

REFGOV

Reflexive Governance in the Public Interest

Fundamental Rights Governance

**The division of tasks between the Council of Europe and the
European Union in the promotion of Human Rights in Europe :
Conflict, Competition and Complementarity**

by Olivier DE SCHUTTER

15 January 2007

Working paper series : REFGOV-FR-11

The division of tasks between the Council of Europe and the European Union in the promotion of Human Rights in Europe : Conflict, Competition and Complementarity

*Olivier DE SCHUTTER**

This contribution to the REFGOV Fundamental Rights Sub-Network addresses the question of the division of tasks between the Council of Europe and the European Union in the protection of fundamental rights in Europe. The REFGOV Fundamental Rights Sub-Network aims at defining the conditions under which the EU might develop a more proactive fundamental rights policy, how this policy could be better informed and effective, and what tools would be required for that purpose, by taking into account the guiding hypothesis of the overall project – that the participatory dimensions of law- and policy-making in the EU should ensure that the actors involved are effectively endowed with the capacity to participate meaningfully in any processes in which they are involved –. In the discussions held so far on the possibility of an active fundamental rights policy of the EU emerging, however, the question of the relationship with the Council of Europe, the leading regional organisation for standard-setting and monitoring in the field of fundamental rights, has repeatedly come to the surface. The question has been raised, in particular, whether the principles of subsidiarity and proportionality which should guide the exercise by the Union of the powers it shares with the member states should take into account either the fact that common standards have already been defined in the area of fundamental rights for the EU member states by the Council of Europe, or even the fact that the forum of the Council of Europe might be better suited than the EU for the development of new standards where new problems emerge. This study is an attempt to answer this question, in a rapidly changing political environment.

I. Introduction

The Europe of human rights is at a crossroads. The European Union, while not a ‘human rights organisation’ whose objective it would be to promote and protect human rights,¹ has come to acknowledge that, having achieved the degree of integration it has now arrived at, it cannot ignore the issue of human rights as a condition for continued cooperation both between the Member States of the EU² and for cooperation with third countries. But the immense leverage of the European Union, both

* Olivier De Schutter is Professor at the Catholic University of Louvain (UCL), where he is a Member of the Centre for Philosophy of Law (CPDR), and a member of the teaching faculty at the College of Europe (Natolin); former Coordinator of the EU Network of independent experts on fundamental rights. Email : deschutter@cpdr.ucl.ac.be. This study was prepared for the Fundamental Rights subnetwork created under the ‘Reflexive Governance in the public interest’ (REFGOV) research project, developed with the support of the 6th EC Research and Development Programme (Project n° CIT3-CT-2005-513420), <http://refgov.cpdr.ucl.ac.be>

¹ See Armin Von Bogdandy, ‘The European Union as a human rights organisation? Human Rights and the core of the European Union’, 37 *Common Market L. Rev.* 1312 (2000).

² Articles 6 and 7 of the Treaty on European Union define human rights, along with democracy and the rule of law, as part of the values on which the Union is founded ; and they give the Council the possibility both of adopting sanctions against a State which, according to the determination made by the Council, has seriously and persistently breached the principles mentioned in Article 6(1) EU (see Article 7(2) to (4) EU and, for the implementation of these sanctions in the framework of the EC Treaty, Article 309 EC), and – since the entry into force of the Nice Treaty on 1 February 2003 (OJ C 180, of 10.3.2001) – of European FP6 – Integrated Project

by the weight of the financial instruments it has at its disposal and by its power of attraction – especially for third States for whom accession to the Union or the obtention of the status of a candidate country is a reasonable prospect –, is seen as a threat by some other intergovernmental organisations, in particular the Council of Europe.

The fear of marginalization of the Council of Europe has been fueled by a number of factors. Two of these have been broadly commented upon in the first years of the decade. The successive enlargements of the Union, now to 27 Member States since the recent accessions of Romania and Bulgaria, have led to a situation in which the Member States of the European Union form a majority within the 46-members wide Council of Europe. As a result, from standard-setter, the Council of Europe risks becoming a standard-receiver : where the Union has taken action, especially legislative action – in the field of trafficking of human beings, for instance, or in combating child pornography and sexual exploitation of children –, it is difficult for the Council of Europe not only to ignore those standards – but also, quite simply, not to align itself with them.³ Of course, it is not a specificity of the most recent instruments concluded under the framework of the Council of Europe that they are inspired by instruments adopted within the European Community or the European Union in the same field.⁴ However, it is clear that the more the European Community or the Union adopt instruments in the field of human rights, the more narrow the margin of appreciation will be in the negotiation of Council of Europe instruments, especially since most of the Council of Europe Member States are now members of the European Union.⁵ And as a clear sign that this evolution is being recognized, the Parliamentary Assembly of the Council of Europe recommended to the Committee of Ministers of the Council of Europe in April 2006 that it should propose to the European Union in the future memorandum of understanding between the two organisations the setting up of ‘a co-ordination committee in the field of standard setting with a view to increasing co-operation in the drafting of new international legal

determining that there exists a clear risk of a serious breach by a Member State of the common values on which the Union is based and addressing recommendations on that basis to the Member State concerned. In addition, a number of instruments adopted in the field of judicial cooperation in criminal matters contain a human rights clause : see the examples cited hereunder, in n. 101.

³ For instance, the relevant provisions Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197, opened for signature on 16 May 2005) closely mirror the Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings (OJ L 203 of 1.8.2002, p. 1) and Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L 261 of 6.08.2004, p. 19). The Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198, opened for signature on 16 May 2005) was influenced by the instrument then under preparation within the European Community (Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15) and by the Community instruments already existing in this field (Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (OJ L 166, 28.6.1991, p. 77, as amended by Directive 2001/97/EC of the European Parliament and of the Council (OJ L 344, 28.12.2001, p. 76)). Both these examples also have in common that the Council of Europe and the European Community have sought to implement the requirements of instruments negotiated in the framework of the United Nations : see, respectively, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime ; and the International Convention for the Suppression of the Financing of Terrorism.

