Council of Europe was completed by the Additional Protocol of 8 November 2001 to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows, which is directly inspired by Directive 95/46/EC.

<sup>43</sup> See Article 29 Working Party, Working Document *Transfers of Personal Data to Third Countries: Applying Articles 25 and 26 of the EU Data Protection Directive*, 24 July 24 1998, WP 12.



In the course of the negotiations between the European Commission and the US authorities, the Working Party set up by Article 29 of the Personal Data Directive<sup>44</sup> adopted a number of opinions setting out what such safeguards should consist in.<sup>45</sup> These recommendations could be taken into account only partly in the agreement finally reached between the parties.<sup>46</sup> Nevertheless, the European Commission adopted a decision<sup>47</sup> valid for an initial period of three-and-a-half years, declaring that “For the purposes of Article 25(2) of Directive 95/46/EC, the United States' Bureau of Customs and Border Protection (CBP) is considered to ensure an adequate level of protection for PNR data transferred from the Community concerning flights to or from the United States, in accordance with the Undertakings [of the United States' Bureau of Customs and Border Protection] set out in the Annex.” On the proposal of the Commission, the Council of the EU approved the agreement, which was then signed on 28 May 2004.<sup>48</sup>

The European Parliament had not remained passive in the course of these discussions. In several resolutions of 13 March 2003, 9 October 2003 and 31 March 2004, the European Parliament had called into question the way the negotiations were conducted as well as the compatibility of its outcome with fundamental rights.<sup>49</sup> On 21 April 2004, in accordance with Article 300(6) EC, it also had sought an opinion of the Court of Justice on the compatibility of the draft international agreement with the Treaty.<sup>50</sup> It is therefore hardly surprising that, after the Council and the Commission decided to go ahead with the approval of the agreement without waiting for the opinion of the Court, the Parliament took legal action. On 27 July 2004, relying on the new competences conferred upon it by the Treaty of Nice under Article 230(2) EC, it filed two actions for annulment with the Court of Justice, challenging both the 'adequacy decision' adopted by the European Commission on 14 May 2004 and the decision of the Council of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection. The Court delivered its judgment on 30 May 2006.<sup>51</sup> It annulled both decisions, but on the narrow ground that both acts had been adopted on an incorrect legal basis: in the view of the Court, the processing of personal data for the purposes of transferring them to the US CBP fell outside the scope of application of the 1995 Personal Data Directive, as such processing aimed at public security and law enforcement.<sup>52</sup> For the Parliament, this meant a pyrrhic victory: the Court did not feel it necessary to address the question whether the decisions challenged complied with the requirements of

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<sup>44</sup> 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.

<sup>45</sup> Opinion 4/2003 of the Article 29 Working Party on the level of protection ensured in the United States for the transfer of passengers' data, adopted on 13 June 2003 (WP 78).

<sup>46</sup> As noted by the Working Party Article 29 in its Opinion 6/2004 on the implementation of the Commission decision of 14-V-2004 on the adequate protection of personal data contained in the Passenger Name Records of air passengers transferred to the United States' Bureau of Customs and Border Protection, and of the Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection.

<sup>47</sup> Commission Decision 2004/535/EC of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States' Bureau of Customs and Border Protection, OJ L235 of 6.7.2004, p. 11.

<sup>48</sup> Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, OJ L 183 of 20.05.2004, p. 83.

<sup>49</sup> See the report prepared in the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs of the European Parliament by J. L. A. Boogerd-Quaak, on 7 April 2004 (doc. PE A5-0271/2004).

<sup>50</sup> The request for an Opinion was registered under No 1/04. On 9 July 2004, the Parliament informed the Court that it was withdrawing its request for an opinion.

<sup>51</sup> Joined Cases C-317/04 and C-318/04, *Parliament v. Council and Parliament v. Commission*, [2006] ECR I-4721.

<sup>52</sup> Article 3(2) of Directive 95/46/EC, the Directive "shall not apply to the processing of personal data ... in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law".

fundamental rights, and in particular with the right to respect for private life<sup>53</sup>; and at the time the case was decided,<sup>54</sup> personal data protection in the context of law enforcement was significantly less developed than in internal market legislation, which was covered by the 1995 Personal Data Directive.

Though it still is invoked as a threat,<sup>55</sup> it is unlikely that, in the future, the Parliament will make significant use of the power it has been attributed under Article 263 al. 2 TFEU, to seek the annulment of acts adopted by the EU institutions that intend to produce legal effects. This is not only because of these precedents, which can be considered, at best, as only partially successful. It is also because of deeper shifts of the position of the Parliament in the institutional structure of the EU: until the Treaty of Maastricht, the Parliament had almost only consultative powers, and it was influential primarily because of its moral authority ; now, its transmutation into a legislative assembly co-deciding with the national governments is almost complete. As the co-decision procedure is generalized, establishing the Parliament as a co-legislator together with the Council, the filing of actions for annulment before the Court loses much of its importance in the hands of the Parliament, as least as regards legislative acts: it is in its role of co-legislator that, in the future, the Parliament will seek to ensure that fundamental rights be consistently adhered to in law-making in the EU.

But there is a second reason why relying on actions for annulment before the Court may be of limited use to the Parliament in the future. The Parliament has consistently demanded that the EU ensures a high level of protection of fundamental rights in its legislative, regulatory, and policy-making functions. But important restraints are now imposed on the EU institutions in the name of the principles of subsidiarity and proportionality in all areas in which the competences are shared between the EU and the member States. In particular, the role of national parliaments in ensuring that these principles are complied with has been affirmed by the Treaty of Lisbon<sup>56</sup>: this may discourage the European Parliament from insisting that, in legislative acts adopted by the EU, the provisions related to fundamental rights be clarified and made more precise, beyond the general requirement that the fundamental rights must be complied with in the implementation of such acts. This may be compensated, in part, by an increased insistence of the Parliament that the European Commission carefully monitor compliance with fundamental rights by the EU member States, where necessary by launching infringement proceedings against States adopting implementing measures that may be in violation of such rights<sup>57</sup>; but it certainly will discourage the Parliament from taking a proactive stance in this regard, and from insisting on the need for the EU legislation itself to clarify how fundamental rights are to be ensured at the domestic level.

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<sup>53</sup> By contrast, this point is discussed in the Opinion of Advocate-General Léger delivered on 22 November 2005. This opinion concludes that the requirements of Article 8 of the European Convention on Human Rights have been complied with (see paras. 207-262 of the opinion). No reference is made to the Charter on Fundamental Rights.

<sup>54</sup> See now Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350 of 30.12.2012, p. 60.

<sup>55</sup> In its resolution of 12 December 2012, cited above, the European Parliament "...underlines its commitment to use its powers to act as a human rights litigant, in particular to ensure that EU acts respect, protect, promote and fulfil human rights" (OP 32).

<sup>56</sup> On the principles of subsidiarity and proportionality, see Article 5, §§ 3 and 4, of the EU Treaty, and Article 69 TFEU; and on the role of national parliaments in this regard, see Article 12(b) of the EU Treaty and Protocol (n° 2) on the application of the principles of subsidiarity and proportionality (providing that each national parliament or chamber of a national parliament may adopt a reasoned opinion stating why it considers that a draft legislative act does not comply with the principle of subsidiarity, within six weeks of the presentation of the proposal; and establishing certain thresholds (in principle, one third of the votes allocated to the national parliaments on the basis of two votes per national parliament) which may force a review of the legislative proposal).

<sup>57</sup> An indication of this may be found in the motion for a resolution on the situation of fundamental rights in the European Union (2010-2011) (EU doc. A7-0383/2012; inter-institutional procedural file 2011/2069(INI)), which notes that "the establishment of a genuine "culture of fundamental rights" in the Union calls for the development of a comprehensive system for monitoring the application of those rights, encompassing the Council and decisions taken as part of intergovernmental cooperation, in that the protection of fundamental rights does not consist solely of formal compliance with rules, but above all of their active promotion and of intervention in cases where Member States violate fundamental rights or enforce them unsatisfactorily" (Preamble, para. G), and that "the practical application of fundamental rights must be an objective of all European policies; takes the view that, to that end, the European Union institutions should actively promote and safeguard fundamental rights and take full account of them when drafting and adopting legislation" (OP 9).



### c) The Parliament as co-legislator

The establishment of the Parliament as a co-legislator in EU law-making may diminish the importance of filing actions for annulment before the Court. But it may enhance the importance of the Charter of Fundamental Rights in the work of the Parliament through a different channel, by increasing the importance of fundamental rights in the legislative process.

Already on 5 April 1977, the Presidents of the European Parliament, the Council and the Commission of the European Communities adopted a joint declaration in Luxembourg affirming that they will do their utmost to protect the fundamental rights enshrined in both in the constitutions of the Member States and the European Convention on Human Rights.<sup>58</sup> The Declaration essentially endorsed the case-law of the European Court of Justice that had developed since 1969, including fundamental rights among the general principles of law which the Court considered it had a mandate to enforce in the field of application of European Community law. The three institutions welcomed this development, and pledged that "[i]n the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights". The Declaration was useful in endorsing the position of the Court of Justice. But it remained more a symbol than a tool, in the absence of an agreed upon catalogue of rights that the institutions could use as a reference point. It is this gap that the Charter of Fundamental Rights has now come to fill. On the basis of the Charter, it has become easier for the European Parliament to systematically check whether the legislative proposals it is presented with comply with the rights, freedoms, and principles it brings together.

Under the heading "Respect for the Charter of Fundamental Rights of the European Union", Article 36 of the Rules of Procedure of the European Parliament now states that the Parliament shall "in all its activities" fully respect both the Charter of Fundamental Rights and the rights and principles "enshrined in Article 2 and in Article 6(2) and (3) of the Treaty on European Union".<sup>59</sup> This dual reference -- both to the Charter itself and to fundamental rights including among the general principles of law that the Court of Justice of the European Union ensures respect for, based on the common constitutional traditions of the EU member States and the ECHR -- should avoid the risk of the Charter becoming a "screen", discouraging reference to other sources of human rights as they may develop in the EU, and thus "freezing" the evolution of fundamental rights as recognized in the legal order of the EU. Article 36 then describes a procedure that should ensure that any potential violation of fundamental rights by amendments introduced by the European Parliament to a legislative proposal shall be subjected to a close scrutiny :

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

The LIBE committee is thus formally recognized as having a special responsibility to ensure that fundamental rights are complied with in the course of the legislative procedure. In addition of course, the Parliament may seek an opinion from the EU Fundamental Rights Agency. Consistent with its role as described in its founding Regulation, the Agency 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'.<sup>60</sup> The Regulation establishing the Fundamental Rights Agency does not in principle authorize the Agency to adopt opinions concerning pending legislative proposals, but the

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<sup>58</sup> OJ C 103 of 27.04.1977.

<sup>59</sup> Art. 36(1).

<sup>60</sup> 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).

Agency may do so where it receives a specific request from an institution involved in the procedure.<sup>61</sup> In addition, the Agency may "formulate and publish conclusions and opinions on specific thematic topics, 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 or the Commission".<sup>62</sup> Therefore, certain reports of the Agency may be taken into account in the legislative procedure, even though they may not be directly related to the legislative proposal under discussion.

### 3. The integration of the Charter of Fundamental Rights by the European Commission

The role of fundamental rights in the exercise by the European Commission of its powers, particularly in drafting legislative proposals and in policy-making, has developed in three directions : first, the Commission has gradually strengthened the procedures through which it seeks to assess the compatibility of its legislative proposals with the requirements of fundamental rights ; secondly, it has integrated fundamental rights into its practice of impact assessments; thirdly, it has moved to a more proactive approach to fundamental rights, through the preparation of an annual report on the implementation of the Charter of Fundamental Rights. These developments are examined in turn.