⁴ For instance, the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding Supervisory Authorities and Transborder Dataflow (CETS No. 181, opened for signature on 8 November 2001), was inspired by the chapter relating to the establishment of such supervisory authorities in the field of data protection in Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281 of 23.11.1995, p. 31); and a number of provisions both in the 1988 Additional Protocol (CETS No. 128) to the 1961 European Social Charter (CETS No. 35) and in the 1996 Revised European Social Charter (CETS No. 163) were inspired by provisions from European Community directives adopted in the field of social rights.

⁵ Currently, a new instrument is being negotiated within the Council of Europe on combating the sexual exploitation and abuse of children. Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (OJ L 13, 20.1.2004, p. 44) figures prominently among the references used in the elaboration of this instrument.

instruments'.⁶ Second, the choice in 1999-2000 to adopt a Charter of Fundamental Rights specific to the EU,⁷ was denounced at the time as betraying a desire to create a 'two-speeds Europe', with the European Union deciding to define its own human rights standards without contenting itself with referring to the instruments adopted in the framework of the Council of Europe.⁸ This was so, in particular, because that process was not immune from a certain selectivity – certain instruments, in particular the European Convention on Human Rights, being recognized a privileged position in the Charter, while others, such as the European Social Charter and the Framework Convention for the Protection of National Minorities, were comparatively neglected.

Two more recent developments, however, have contributed to place the question of the division of tasks between the Council of Europe and the European Union in protecting and promoting human rights in Europe on the top of the political agenda. In 2005, the debate on the so-called 'disconnection clauses', inserted into the three conventions opened for signature at the Third Summit of the Heads of State or government of the Council of Europe Member States held in Warsaw on 16-17 May 2005, has brought to the surface the underlying tension between the deepening of the integration within the EU and the undertakings of the EU Member States under Council of Europe instruments, since such clauses were seen as an attempt of the EU Member States to exempt themselves, to a certain extent, from the requirements of these Council of Europe instruments. At the very same moment, the decision to set up by 2007 a Fundamental Rights Agency for the European Union, which is to absorb the EU Monitoring Centre on Racism and Xenophobia, has again raised the concern that the European Union is occupying a field which was previously reserved domain of the Council of Europe. In 2013, the budget of the Fundamental Rights Agency should represent one fifth of the total budget of the Council of Europe, without including the Court : this choice has been construed against the background of a budget of the Council of Europe which is widely perceived as insufficient to meet its mandate, and which in 2006 had witnessed a zero growth increase in real terms.⁹

Has the time come for the members of the human rights community to choose their camp ? Should they call upon the Union to fully mainstream human rights in its activities and to develop a more proactive fundamental rights policy, and ignore in the process the concerns raised in Strasbourg, under the pretext that these should be dismissed as parochial ? Or should they remain instead, as they have traditionally been, staunch defenders of the unique role of the Council of Europe in setting standards for the protection of human rights in Europe, and develop strategies against the annexation of human rights by an international organisation, the European Community and now the Union, where respect for human rights has sometimes appeared as little more than a figleaf, or at best, an instrument allowing for further market integration and, now, deepened cooperation in the establishment of an area of freedom, security and justice ?

As we all know, such an alternative is simply not tenable. The challenge today is, on the contrary, to explore the complementarities between the two organisations, how they can mutually support themselves and benefit from one another's strengths. It is the hope of this author that, by re-exploring the recent debates on the establishment of the Fundamental Rights Agency for the EU and on the 'disconnection clauses' inserted for the EU Member States in Council of Europe instruments – as well as, more generally, on the legislative activity of the EU in the name of strengthening the 'mutual trust'

⁶ Recommendation 1743(2006) of 13 April 2006, that it should propose to the European Union in the future memorandum of understanding between the two organisations the setting up of 'a co-ordination committee in the field of standard setting with a view to increasing co-operation in the drafting of new international legal instruments' (para. 9.5.7.).

⁷ The EU Charter of Fundamental Rights (OJ C 364 of 18.12.2000, p. 1) was proclaimed jointly by the Council of the European Union, the European Commission, and the European Parliament, at the Nice Summit of December 2000.

⁸ See in particular P. Drzemczewski, 'The Council of Europe's Position with Respect to the EU Charter of Fundamental Rights', *Human Rights Law Journal*, vol. 22, n°1-4, 2001, pp. 14-31.

⁹ Together with the Partial Agreements and other budgets, the Council of Europe total budget amounted to 262.60 million euros for 2006 ; of this total, 44,189,000 euros serve for the functioning of the European Court of Human Rights, and 1.63 million euros fund the Office of the Council of Europe Commissioner for Human Rights. The 2007 budget decided by the Committee of Ministers of the Council of Europe in December 2006 raised the ordinary budget by 3,72 %, representing a rise of 1,52 % in real terms. In comparison, the 13 million euros provided annually for the EU Fundamental Rights Agency when it will be set up, which should be progressively raised to attain 39 million euros in 2013, is a very significant sum.

between the EU Member States –, some light can be shed on the evolving division of tasks between the two organisations. These debates are representative both of the risks and of the opportunities resulting from a more active role of the European Union in the field of human rights. The classical view, which many actors hold spontaneously, is that the Union should do less in this field, in order not to pre-empt, or compete with, the Council of Europe in setting human rights standards and in monitoring these standards in Europe. The argument presented here is that only by doing not less, but more, while more systematically referring to the standards of the Council of Europe, may the Union overcome the suspiciousness with which its interventions have sometimes been met.

II. From Competition to Cooperation between the European Union and the Council of Europe in the debate around the EU Fundamental Rights Agency

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

After the European Council decided, in December 2003, to transform the Vienna EU Monitoring Centre on Racism and Xenophobia¹⁰ into a ‘Human Rights Agency’ for the European Union, both the Secretariat of the Council of Europe and its Parliamentary Assembly expressed concerns. In her intervention at the public hearing organized by the European Commission on January 25th, 2005, where a number of participants presented their views on the public consultation document presented in the form of a Communication of the Commission,¹¹ the Deputy Secretary General of the Council of Europe Ms de Boer-Buquicchio sought to distinguish the function the EU Fundamental Rights Agency could fulfil – crafted along the lines of a national institution for the promotion and protection of human rights for the Union – from the tasks entrusted to the Council of Europe monitoring bodies, by emphasizing the difference between monitoring as collection and analysis of data on the one hand (what might be called ‘advisory monitoring’), monitoring as evaluation of compliance with certain standards on the other (or ‘normative monitoring’)¹².