#### a) Assessment of compatibility of legislative proposals with the Charter

The European Commission announced its intention to verify the compatibility of its proposals with the Charter at an early stage : the first statement in this regard dates from 13 March 2001, at a time when the Charter had been proclaimed but was not formally binding and was not invoked in judicial proceedings.<sup>63</sup> In 2005, moving one step further, the Commission adopted a Communication clarifying the methodology it would use in order to assess the compatibility with the Charter of Fundamental Rights of its legislative proposals.<sup>64</sup> In 2009, the Commission published a Report containing an appraisal of this methodology and announcing a range of improvements.<sup>65</sup>

Though they could be further improved in a number of ways,<sup>66</sup> these arrangements are not simply a gesture of goodwill, or a signal given by the Commission that it intends to take fundamental rights seriously. They also are a means to reassure the Court of Justice that all precautions have been taken to ensure an adequate assessment of the compatibility of legislative proposals with the requirements of the Charter of Fundamental Rights, so that the Court may content itself with a relatively low level of scrutiny. Indeed, the Court increasingly tends to assess whether the requirements of fundamental rights have been complied with by considering *how* a decision was reached -- for instance, which interests were considered, which alternatives were explored, and how much efforts went into seeking to reconcile conflicting interests --, rather than simply *what* decision was reached -- and whether, in the view of the Court, the balance of interests that was struck was the right one --.

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<sup>61</sup> 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 [now Art. 263 TFEU, 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 [now Art. 258 TFEU, concerning infringement proceedings against member States for failure to comply with their obligations under EC law]".

<sup>62</sup> Council Regulation (EC) No. 168/2007, cited above (see Art. 2 § 1, d) and § 2). The role of the Agency 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' (Art. 2).

<sup>63</sup> SEC(2001) 380/3.

<sup>64</sup> 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.

<sup>65</sup> See COM(2009) 205 final of 29.4.2009 on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the charter of fundamental rights.

<sup>66</sup> See Israel de Jesus Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission', *European Law Review*, vol. 37, Issue 4 (2012), pp. 397-418.

The *Schecke* and *Eifert* cases illustrate this shift to a more procedural test in the case-law of the Court.<sup>67</sup> The case raised the question of the validity of regulations on the financing of the common agricultural policy<sup>68</sup> and providing for the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD).<sup>69</sup> Specifically, the Court was asked whether the publication on the internet site of the Federal Office for Agriculture and Food of personal data relating to recipients of funds from the EAGF or the EAFRD<sup>70</sup> was compatible with the requirements of the right to respect for private life, as guaranteed under Article 8 of the Charter of Fundamental Rights and under secondary EU law. The argument in favor of the publication of such information was that the taxpayer should know who are the beneficiaries of the programs that are supported by public budgets. However, the Court noted,

"... striking a proper balance between the various interests involved made it necessary for the institutions, before adopting the provisions whose validity is contested, to ascertain whether publication via a single freely consultable website in each Member State of data by name relating to all the beneficiaries concerned and the precise amounts received by each of them from the EAGF and the EAFRD – with no distinction being drawn according to the duration, frequency or nature and amount of the aid received – did not go beyond what was necessary for achieving the legitimate aims pursued, having regard in particular to the interference with the rights guaranteed by Articles 7 and 8 of the Charter resulting from such publication" (para. 79).

In order to inform its view as to whether the rights at stake were violated, the Court focuses primarily on the conduct of the authorities -- whether they acted with due diligence in examining the potential impacts of their choices on fundamental rights --. It notes that: "There is nothing to show that, when adopting Article 44a of Regulation No 1290/2005 and Regulation No 259/2008, the Council and the Commission *took into consideration methods of publishing information on the beneficiaries concerned* which would be consistent with the objective of such publication while at the same time causing less interference with those beneficiaries' right to respect for their private life in general and to protection of their personal data in particular, such as limiting the publication of data by name relating to those beneficiaries according to the periods for which they received aid, or the frequency or nature and amount of aid received" (para. 81 (emphasis added)). The Court concluded that the restriction to the right to respect for private life was disproportionate. But it arrived at this conclusion not as much because its own balancing of the interests led to a result different from that of the Council of the EU or the Commission, but rather because it could not find any indication that a serious effort was done by these institutions to choose the route that would achieve the best "fit" between the objective of transparency and the requirements of fundamental rights: as much as the result, it was the method that was found objectionable. Therefore, strengthening the steps through which the compatibility of a piece of legislation with fundamental rights is assessed prior to its adoption, may serve as a way to preempt the risk of a judicial veto: it is a way to reassure the court that the decision was not made lightly, and

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<sup>67</sup> Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen*, judgment of the Court (Grand Chamber) of 9 November 2010. See Elise Degreve, 'Arrêt "Volker und Markus Schecke et Eifert": le droit fondamental à la protection des données à caractère personnel et la transparence administrative', *Journal de droit européen*, n° 178 (2011), pp. 97-99; Stefan Huber and Hans Kristoferitsch, 'Let There Be Light? - Comments on the Judgment of the European Court of Justice, Joined Cases C-92/09 and C-93/09', *European State Aid Law Quarterly*, vol. 10, n° 4 (2011), pp. 687-695; Michal Bobek, 'Joined Cases C-92/09 & C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert, Judgment of the Court of Justice (Grand Chamber) of 9 November 2010', *Common Market Law Review*, vol. 48, n°6 (2011), pp. 2005-2022; and Isabelle Andoulsi, 'L'arrêt de la Cour du 9 novembre 2010 dans les affaires jointes Volker und Markus Schecke GBR et Hartmut Eifert contre Land d'Hessen (C-92/09 et C-93/09): une reconnaissance jurisprudentielle du droit fondamental à la protection des données personnelles?', *Cahiers de droit européen*, 2011 pp. 471-522.

<sup>68</sup> Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1), as amended by Council Regulation (EC) No 1437/2007 of 26 November 2007 (OJ 2007 L 322, p. 1).

<sup>69</sup> Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of Regulation No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) (OJ 2008 L 76, p. 28).

<sup>70</sup> As prescribed by Article 44a of Regulation No 1290/2005.

that any interference with fundamental rights was kept to the strictest minimum.

## **b) Impact assessments**

In parallel to such assessments of the compatibility of the draft legislative proposals submitted by the European Commission, the practice of impact assessments also was improved in order to better take into account the requirements of fundamental rights. The preparation of such impact assessments has become a standard practice since 2002.<sup>71</sup> 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 listed in the Charter.<sup>72</sup> The new guidelines are still based, as the former impact assessments, on a division between economic, social and environmental impacts. Indeed, the Commission has repeatedly stated that it was unwilling to perform separate human rights impact assessments, distinct from the assessment of economic, social and environmental impacts. In its 2005 communication presenting the revised version of the guidelines for impact assessments, the European Commission presents this position by the fact that impact assessments should not be confused with a legal assessment of the compatibility of legislative proposals with the requirements of fundamental rights. But its choice not to create a separate "fundamental rights impact assessment" can also likely be explained by the fact that the results of human rights impact assessments would be more difficult to ignore than if such results are part of a broader assessment, in which positive impacts at various levels (including, e.g., on economic growth and social cohesion) can compensate for other, negative impacts (such as a narrowing down of civil liberties or of the provision of certain public services).

Despite these hesitations, the role of fundamental rights in impact assessments as practiced by the European Commission has been gradually enhanced. The most recent guidelines on impact assessments further strengthen the role of fundamental rights in such assessments in comparison to the 2005 version of the guidelines,<sup>73</sup> and the Commission has recently pledged, in its "smart regulation" communication of 2010, to take more steps in this direction.<sup>74</sup> Further progress in this area is also encouraged by the European Parliament. In its December 2012 resolution on the situation of fundamental rights in the EU (2010-2011), the Parliament "recommends that the Commission revise the existing Impact Assessment Guidelines to give greater prominence to human rights considerations, widening the standards to include UN and Council of Europe human rights instruments".<sup>75</sup> It also calls on the Commission "to make systematic use of external independent expertise, notably from the Fundamental Rights Agency, during the preparation of impact assessments".<sup>76</sup>

More specifically, fundamental rights impact assessments could be developed in two major directions. First, as suggested by the European Parliament, the list of fundamental rights on which such assessments are based could be broadened in order to include, not only the catalogue provided by the Charter of Fundamental Rights, but also international instruments for the protection of fundamental rights to which the EU Member States are parties: this would be a means to ensure that EU law shall develop in a way that is fully consistent with the obligations of the member States in international law, thus reducing the risk that they may be faced with conflicting international obligations.<sup>77</sup>

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<sup>71</sup> Communication of 5 June 2002 on Impact Assessment, COM(2002)276.

<sup>72</sup> See SEC(2005)791, 15.6.2005. Indeed, a specific report was commissioned by the European Commission (specifically, by what was then DG Justice, Freedom and Security) to EPEC (European Policy Evaluation Consortium) in preparation of the revised guidelines: see EPEC, *The Consideration of Fundamental Rights in Impact Assessment*. Final Report, December 2004, 61 pages.

<sup>73</sup> SEC(2009) 92 of 15.1.2009.

<sup>74</sup> See COM(2010) 543 final of 8.10.2010, at 7. Indeed, the methodology through which impact assessments are being prepared has been generally improved. In order to maintain a high level of quality of the IAs, an Impact Assessment Board (IAB) has been created, as a body attached to the Commission's Secretariat-General that assesses the quality of each impact assessment report and publishes its opinion thereon. The Board consists of four directors from different DGs and the deputy Secretary-General of the Commission.

<sup>75</sup> Cited above, op. para. 3.

<sup>76</sup> Id., op. para. 6. The same applies to the Council when it initiates legislation.

<sup>77</sup> For an in-depth discussion, see Olivier De Schutter and Israel de Jesus Butler, 'Binding the EU to International Human Rights Law', *Yearbook of European Law*, vol. 27 (2008), pp. 277-320.



Second, fundamental rights impact assessments could encourage the mainstreaming of fundamental rights in all law- and policy-making of the Union. Because it acts preventively rather than *post hoc*, mainstreaming of fundamental rights can *aim at the causes of the problems identified rather than at their surface manifestations*. It addresses the definition of policies at their initial stages and throughout their implementation. Therefore its transformative character is much more powerful than that of remedial or after the fact monitoring, where the impact of policies is measured. For the same reasons, mainstreaming by *ex-ante* fundamental rights impact assessments encourages policy-makers *to develop new policy instruments*, by systematically asking how a particular tool or piece of legislation could be designed in order to maximize its contribution to the fulfillment of fundamental rights. Mainstreaming displaces questions which were sectorialized from the vertical to the horizontal, from the policy margins to their centre. It therefore requires from policy-makers that they ask new questions about old themes. It is a lever for political imagination. For instance, the mainstreaming of disability issues within the European Commission obliged the policy-makers to identify how, in their particular sector, they could contribute to the social and professional integration of persons with disabilities : rather than remedying the exclusion from employment of persons with disabilities, mainstreaming seeks to combat such exclusion by tackling the phenomenon at its root, in the market mechanisms which produce it. An obligation imposed on all policy-makers to identify how they could facilitate the realization of the objective which is mainstreamed, in this sense, is a first step towards identifying means by which the mechanisms producing undesirable outcomes may be modified : it rewards imagination above the reproduction of routine solutions.

But the practice of mainstreaming fundamental rights also presents a range of other important advantages.<sup>78</sup> First, it accelerates *institutional learning, beyond the circle of specialists of human rights*. Policy-makers are encouraged to identify issues which are present in the policies they pursue or the sectors these policies impact upon, but which would otherwise be obliterated and marginalized. As they get acquainted with the new tools mainstreaming requires, these actors will learn about these implications which previously may have gone unnoticed. They will progressively gain an expertise in the issues mainstreaming requires them to consider. The objective is that, in time, the institutional culture within the organisation will evolve, and that both awareness to fundamental rights issues and the capacity to address them will augment.