This roughly corresponds to the views adopted simultaneously by the Parliamentary Assembly of the Council of Europe (PACE). Acting on the basis of the McNamara report prepared within the Committee on Legal Affairs and Human Rights,¹³ the Parliamentary Assembly adopted on 18 March 2005 Resolution 1427 (2005) in which it recalled the human rights acquis developed by the Council of Europe through intergovernmental cooperation, the monitoring by the Council of Europe of compliance with these standards by its member states,¹⁴ and the practical assistance work by the Council of Europe designed to facilitate attainment of the requisite standards, as well as its activities in

¹⁰ This Monitoring Centre, sometimes referred to as the Vienna Observatory, was created by the Council Regulation (EC) 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151 of 10.6.1997, p. 1 (since amended by Regulation (EC) No 1652/2003, OJ L 245, 29.9.2003, p. 33).

¹¹ COM(2004) 693 final, of 25.10.2004.

¹² Monitoring ‘can also be understood as comprising the verification of actual compliance, identifying violations, shortcomings and best practices as well as addressing recommendations to individual states. It is in this latter sense that monitoring is understood and carried out within the Council of Europe’ (Public Hearing on the Agency on Fundamental Rights of 25 January 2005, statement by Ms de Boer-Buquicchio, Deputy Secretary General of the Council of Europe, available on http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/index_en.htm). I return to this distinction below (see text corresponding to nn. 27-28).

¹³ ‘Plans to set up a Fundamental Rights Agency of the European Union’, Doc 10241, Draft resolution and draft recommendation adopted unanimously by the Committee on 27 January 2005.

¹⁴ The Resolution notes in this regard: ‘Such monitoring is carried out by several well-established independent human rights bodies with recognised expertise and professionalism, both on a country-by-country basis (including through country visits and on-the-spot investigations) and, increasingly, also thematically. Through these mechanisms, the Council of Europe monitors compliance with all the human rights obligations of its member states (including the twenty-five member states of the European Union), identifies issues of non-compliance, addresses recommendations to member states and, in the case of the European Court of Human Rights, issues judgments binding on states parties whenever these standards are not respected’ (at para. 4).

the field of human rights education and awareness-raising. While welcoming the establishment of a Fundamental Rights Agency of the EU, the PACE took (in para. 10) the view that

the creation of a fundamental rights agency within the EU could make a helpful contribution, provided that a useful role and field of action is defined for it and that the agency therefore genuinely “fills a gap” and presents irrefutable added value and complementarity in terms of promoting respect for human rights. Defining such a role presupposes careful reflection within the EU about the aims, content, scope, limits, and instruments of its own internal human rights policy. Conversely, there is no point in reinventing the wheel by giving the agency a role which is already performed by existing human rights institutions and mechanisms in Europe. That would simply be a waste of taxpayers’ money.

The PACE therefore concluded (in para. 13) that

the role of the agency should be that of an independent institution for the promotion and protection of human rights within the legal order of the EU, along the lines of similar national institutions that exist in several member states. The agency should collect and provide to the EU institutions information about fundamental rights that is relevant to their activities, and thus contribute to mainstreaming human rights standards in the EU decision-making processes.

In the view of the PACE, this understanding of the role of the EU Fundamental Rights Agency had three implications. First, it should have a mandate limited to the scope of application of Union law, including the implementation by EU Member States of Union law, but not areas outside EC/EU competence, where member states act autonomously. In other terms, although the mutual trust on which mutual recognition mechanisms within the Union are built presupposes that the EU Member States comply with fundamental rights in general rather than only in the implementation of Union law,¹⁵ the Agency should not monitor fundamental rights beyond the situations to which the fundamental rights recognized as general principles of Union law already apply under the supervision of the European Court of Justice, and to which the EU Charter of Fundamental Rights applies.¹⁶ Second, the Agency should work on a thematic, not a country-by-country basis, focusing on certain specified themes having a special connection with EC/EU policies. While this restriction does not follow from the definition of the Fundamental Rights Agency as a ‘national institution for the promotion and the protection of human rights’ for the Union, it was put forward, presumably, to limit any risk of the Agency competing with the monitoring bodies of the Council of Europe, and in particular of the Agency arriving at different conclusions than those of these bodies as regards specific situations arising in the Member States. In a recommendation it adopted on 13 April 2006, the PACE therefore stated very clearly that ‘the agency should be explicitly excluded, in its mandate, from engaging in activities that involve assessing the general human rights situation in specific countries, in particular those that are members of the Council of Europe’.¹⁷ Thirdly, the PACE considered that the

¹⁵ See above, n. 2.

¹⁶ On the precise delineation of the situations in which the Member States are bound by fundamental rights as general principles of EC or EU law, see esp. J.H.H. Weiler, “The European Court at a Crossroads: Community Human Rights and Member State Action”, in: *Du droit international au droit de l’intégration. Liber amicorum Pierre Pescatore*, Baden-Baden, Nomos Verlagsgesellschaft, 1987, p. 821; J. Temple Lang, “The Sphere in Which Member States are Obligated to Comply with the General Principles of Law and Community Fundamental Rights Principles”, *L.I.E.I.*, 1991/2, p. 23; J.H.H. Weiler, “Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights”, in N. Neuwahl et A. Rosas, *The European Union and Human Rights*, Martinus Nijhoff Publ., Kluwer, The Hague-Boston-London, 1995, p. 56; and K. Lenaerts, “Le respect des droits fondamentaux en tant que principe constitutionnel de l’Union européenne”, *Mélanges en hommage à Michel Waelbroeck*, Bruxelles, Bruylant, 1999, p. 423. The wording of the Charter of Fundamental Rights is more restrictive than what the case-law of the European Court of Justice would suggest, since it refers not in general to the scope of application of Union law – which would include situations where the Member States act under exceptions provided by EC/EU law (see, e.g., Case C-368/95, *Familiapress*, [1997] ECR I-3689 (Recital 24); Case C-112/00, *Schmidberger*, [2003] ECR I-5659 (Recital 81)) – but only to the situation where the EU Member States *implement* Union law (see Article 51 of the Charter).