Second, mainstreaming improves the *implication of civil society organisations in policy-making*. In most cases, the requirement to identify the policies which best take into account the objective to be mainstreamed, imposed on policy-makers who have no specialized knowledge in the issue, will require them to consult externally. They may of course limit that consultation to experts. But they may also be incentivized to consult more widely, within the community of stakeholders, in order not only to better evaluate the impact the proposed policies may have – as such an impact may be difficult to anticipate and often will be impossible to measure –, but also to stimulate the formulation of alternative proposals, better suited to the conciliation of the different objectives pursued and, therefore, more satisfactory in a mainstreaming perspective.<sup>79</sup>

Third, mainstreaming, as facilitated by fundamental rights impact assessments, could *improve transparency and accountability*. The obligation to formulate policies or legislative proposals by referring to the impact they may have on the realization of fundamental rights will lead the proposals to be more richly justified, as the policy-maker will have to explain why a particular route was chosen and preferred above alternative possibilities, after having examined those possibilities and evaluated their potential impact.

Finally, mainstreaming provides direction, and therefore serves to improve *coordination between different services*. The sectorialization of policies, although inevitable in any large organisation, may lead to the development of policies effectively contradicting one another. Because it is transversal and

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<sup>78</sup> For a more detailed exposition, see Olivier De Schutter, "Mainstreaming Human Rights in the European Union", in Ph. Alston and O. De Schutter (eds), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford, Hart Publ., 2005, pp. 37-72.

<sup>79</sup> I return to this issue in the concluding section of this chapter.

creates horizontal bridges between vertical sectors, mainstreaming may serve to identify tensions between policies adopted in different areas, in order to remedy them. It is a way to restore communication between different services or departments, as one of its tools may consist in the organisation of common meetings with representatives from different services to compare the schemes they are proposing and identify potential conflicts or redundancies, or other failures in coherence.

Beyond those obvious advantages of fundamental rights impact assessments, it is important to acknowledge that such assessments present a potential that may be insufficiently appreciated: unless they are more or less equated with assessments of compatibility with fundamental rights and conceived therefore as purely negative, they could become an important tool for a fundamental rights policy of the European Union that would shift from being *reactive* to becoming *proactive*.<sup>80</sup> They could indeed develop into an instrument to ensure, *proactively*, that the concern for fundamental rights is mainstreamed in all legislative proposals of the European Commission.

It is perhaps significant in this regard that the European Parliament, in the resolution of 12 December 2012 referred to above, takes the view that "the effective safeguarding and promotion of rights must constitute an overall objective of all EU policies, including their external dimension", and notes that "observing the duty to protect, promote and fulfil does not require new competences for the EU but rather proactive institutional engagement with human rights, developing and reinforcing a genuine culture of fundamental rights in the institutions of the Union and in Member States".<sup>81</sup> As already noted above where reference was made to the 2006 *Parliament v. Council* case,<sup>82</sup> the EU legislator is not considered to act in violation of fundamental rights simply because it leaves to the EU Member States a freedom to act in certain areas (for instance, for the implementation of directives), even in situation where the Member States may be tempted to exercise such freedom in violation of fundamental rights. But this is precisely the point at which fundamental rights impact assessments should be seen as an opportunity to move beyond verifying the compatibility of legislative proposals with the requirements of the Charter of Fundamental Rights, in order to ensure that the European legislator not only does not violate fundamental rights (a merely negative requirement), but in addition exercises its competences in order to contribute to the full realization of fundamental rights (which amounts to a positive duty).

### c) Ensuring the implementation of the Charter of Fundamental Rights

There is finally a third tool that the European Commission has developed more recently on the basis of the Charter. In 2010, invoking the fact that the recognition by the Treaty of Lisbon of the binding nature of the Charter, the Commission published a communication exposing its strategy for the implementation of the Charter of Fundamental rights.<sup>83</sup> The Commission pledged to remind the authorities in charge of the implementation of EU law about their obligation to comply with fundamental rights. It also committed to improve the information of citizens about their rights. It proposed to maintain its current practice of accompanying all new legislative proposals with a fundamental rights impact assessment. It expressed its intention to oversee the legislative process to ensure that emerging final texts comply with the Charter, and to apply a 'zero tolerance' policy on violations of the Charter, conducting in-depth investigations and initiating infringement procedures when Member States are in breach of their human rights obligations in implementing EU law. But probably the most important innovation of the communication is that the Commission offers to prepare an annual report on the implementation of the Charter, with the aim both to increase

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<sup>80</sup> 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 O. De Schutter and P. Nihoul (eds.), *Une Constitution pour l'Europe. Réflexions sur les transformations du droit de l'Union européenne*, Bruxelles, Larcier, 2004, pp. 81-117.

<sup>81</sup> Preamble, para. F.

<sup>82</sup> See above, text corresponding to notes 36-40.

<sup>83</sup> See European Commission, Communication on the implementation of the Charter of Fundamental Rights (COM(2010) 573 final of 19.10.2010. On this communication, see, inter alia, the UK Parliament's briefing note *The European Charter for Fundamental Rights: the Commission's Strategy for Implementation* (5 May 2011 (authored by Vaughne Miller)), available on: <http://www.parliament.uk/briefing-papers/SN05963> (last consulted 30 June 2011).



transparency about the progress made in the implementation of the Charter through the action of the institutions, and to promote a debate with the European Parliament and the Council of the EU.

This annual report, in time, could develop into a tool to review developments within the EU Member States and identify areas in which the EU could take measures, within the limits of its competences, to strengthen the protection of human rights in the EU. That seems to be the hope of the European Parliament, which in December 2012 called on the Commission, "as guardian of both the Treaties and the Charter and on the basis of Articles 2, 6 and 7 of the TEU", to "draft an annual report on the situation of fundamental rights in the EU, on the basis inter alia of Articles 2 and 6 TEU and of the Charter", and suggesting that such a report should "include an analysis of the situation in the Member States, including on the basis of international organisations', NGOs', EP and citizens' concerns in relation to violations of fundamental rights, the rule of law and democracy" as well as "address the implementation, protection and promotion of, and respect for, fundamental rights in the EU and its Member States, as referred to in the Charter, the ECHR and international treaties on fundamental rights, and to contain specific recommendations".<sup>84</sup>

Beyond the gradual recognition of positive obligations flowing from the Charter of Fundamental Rights, that the European Parliament would apparently be willing to impose, it has been proposed elsewhere that the EU could adopt fundamental rights action plans, setting out on a regular basis a series of objectives to be attained within a specified timeframe, associated with indicators to measure progress in moving towards such objectives.<sup>85</sup> The advantages associated with such action plans, it was noted at the time, were that they might improve coordination across institutions or, within a departmentalized institution such as the Commission, across the different departments (DGs); that they could constitute a tool in order to promote participatory processes, as the contribution the relevant stakeholders could make to the discussion of the scheme would incentivize these stakeholders to invest into the process ; and finally, that the adoption of such action plans could constitute a source of reflexivity within the public bodies presenting such schemes, as these bodies would be obliged to think about the definition of attainable targets, benchmarking and indicators to measure progress, and the resources required for the achievement of the stated goals.

The idea now has been endorsed by the European Parliament. In its 2012 resolution on the situation of fundamental rights in the EU (2010-2011), the Parliament calls the launch of a 'European fundamental rights policy cycle', "detailing on a multiannual and yearly basis the objectives to be achieved and the problems to be solved; considers that this cycle should foresee a framework for institutions and the FRA, as well as Member States, to work together by avoiding overlaps, building on each other's reports, taking joint measures and organising joint events with the participation of NGOs, citizens, national parliaments, etc."<sup>86</sup> It remains to be seen whether the Commission shall follow upon this request, and set targets for multi-year strategies, as recommended by the Parliament; if it did, this would certainly have a major impact on the exercise by the EU of the competences it may use to develop a fundamental rights policy.

#### **4. The integration of the Charter of Fundamental Rights by the Council of the EU**

As already noted above, following the entry into force of the Treaty of Lisbon and the recognition of the legal authority of the Charter of Fundamental Rights, the institutions will be encouraged to scrutinize more carefully their role in ensuring that the provisions of the Charter are adhered to in the exercise of their powers. The latest to do so was the Council of the EU, which began taking steps in this regard only following the entry into force of the Treaty of Lisbon.

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<sup>84</sup> Resolution of the European Parliament of 12 December 2012 on the situation of fundamental rights in the European Union (2010-2011) (2011/2069(INI)), op. para. 9.

<sup>85</sup> See Olivier De Schutter, "Mainstreaming Human Rights in the European Union", in Ph. Alston and O. De Schutter (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford, Hart Publ., 2005, pp. 37-72, at 65-69. For a systematic description of the role of human rights action plans, see also Gauthier de Beco, *Non-Judicial Mechanisms for the Implementation of Human Rights in European States*, Bruxelles, Bruylant, 2010, pp. 309-346.

<sup>86</sup> op. para. 20.

The Stockholm Programme on the area of freedom, security and justice, adopted by the European Council on 11-12 December 2009, only days after the Treaty of Lisbon finally entered into force, invited the institutions of the EU and the Member States to "ensure that legal initiatives are and remain consistent throughout the legislative process by way of strengthening the application of the methodology for a systematic and rigorous monitoring of compliance with the [European Convention on Human Rights] and the rights set out in the Charter of Fundamental Rights".<sup>87</sup> The same month, the Council of the EU on Justice and Home Affairs decided to establish a permanent Working Party on fundamental rights and citizenship (FREMP) in charge of fundamental rights, citizenship of the Union and free movement of persons. This working group originally was set up only on a temporary basis in order to discuss the proposals of the Commission related to the establishment of the Fundamental Rights Agency. By the time agreement was reached on the Agency, however, after almost three years of discussions (from December 2003 to December 2006), the usefulness of a forum in which the EU member States could debate on the implementation of fundamental rights within the EU had become clear : the European Parliament has expressed its support to the establishment of the ad hoc Working Group on a more permanent basis.<sup>88</sup> Finally, the Council also adopted on 24-25 February 2011 conclusions on the integration of fundamental rights in its working methods: a new methodology was endorsed by the Committee of Permanent Representatives (COREPER) in May 2011, to ensure that fundamental rights would be complied with by the Council, both in its legislative and in its non-legislative actions.<sup>89</sup>

It is too early to assess the impacts of these changes. The future role of the Charter of Fundamental Rights in the working methods and modes of organization of the Council of the EU shall depend on the balance between two contradictory tendencies. A first tendency will be to accelerate the adoption of legislative instruments that approximate domestic laws in areas linked to fundamental rights -- as has been done, for instance, in order to harmonize the prohibition of racism and xenophobia through the criminal law,<sup>90</sup> the rights of asylum-seekers arriving at the borders of the EU member States,<sup>91</sup> or the protection of personal data<sup>92</sup> --: in these and other areas, mutual trust (whether for the establishment of the internal market or for the creation of the area of freedom, security and justice) has increasingly been seen as having to be cemented through legal harmonization, even in areas in which Council of Europe or other international instruments already ensure that a certain level of protection of fundamental rights has been achieved across all Member States. But a second, contradictory tendency is to ensure a more rigorous scrutiny of the exercise by the EU institutions of the competences that they share with the Member States, to ensure that such competences are not exercised in violation of the principles of subsidiarity and proportionality. In 2012, after it proposed the adoption of a new

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<sup>87</sup> See Conclusions of the European Council, 11-12 December 2009, and The Stockholm Programme – An open and secure Europe serving and protecting the citizens, EU doc. 17024/09, point 2.1., p. 12.

<sup>88</sup> See European Parliament resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008, cited above (in which the Parliament "urges the Council to transform its ad hoc working party on fundamental rights and citizenship into a standing working party, which would work in tandem with the Working Party on Human Rights (COHOM)" (OP 17).