¹⁷ PACE Recommendation 1744 (2006), *Follow-up to the 3rd Summit: the Council of Europe and the proposed fundamental rights agency of the European Union*, adopted on 13 April 2006 on the basis of the report prepared within the Committee on Legal Affairs and Human Rights (doc. 10894, rapp. Mr Jurgens) (see para. 11.4. of the recommendation).

future Agency should include within its reference instruments not only the European Convention on Human Rights, but also the other human rights instruments of the Council of Europe.¹⁸ The PACE also recommended that the Council of Europe be included in the management structures of the Agency, and that a cooperation agreement be concluded to that effect between the Council of Europe and the Union.¹⁹ These elements are summarized in Recommendation 1696 (2005) adopted by the Parliamentary Assembly on the same day.

There were two reactions by the governments of the Member States of the Council of Europe to the position thus expressed by the Parliamentary Assembly. At their Third Summit held in Warsaw on 16-17 May 2005, the Heads of State or government of the Member States of the Council of Europe adopted a Declaration in which they expressed their determination to ‘ensure complementarity of the Council of Europe and the other organisations involved in building a democratic and secure Europe’, and resolved to ‘create a new framework for enhanced co-operation and interaction between the Council of Europe and the European Union in areas of common concern, in particular human rights, democracy and the rule of law’ (para. 10). In an Annex to the Declaration, the Heads of State and Government called upon the Council of Europe to ‘strengthen its relations with the European Union so that the Council of Europe’s and the European Union’s achievements and future standard-setting work are taken into account, as appropriate, in each other’s activities’; they also emphasized that the new framework of enhanced co-operation and political dialogue between the Council of Europe and the European Union should focus especially on ‘how the European Union and its member states could make better use of available Council of Europe instruments and institutions, and on how all Council of Europe members could benefit from closer links with the European Union’ (Annex, IV, 1). Finally, they agreed on a set of guidelines on the relations between the Council of Europe and the European Union, which state in particular :

6. The Council of Europe will, on the basis of its expertise and through its various organs, continue to provide support and advice to the European Union in particular in the fields of Human Rights and fundamental freedoms, democracy and the rule of law.

7. Cooperation between the European Union and specialised Council of Europe bodies should be reinforced. The European Union shall in particular make full use of Council of Europe expertise in areas such as human rights, information, cyber-crime, bioethics, trafficking and organised crime, where action is required within its competence.

8. The future Human Rights Agency of the European Union, once established, should constitute an opportunity to further increase cooperation with the Council of Europe, and contribute to greater coherence and enhanced complementarity.

The Heads of State or government also requested Prime Minister of Luxembourg, Jean-Claude Juncker, that he prepare, in his personal capacity, a report on the relationship between the Council of Europe and the European Union, on the basis of the decisions adopted at the Summit and taking into account the importance of the human dimension of European construction. That report was made public on 11 April 2006.

Second, the Committee of Ministers of the Council of Europe replied on 13 October 2005 to Recommendation 1696 (2005) of the Parliamentary Assembly.²⁰ After recalling the results of the Warsaw Summit, the Committee of Ministers referred to the proposals made in the meantime by the European Commission on 30 June 2005,²¹ which (it considered) ‘take several of the recommendations

¹⁸ PACE Resolution 1427 (2005), para. 14, ii).

¹⁹ Id., para. 14, iii).

²⁰ CM/AS(2005)Rec1696 final, adopted at the 939th meeting of the Ministers’ Deputies.

²¹ Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, COM (2005) 280 final of 30.06.05.

made by the [Parliamentary Assembly of the Council of Europe] and the Secretary General into account. Many of the tasks foreseen for the agency would indeed be complementary to the activities carried out by the Council of Europe. As regards co-operation with the Council of Europe, the Committee of Ministers acknowledges that the draft regulation [establishing the EU Fundamental Rights Agency] provides for a close institutional relationship, including provisions that the agency shall co-ordinate its activities with those of the Council, that a bilateral co-operation agreement shall be concluded and that an independent person shall be appointed by the Council to the management board of the agency'. It also states, in para. 4 of its reply, that it 'agrees with the Assembly that the agency's mandate should focus on human rights issues within the framework of the European Union, address its advice to the EU institutions and ensure that unnecessary duplication with the Council of Europe is avoided'; and it states its hope 'that these points will be fully reflected in the future Community regulation'.

It is doubtful that these statements have fully reassured the Secretariat and the Parliamentary Assembly of the Council of Europe. On the contrary, after his meeting in July 2005 with Vice-President F. Frattini, in charge within the Commission of Justice, Freedom and Security, the Secretary General of the Council of Europe, Mr Terry Davis, agreed to provide the Commission with an analysis, by the Secretariat of the Council of Europe, of the proposals on the establishment of the EU Fundamental Rights Agency. This memorandum was finalized on September 8th, 2005.²² Many of the themes evoked above are reiterated, in particular the idea that, in order to avoid duplication with the missions of the Council of Europe, the Agency should not systematically monitor the human rights performance of non-EU Member States who are Member States of the Council of Europe. These concerns were again reiterated by the Parliamentary Assembly of the Council of Europe in April 2006.²³

But what is the reality of the potential duplication of tasks between the Fundamental Rights Agency and the monitoring bodies of the Council of Europe? And if such duplication exists, how real are the risks involved? In order to assess the different questions raised in the debate concerning the relationship between the Council of Europe mechanisms and the EU Fundamental Rights Agency, it is important to distinguish between the different tasks which will be entrusted to the Agency, now that a political agreement has been reached on the regulation establishing it.²⁴ Where those tasks duplicate tasks already performed by the Council of Europe monitoring bodies, the arguments in favor and against such a duplication should be examined and carefully weighed against one another.

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

Two preliminary remarks should be made. First, the Agency will have, as its primary task, to provide advice to the institutions of the Union in the field of fundamental rights. This task is not fulfilled, for the moment, by the Council of Europe bodies²⁵ – an important lacuna which the establishment of the Agency, in part, will help compensating for. That alone would justify setting up the Agency, in order

²² This document will be referred to hereafter as the 'Council of Europe Memorandum of 8 September 2005'.

²³ PACE, Recommendation 1744 (2006), *Follow-up to the 3rd Summit: the Council of Europe and the proposed fundamental rights agency of the European Union*, cited above n. 17.