<sup>89</sup> Council conclusions on the Council's actions and initiatives for the implementation of the Charter of Fundamental Rights of the European Union, 3092nd General Affairs Council meeting, Brussels, 23 May 2011, para. 9. For the text of the methodology, see Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies, presented by the General Secretariat of the Council of the EU to the Committee of Permanent Representatives (COREPER), Council of the EU, doc. 10140/11 of 18 May 2011.

<sup>90</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328 of 6.12.2008, p. 55.

<sup>91</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, JO L 31 of 6.2.2003, p. 18; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, JO L 326 of 13.12.2005, p. 13.

<sup>92</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/95, p. 31 ; Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350, 30.12.2008, p. 60; Proposal for a Directive of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM(2012) 10 final of 25.1.2012.

regulation on the conciliation between the right for unions to resort to collective action and the economic freedoms of establishment and to provide services,<sup>93</sup> the European Commission faced opposition from nineteen national parliaments, leading it to remove its proposal. This defeat of the Commission illustrates how determined the national parliaments are to exercise the new powers they are attributed under the Lisbon Treaty, in accordance with Article 69 of the Treaty on the Functioning of the European Union and with the Protocol on the application of the principles of subsidiarity and proportionality.

In other terms: whereas further harmonization may be desirable in the area of fundamental rights, it will be, for political rather than for legal reasons, increasingly difficult to achieve. And it is doubtful whether the mere establishment of a new Working Group of public officials under the responsibility of the COREPER and the professed intention of the Council of the EU to take into account the Charter of Fundamental Rights more systematically in its work shall trump the concern that the Charter is increasingly used by the Commission as a tool to pursue an integrationist agenda, even in areas in which the Member States have widely diverging national traditions that they consider as constitutive of their national identities.

## **5. The integration of the Charter of Fundamental Rights in law- and policy-making : the next steps**

Invoking fundamental rights within the EU thus has become routine in the work of the institutions. This was considerably facilitated by the agreement on a catalogue of rights, prepared under conditions which guaranteed it a high degree of legitimacy. The current system could be further strengthened, however. Three directions in particular may be explored.

(i) First, there is currently no systematic guidance provided to the EU Member States as to how they should implement EU legislation in compliance with the requirements of fundamental rights. While the Fundamental Rights Agency may be well positioned to provide such guidance in the future,<sup>94</sup> and while the European Commission has committed to monitor the compatibility of measures implementing EU law with the requirements of fundamental rights, organisations working in this area could also contribute to this, by preparing model impact assessments to help national authorities assess the impact on the rights, freedoms and principles of the Charter, of any legislation or policy measure implementing EU law that may affect such guarantees.

This would be particularly important since there is currently no requirement imposed under EU law that the instruments adopted by the EU prevent the risk of fundamental rights being violated in their implementation by the Member States : all that is imposed is that these instruments do not, as such, result in such violation. It would be conceivable to impose on the institutions of the Union a duty to ensure proactively an adequate level of protection of fundamental rights, in whichever field they may be taking action. In its resolution on the situation of fundamental rights in the EU in 2010-2011, the European Parliament expressed the view that 'Parliament, the Commission and the Council [should] jointly and formally recognise the existence of positive obligations to protect and promote human rights as part of EU law'.<sup>95</sup> Yet we have seen that, according to the Court of Justice, while EU law is

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<sup>93</sup> Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final of 21.3.2012.

<sup>94</sup> 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. On the role of the Fundamental Rights Agency and the dynamizing impact it could have on the exercise of the EU's competences in the area of fundamental rights, see O. De Schutter, 'The EU Fundamental Rights Agency: Genesis and Potential', in Kevin Boyle (ed.), *New Institutions of Human Rights Protection*, Oxford University Press, Collected Courses of the Academy of European Law (European University Institute, Florence), Oxford University Press, Oxford, 2009, pp. 93-135; and Gabriel N. Toggenburg, 'The role of the new EU Fundamental Rights Agency: Debating the 'sex of angels' or improving Europe's human rights performance?', *Eur. L. Rev.*, vol. 33, n° 3 (2008), pp. 385-398.

<sup>95</sup> See op. para. 13. In a transparent allusion to the controversies raised by the Viking and Laval cases and to the failed attempts of the European Commission to legislate in order to ensure the protection of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (see the proposal for a Council Regulation to that effect, COM(2012) 130 final of 21.3.2012), the European Parliament also "considers that the possible tensions between

prohibited from imposing on the Member States to 'adopt or retain national legislation not respecting those rights',<sup>96</sup> an instrument of EU law will be considered valid provided it leaves to the EU Member States a 'margin of appreciation, ... sufficiently wide to enable them to apply [the instrument's] rules in a manner consistent with the requirements flowing from the protection of fundamental rights'.<sup>97</sup> Thus, secondary legislation would be compatible with the requirements of fundamental rights insofar as it does not compel the Member States to violate such rights, *even where it does not establish clear safeguards against such risk*.<sup>98</sup> The implication is that there is no requirement that legislative instruments be drafted in order to explicitly prohibit Member States to exercise their discretion in the implementation phase in such a way as to violate human rights standards. This is consistent with the general approach of the Court of Justice of the EU, according to which it is for the national authorities to ensure that they did not adopt an interpretation of EU law that conflicted with the general principles of law, but that the instrument of EU secondary law in question is not invalid merely because it allows a Member State discretion which could be exercised in this manner.<sup>99</sup> Strengthening the monitoring of implementation measures adopted at the level of each EU Member State is therefore essential. And this should be done, to the fullest extent possible, preventively rather than *post hoc*.

(ii) Second, the current system fails to distinguish clearly between the respective functions of the assessment of compliance with the Charter of Fundamental Rights (and other fundamental rights binding in the EU) and human rights impact assessments. Both of course are performed in different ways in the current decision-making procedure, and by different actors. But, for the most part, they are conceived as contributing to the same objective: both are devices to ensure, under the responsibility of the European Commission, that legislative proposals or policies shall not infringe upon fundamental rights. The duty remains a primarily negative one.