²⁴ The following presentation takes into account, as the most recent document available at the time of writing, the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights in the compromise version prepared by the Finnish presidency of the Council and approved by the COREPER on 29 November 2006 (Council doc. 16018/06, JAI 663, CATS 184, COHOM 180, COEST 337). The 4-5 December 2006 Justice and Home Affairs Council of the European Union confirmed the general agreement on the proposal, although the formal adoption of the proposal would not intervene before the reception of the opinion of the European Parliament (press release following the 2768th meeting of the JHA Council of the EU, 15801/06, Presse 341, p. 10).

²⁵ Of course, the international responsibility of the EU Member States may be engaged by not ensuring that human rights are respected within their jurisdiction, even in situations where the alleged violation has its source in European Union law. See, e.g., Eur. Ct. HR (GC), *Matthews v. the United Kingdom* (Appl. N° 24833/94) judgment of 18 February 1999, § 32; Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, § 154.

to ensure that fundamental rights are taken into account *ex ante* on a systematic basis in the legislative procedure of the European Union, rather than only *ex post*, through judicial review mechanisms.²⁶ However, leaving aside that important function of the Agency, the focus will be here on the role of the Agency vis-à-vis countries which are Member States of the Council of Europe – since it is here, of course, that the risk of overlap with the tasks fulfilled by the Council of Europe bodies is greatest. The Agency shall monitor the situation of fundamental rights both as regards the EU Member States insofar as they implement Community law, and as regards certain non-EU Member States.

Second, the Fundamental Rights Agency is not conceived of as entrusted mainly with a monitoring mission, in the sense of ‘normative monitoring’ – evaluation of compliance on the basis of a preexisting normative grid;²⁷ it is, rather, to provide technical advice on the basis of its collection and analysis of information pertaining to the situation of fundamental rights in the Member States. As defined in Article 2 of the Regulation establishing the Agency, its objective shall be ‘to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights’.

Whether the division of tasks between the Council of Europe bodies and the European Union Fundamental Rights Agency could be founded exclusively on such a distinction may be doubted, however. First, it is uncertain whether it will be possible, in practice, to maintain a watertight division between monitoring consisting only in collecting and analyzing information in order to offer technical assistance, on the one hand (‘advisory monitoring’), and monitoring implying an evaluation of the degree of compliance with fundamental rights, on the other hand (‘normative monitoring’): even mere fact-finding, after all, necessarily consists in highlighting certain situations, and thus putting pressure on the actors concerned to remedy any deficiencies found to exist. In addition, even though the emphasis or formulations may differ – with expert bodies of the Council of Europe though explicitly evaluating certain situations for their compliance with the relevant standards, and the Fundamental Rights Agency more cautiously reporting about what it has found to occur and making certain recommendations of a general nature about trends –, it remains the case that the same situations may be considered under both mechanisms. The EU Fundamental Rights Agency will publish annual reports and formulate conclusions and opinions on fundamental rights dimensions of the implementation of Community law by the Member States. Although the adoption of reports or recommendations on individual Member States is not defined as one of the tasks of the Agency in

²⁶ However, according to Article 4(2) of the Regulation establishing the Agency, conclusions, opinions or reports adopted by the Agency ‘may concern proposals from the Commission under Article 250 of the [EC] Treaty or positions taken by the institutions in the course of legislative procedures only where a request by the respective institution has been made’. Therefore, the review by the Agency of the instruments or policies adopted by the Union will not be systematic. In addition, while both the European Commission and the European Parliament have currently included mechanisms ensuring that they will take into account the Charter of Fundamental Rights in making legislative proposals or in contributing to the legislative procedure (as regards the Commission, see 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, and the new set of guidelines for the preparation of impact assessments (SEC(2005)791 of 15.6.2005) now including references to fundamental rights; as regards the European Parliament, see Rule 34 of the Rules of Procedure of the European Parliament stipulating that ‘During the examination of a legislative proposal, Parliament shall pay particular attention to respect for fundamental rights and in particular that the legislative act is in conformity with the European Union Charter of Fundamental Rights (...’), no such mechanism exists as regards legislative proposals made by the Member States according to Article 34(2) EU, which provides that the Council may, in the field of police cooperation and judicial cooperation in criminal matters (Title VI EU) adopt common positions, framework decisions, or decisions, acting unanimously on the initiative of any Member State or of the Commission. Ironically, it is precisely in this field, where the current safeguards are most clearly lacking, that the Council has decided not to include among the fields to which the mandate of the Agency should extend. The exclusion of Title VI EU from the fields falling under the remit of the Agency was the single most fundamental change made to the original proposals of the European Commission in the course of the discussions within the Council.

²⁷ On this distinction, see Martin Scheinin, ‘The Relationship between the Agency and the Network of Independent Experts’, in Ph. Alston and O. De Schutter (eds), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Oxford, Hart Publ., 2005, at pp. 73-90.

Article 4 of the Regulation establishing the Agency – on the contrary, Article 4(1)(d) specifically mentions that the Agency shall ‘formulate and publish conclusions and opinions *on specific thematic topics*, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission’, a formulation which seems to be calculated to exclude conclusions and opinions on individual Member States or on specific events or measures²⁸ –, it is doubtful that the Agency will fully abstain from even naming in its thematic reports or annual reports specific Member States, when the Agency will describe the situation of fundamental rights in the Union.

2.1. The EU Member States implementing Community law

The EU Member States will only be provided assistance by the Agency and be ‘monitored’ through the opinions and reports of the Agency in the implementation of EC Law. The original proposals of the Commission also envisaged that the Agency could be invited to provide its ‘technical expertise’ in the context of Article 7 EU.²⁹ However, the Legal Service of the Council of the Union³⁰ took the view that such a possibility would ‘go beyond Community competence’, and that, moreover, it would be incompatible with Article 7 EU itself, insofar as this provision would not allow for the adoption of implementation measures and was, in that sense, self-sufficient. The Commission answered that the draft Article 4 (1)(e) it proposed ‘should be seen not as an autonomous exercise of Community competence needing a proper legal basis in the EC Treaty, but rather as a largely declaratory opening clause, admitting a possibility that the Council would arguably have anyway, while clarifying modalities and limits’.³¹ Indeed, Article 7(1) EU itself refers to the possibility to ‘call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question’, in order to determine whether there exists a ‘clear risk of a serious breach by a Member State of principles mentioned in Article 6(1)’, among which principles are human rights and fundamental freedoms. The implicit view of the Commission was that the Agency could either be an ‘independent person’ for the purposes of this provision, or contribute to identifying such independent persons, in accordance with the broad margin of appreciation which Article 7(1) EU intended to leave to the Council.³² In the view of the Commission therefore, including Article 4(1)(e) in the proposed Regulation added nothing to Article 7 EU itself.³³ Referring to the possibility of the Agency to contribute its technical expertise upon request of the Council, in particular, ‘should be distinguished from any further reaching provision that would enable other institutions to seize the FR Agency or even an own initiative power of the latter to analyse possible Article 7 TEU situations. Any such provision might indeed exceed Community competence and conflict with the exhaustive institutional setting in Article 7 TEU’. The Commission was taken at its word. Within the Council *Ad hoc* Working Party on Fundamental Rights and Citizenship, a number of delegations expressed doubts as to the need

²⁸ In the original proposal of the Commission, this provision read : ‘[the Agency shall] formulate conclusions and opinions *on general subjects*, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council of the Commission’ (emphasis added).

²⁹ See Article 4(1) (e) of the proposed Regulation. On Article 7 EU, see above, n. 2.

³⁰ Doc. 13588/05JUR 425 JAI 363 COHOM 36 (26 October 2005).

³¹ Note from the Commission to the Council *Ad hoc* Working Party on Fundamental Rights and Citizenship, Council doc. 14702/05, JAI 437, CATS 75, COHOM 38 COEST 202 (18 November 2005), paras. 46-52.

³² This paragraph was inserted in Article 7 EU following the crisis opened by the entry into the Austrian governmental coalition of the Austrian Freedom Party (FPÖ) of Jörg Haider in early 2000. On this crisis, see M. Merlingen, C. Muddle and U. Sedelmeier, ‘The Right and the righteous? : European norms, domestic politics and the sanctions against Austria’, 39 *J.C.M.S.* 59 (2001); M. Happold, ‘Fourteen against One : The EU Member States’ Response to Freedom Party Participation in the Austrian Government’, 49 *International and Comparative Law Quarterly* 953 (2000); and E. Bribosia, O. De Schutter, T. Ronse and A. Weyembergh, ‘Le contrôle par l’Union européenne du respect de la démocratie et des droits de l’homme par ses Etats membres : à propos de l’Autriche’, *Journal des tribunaux – Droit européen*, March 2000, pp. 61-65. On the insertion of Article 7(1) EU by the Treaty of Nice, see G. de Búrca, ‘Beyond the Charter: How Enlargement has enlarged the Human Rights Policy of the EU’, in O. De Schutter and S. Deakin (eds), *Social Rights and Market Forces: Is the open coordination of employment and social policies the future of social Europe?*, Bruxelles, Bruylant, 2005, pp. 245-278, at pp. 259-262.

³³ Already in a Communication where it clarified its understanding of Article 7 EU, the Commission has mentioned the possibility that the Council draw up a list of independent personalities which could be called upon to assist the Council in exercising its functions under Article 7(1) EU (see COM(2003) 606 final, of 15.10.2003, at para. 1.3.).

to include a reference to Article 7 EU in the text of the Regulation establishing the Agency, as such a reference would, according to the Commission's own admission, serve no useful purpose and, going beyond Community law, could moreover lack a legal basis. The compromise solution consisted therefore in appending to the Regulation establishing the Agency a Declaration of the Council confirming this possibility, without any reference being made to Article 7 EU in the text of the Regulation itself.³⁴ This solution also preserved the purely political character of Article 7 EU, in the sense that the mechanisms it provides for should allow for a political appreciation by the Council of the European Union and the European Parliament, without, in particular, the question of whether a State is in serious and persistent breach of the values listed in Article 6(1) EU or whether there exists a clear risk of a serious breach, being determined by the European Court of Justice, as was suggested by the European Commission on a number of occasions, or by any other independent instance such as a Fundamental Rights Agency.

But the question of any potential role the Agency might have to play under Article 7 EU remains of marginal importance, in any event, in comparison with its role in providing the Member States when implementing Community law with 'assistance and expertise relating to fundamental rights', as provided under Article 2 of the Regulation. This may overlap with the activities of the Council of Europe bodies. Indeed, even when they implement Union law, the Member States remain fully bound to respect their other international obligations as defined, in particular, by instruments adopted within the framework of the Council of Europe.³⁵ Therefore, the Council of Europe bodies (in particular, the European Court of Human Rights, the European Committee of Social Rights, the Advisory Committee of the Framework Convention for the Protection of National Minorities, or the Commissioner for Human Rights) routinely examine whether the States parties to Council of Europe instruments comply with their obligations under these instruments, even where the States concerned act in fulfilling their obligations under Union law. Whether this overlap may prove problematic depends on the nature of the relationship established between the Council of Europe and the EU Agency for Fundamental Rights, and even more decisively, on the status which the findings made by the Council of Europe monitoring bodies will have in the opinions, conclusions and reports of the Agency. I return to this point later.

2.2. *Third countries*

The initial proposals of the Commission included a possibility for the Agency to provide, at the request of the Commission, information and analysis on fundamental rights issues identified in the request, concerning third countries with which the Community has concluded association agreements or agreements containing provisions on respect of human rights, or has opened or is planning to open negotiations for such agreements, in particular countries covered by the European Neighbourhood policy (ENP).³⁶ The ENP was developed in the context of the EU's 2004 enlargement, with the objective of avoiding the emergence of new dividing lines between the enlarged EU and the neighbouring countries and instead strengthening stability, security and well-being for all in the countries bordering the EU.³⁷ The ENP does not offer an accession perspective. But it does offer the countries concerned a privileged relationship, building upon a mutual commitment to common values (democracy and human rights, rule of law, good governance, market economy principles and sustainable development). Originally, the ENP was intended to apply to the immediate neighbours of the European Union – Algeria, Belarus, Egypt, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, the Palestinian Authority, Syria, Tunisia and Ukraine. In 2004, it was extended to also include the

³⁴ This Declaration states : 'The Council considers that neither the Treaties nor the Regulation establishing the European Union Agency for Fundamental Rights preclude the possibility for the Council to seek the assistance of the future European Union Agency for Fundamental Rights when deciding to obtain from independent persons a report on the situation in a Member State within the meaning of Article 7 TEU when the Council decides that the conditions of Article 7 TEU are met'.