One limitation that results from such confusion is that we may underestimate the usefulness of strengthening the participatory dimension of impact assessments, in order to allow the administration to benefit from the views of grassroots organisations and from the views of those directly affected by the adoption of certain measures. While assessment of the compatibility of certain legislative measures with the requirements of the Charter of Fundamental Rights may be seen as a legal exercise, to be performed by experts -- and that could be centralized, within the European Commission, in DG Justice --, impact assessments should involve a broader set of actors, that can provide views about the potential consequences on the realization of fundamental rights of certain frameworks. Indeed, impact assessments should ideally be seen as requiring to examine the consequences of certain legislative developments also on the freedom of manoeuvre States have to implement fundamental rights. Conflating compatibility assessments and impact assessments represents, in that sense, a missed opportunity: such a confusion underestimates the fact that certain measures, while not directly infringing upon a fundamental right and creating a risk of violation, may create obstacles to its further realisation.

Strengthening the participation of civil society actors in the practice of impact assessments would be consistent with the July 2001 *White Paper on European Governance*, which proposed a number of ways to improve the involvement of stakeholders in the shaping of the policy and legislation of the

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economic freedoms and fundamental rights should be addressed already at legislative level and not only by the EU judiciary" (op. para. 16).

<sup>96</sup> Case C-540/03, *Parliament v Council*, [2006] ECR I-5769, para. 23. For a more detailed discussion, see above, text corresponding to notes 36-40.

<sup>97</sup> Para. 104.

<sup>98</sup> See also, in this regard, the opinion expressed by AG Kokott in the case concerning the action for annulment filed by the European Parliament against the 2003 Family Reunification Directive. Her view (as expressed in paras. 79-82 of the opinion) was that the contested provisions of the Family Reunification Directive must be examined 'in order to determine *whether there is sufficient scope for them to be applied in conformity with human rights*.' Otherwise put 'Community provisions are compatible with fundamental rights if they are *capable of being interpreted in a way which produces the outcome which those rights require*. [...] [What] matters is not what rules Member States might be minded to adopt in order to take full advantage of the latitude which the contested provisions afford, but rather what rules Member States may lawfully adopt if the Community provisions in question are interpreted in conformity with fundamental rights'.

<sup>99</sup> Case C-101/01, *Lindqvist* [2003] ECR I-12971, paras. 84-88.



Union, as well as the openness and accountability of the institutions<sup>100</sup>. Based on the White Paper, a later communication defined the general principles and minimum standards for the consultation of interested parties by the Commission.<sup>101</sup> Conceived in a participatory mode, such a systematic evaluation would introduce a reflexivity in the development of European policies, which would have to permanently revise themselves in view of their consequences. It would immensely contribute to progressively building the knowledge of the actors involved in the process of evaluation, thus constituting one of the self-learning mechanisms the *White Paper* calls for<sup>102</sup>. A virtuous cycle can be expected to result from these evaluation processes: the more these processes are considered seriously and develop into learning processes, the more the representative organisations of the civil society will acquire the capabilities required to effectively exercise their participatory rights, the more weight will be afforded to the positions they feed into the decisional process, and the more their consultation will be seen as adding quality to the decision-making, rather than as burdening it.

(iii) Finally, a third gap is that there exists currently no systematic screening of the situation of fundamental rights in the EU Member States, aimed at identifying where -- within the limits of its powers -- the EU should take action to strengthen the protection of fundamental rights. We know (or we try to know) what the EU must avoid doing in order not to create obstacles to fundamental rights. But we are hardly equipped to identify when the EU must act in order to support efforts at domestic level, that might be difficult to deploy in the absence of the EU-wide framework.

We may express this concern by remarking that the development of the EU may threaten fundamental rights in two distinct ways. Clearly, the adoption of certain rules by the EU may lead to such rights being violated, either by those rules themselves, or by the EU Member States' measures of implementation. It is this risk that the case-law of the European Court of Justice initially sought to avoid<sup>103</sup>; and it is this risk, again, that the human rights vetting of the legislative proposals submitted by the European Commission. But the *failure of the EU to adopt certain rules* – or its failure, when it does adopt rules in a particular field, to ensure that these rules ensure an adequate level of protection of fundamental rights – may also threaten fundamental rights, because of the pressures which, in the single area the EU Member States now share, may create obstacles to the efforts the States may wish to pursue in order to protect and fulfil fundamental rights. Indeed, it is largely for this reason that in October 2003, when it adopted the communication mentioned above in which it set out its views about the implementation of Article 7 EU,<sup>104</sup> the European Commission took the view that information should be collected on a systematic basis by independent experts on the situation of fundamental rights in the EU Member States. Such monitoring, the Commission wrote, 'has an essential preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded'.<sup>105</sup> It is only once a proactive approach shall complement the current reactive approach, that the European Union shall have a fundamental rights policy worthy of the name.

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<sup>100</sup> COM(2001) 428 final, of 25.7.2001.

<sup>101</sup> Communication from the Commission, Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 final, of 11.12.2002.

<sup>102</sup> See COM(2001) 428 final, 25.7.2001, p. 26.

<sup>103</sup> The fundamental rights protected by the European Court of Justice as general principles of law (and, now, by reference to Article 6(2) of the EU Treaty) apply to the acts of the EU institutions (see, e.g., Case 374/87, *Orkem v Commission* [1989] ECR 3283, para. 31), as well as to the acts of the EU Member States when they implement Union law (Case 222/84, *Johnston v Chief Constable of the RUC* [1986] ECR 1651) or when they rely on an exception allowed under Union law (see, e.g., Case C-112/00, *Schmidberger* [2003] ECR I-5659; or Case C-36/02, *Omega Spielhallen* [2004] ECR I-9609).

<sup>104</sup> See above, text corresponding to notes 20-21.

<sup>105</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final of 15.10.2003.