³⁵ See above, n. 25.

³⁶ Article 3(4) of the Proposed Regulation.

³⁷ See generally the Communication of the Commission, *European Neighbourhood Policy: Strategy Paper*, COM(2004) 373 final, of 12. 5.2004.

countries of the Southern Caucasus with whom the then candidate countries Bulgaria, Romania and Turkey share either a maritime or land border (Armenia, Azerbaijan and Georgia).³⁸

It was also envisaged that the Agency would collect information on the situation of fundamental rights in countries which have concluded an association agreement with the Community and which are recognized as candidate or potential candidate countries, where the relevant Association Council decides on the participation of these countries in the Agency.³⁹ The Agency would then extend the remit of its activities to the concerned countries, *mutatis mutandis*. For instance, in principle, the Agency would only concern itself with the respect for fundamental rights in the implementation of the *acquis* of Union law, rather than in all fields. However the precise modalities of such an extension to these countries of the activities of the Agency remained vaguely defined in the draft Regulation, not only because the relevant Association Council is to determine the precise modalities of such participation, but also because under Articles 6(1) and 49 EU, respect for human rights and fundamental freedoms is a condition for accession, which may justify that, vis-à-vis acceding countries, the Agency's remit would be broader than vis-à-vis the EU Member States.

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

This raised the concern, within the Council of Europe, that the Fundamental Rights Agency for the European Union would be duplicating the work performed by the monitoring bodies of the Council of Europe, without this being justified by a sufficiently close link to the activities of the European Union. In the Recommendation it adopted on 13 April 2006 on this question, for instance, the Parliamentary Assembly of the Council of Europe took the view that 'the agency should have no mandate to undertake activities concerning non-European Union member states. Should such a mandate nevertheless be considered absolutely necessary, it should be strictly confined to candidate countries and limited to issues arising from the accession process'.⁴⁰

In part as a reaction to such concerns, the discussions within the *Ad hoc* Working Group of the Council have led to narrowing down the geographical remit of the Agency. In June 2006, the Austrian presidency made a compromise proposal,⁴¹ consisting in abandoning the possibility for the Commission to request the Agency to provide an analysis on certain fundamental rights issues concerning third countries with which the Community has concluded association agreements or agreements containing provisions on respect of human rights, or has opened or is planning to open negotiations for such agreements, in particular countries covered by the European Neighbourhood policy (ENP). Only the possibility of candidate or pre-candidate countries to participate as observers in the Agency was retained. Under the proposal made by the Austrian presidency, Article 3(3) of the Regulation would provide :

The Agency shall deal with fundamental rights issues in the European Union and in its Member States when implementing Community law. In addition, it may deal with fundamental rights issues within the scope of paragraph 1 [within the competencies of the Community as laid down

³⁸ Although Russia is also a neighbour of the EU, the relations between the EU and Russia are instead developed through a Strategic Partnership covering four "common spaces".

³⁹ Art. 27 of the Proposed Regulation.

⁴⁰ PACE, Recommendation 1744 (2006), *Follow-up to the 3rd Summit: the Council of Europe and the proposed fundamental rights agency of the European Union*, cited above, at para. 11.3.

⁴¹ Council of the European Union, doc. 10289/06, 9 June 2006.

in the Treaty establishing the European Community] in those countries as defined in Article 27 (1) to the extent necessary for the gradual alignment to Community Law of the respective country and in accordance with Article 27 (2).

Article 27 now reads :

Participation of candidate countries and countries with which a Stabilisation and Association Agreement has been concluded

1. The Agency shall be open to the participation of candidate countries or of countries with which a Stabilisation and Association Agreement has been concluded by the European Community as observers.

2. The participation and the respective modalities shall be determined by a decision of the relevant Association Council, taking into account the specific status of each country. The decision shall indicate in particular the nature, extent and manner in which these countries will participate in the Agency's work, (...). The decision shall provide that the participating country may appoint an independent person fulfilling the qualifications for persons referred to in Article 11(1)(a) as observer to the Management Board without right to vote.

The subsequent discussions held on this issue within the Council *Ad hoc* working group led to dissociate the modalities of the possible participation of candidate countries on the one hand, and of potential candidate countries with which a Stabilisation and Association Agreement has been concluded on the other hand. In the former group are Croatia and Turkey, which have started negotiations on accession on 3 October 2005, and the former Yugoslav Republic of Macedonia, which was granted candidate at the latest status in December 2005 but with whom accession negotiations have not started yet. The latter group comprises the countries of the Western Balkans whose natural vocation it is, in the future, to accede to the European Union, and for whom Stabilisation and Association Agreements are seen as an instrument to prepare themselves as candidate countries.⁴² These countries are Albania, Bosnia and Herzegovina, Montenegro, and Serbia, who are all considered as potential candidates. For none of these countries will the extension of the remit of the Agency be automatic, since it will depend in all cases on a decision of the respective Association Council. But following the final compromise put forward by the Finnish presidency of the second semester 2006 and agreed by the Council, any potential candidate country with whom a Stabilisation and Association Agreement has been concluded can only participate in the Agency as an observer following a unanimous decision by the Council inviting it to do so, a condition not imposed as regards the participation of candidate countries.⁴³ Moreover, no Stabilisation and Association Agreement with a potential candidate country has so far been concluded, and it may still take a considerable number of years until Stabilisation and Association Agreements will enter into force for the potential candidate countries.

It is therefore probable that, in the immediate future at least, participation in the Agency will be envisaged only for the three candidate countries, and that the geographical remit of the Agency therefore will almost completely be restricted to the Member States of the European Union. In part, this choice was justified by the need to avoid an overlapping of tasks with those performed by the Council of Europe : while it does make sense to facilitate the implementation of the *acquis* of Union law by candidate countries, or by the Western Balkans countries preparing for candidate status, by ensuring that the fundamental rights dimension is taken into account in that preparation – indeed, this is the purpose of the participation of these countries in the work of the Agency, as the Regulation makes explicit⁴⁴ –, it would go beyond the objective of the Agency as defined in Article 2 of the

⁴² See, in particular, the Declaration adopted in Thessaloniki on 21 June 2003, following the EU-Western Balkans Summit (doc. 10229/03 (Presse 163)), and the *Thessaloniki agenda for the Western Balkans: Moving towards European Integration*, General Affairs and External Relations Council, 2518th Council session, External Relations, Luxembourg, 16 June 2003, adopted by the European Council on 20 June 2003.

⁴³ See Article 27(3) of the Regulation.

⁴⁴ See Article 27(2) of the Regulation (mentioning that, as regards countries participating as observers, the Agency may deal with 'the fundamental rights issues within the scope of Article 3(1) in the respective country, to the extent necessary for the

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

3. The risks involved in the overlapping of tasks between the EU Fundamental Rights Agency and the Council of Europe bodies

In sum, to the extent that the implementation of Community law by the EU Member States or by candidate countries (or pre-candidate countries) includes an obligation to take into account the requirements of fundamental rights, the Agency will have a role in providing advice to the States concerned. Leaving aside the fact that such ‘monitoring’ of individual States through the Agency may in reality bear little resemblance to the normative monitoring performed by the Council of Europe bodies, three arguments against such ‘duplication’ of the work of the Council of Europe by the Agency are generally put forward. These arguments are explicitly stated in Resolution 1427(2005) adopted by the Parliamentary Assembly of the Council of Europe. Two arguments may be easily dealt with ((3.1.) and (3.2.) hereunder). The third argument will be discussed in more detail (3.3.).

3.1. The risk of ‘dividing lines in Europe’

The Parliamentary Assembly of the Council of Europe has taken the view, first, that ‘the existence of such parallel mechanisms (one for the twenty-five [now twenty-seven] member states of the Union and one for the forty-six member states of the Council of Europe) would be a serious blow to the principle that there should be no dividing lines in Europe’.⁴⁵

This is a powerful rhetorical argument, but unconvincing when examined carefully. The instruments of the Council of Europe impose *minimum* standards on the States parties, and they contain provisions which allow these Parties to go beyond those minimal requirements either by the adoption of internal legislation, or by the conclusion of international agreements affording a more favorable protection to the individual.⁴⁶ It is no more a problem for the European Union to ensure a guarantee of fundamental rights under the jurisdiction of its Member States which goes beyond the requirements of the Council of Europe instruments concluded by those States, than it would be for any individual State to go beyond those requirements in its national constitutional or legislative framework. Indeed, when the European Community adopted directives on the basis of Article 13 EC,⁴⁷ or adopted Directive 95/46/EC on the basis of Article 95 EC (then Article 100A of the EC Treaty),⁴⁸ going beyond the

gradual alignment to Community Law of the country concerned’). It will be noted that, under the new framework for the conduct of accession negotiations with candidate countries agreed upon by the Brussels European Council of 16 and 17 December 2004, the Commission may recommend, and the Council decide by qualified majority, the suspension of future negotiations in presence of a serious and persistent breach by a candidate State of the principles enshrined in Article 6(1) EU (para. 23 of the Presidency conclusions). Although it would be natural for the analysis of the Agency to contribute to such an evaluation as may be required for such a recommendation to be made by the Commission and for such a decision to be taken by the Council, this would go beyond the wording of Articles 2 and 27(2) of the Regulation, if read literally. Perhaps a reasoning by analogy with that which presided to the compromise on Article 7 EU could be justified here : to the extent that the Member States may entrust the Commission to perform, in their name, tasks lying outside Community competence, a practice accepted by the Court (see Joined Cases C-181/91 and C-248/91, *European Parliament v. Council and Commission*, [1993] ECR I-3685 (concerning aid to Bangladesh), para. 20), it should be allowable for the Council to call upon the Agency to provide them with such an analysis.

⁴⁵ PACE Res. 1427(2005), para. 12.

⁴⁶ See, for example, Article 53 of the European Convention on Human Rights; Article 32 of the 1961 European Social Charter; Article H of the Revised European Social Charter; Article 11 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data; Article 22 of the Framework Convention for the Protection of National Minorities; Article 27 of the Convention on Human Rights and Biomedicine.

⁴⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000, p. 22 ; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L. 303 of 2.12.2000, p. 16.

⁴⁸ 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.

protection from discrimination and the protection of private life in the processing of personal data as provided under Council of Europe instruments, this did not lead to ‘dividing lines in Europe’ in the field of fundamental rights. Quite to the contrary, it contributed to the progress of the overall protection of human rights and inspired, in turn, developments within the framework of the Council of Europe itself.⁴⁹ Indeed, the risk of ‘dividing lines’ in Europe was also invoked when the EU Charter of Fundamental Rights was negotiated between October 1999 and October 2000.⁵⁰ But the answer made then to this objection – that nothing in the Council of Europe instruments imposes a prohibition on the EU Member States or on the Union itself to improve further the protection of human rights in their respective spheres of competence – is the same which should be made today.

3.2. Economizing resources

A second argument which is put forward against any duplication of tasks between the Council of Europe bodies and the EU Agency is that such a duplication would constitute a waste of resources.⁵¹ However, to the extent the ‘monitoring’ of individual States by the EU Fundamental Rights Agency is envisaged, this monitoring is performed for reasons specific to the needs of the Union – in particular, to assist the EU Member States in their implementation of Union law, which should better take into account the requirements of fundamental rights, and to facilitate the progress of candidate countries to the EU towards meeting the accession criteria.

Although the findings by the Council of Europe bodies should be made fully use of in these different contexts, they nevertheless will be relied upon with these different aims in mind, which do not correspond to the aims pursued by the bodies of the Council of Europe under their specific mandates. Indeed, it would not be thinkable to entrust those bodies, for instance, with the task of evaluating whether a country complies with the criteria laid down for accession to the Union.⁵² And it would be incompatible with the principle of autonomy of the legal order of the Union,⁵³ moreover, to have such bodies decide authoritatively whether a Member State has implemented Union law in conformity with the obligation – as imposed under Union law itself – to ensure that this implementation is in conformity with the requirements of fundamental rights.⁵⁴ The principle of autonomy of the Union

⁴⁹ For instance, as already mentioned, the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding Supervisory Authorities and Transborder Dataflow (CETS No. 181, opened for signature on 8 November 2001), was inspired by the chapter relating to the establishment of such supervisory authorities in the field of data protection in Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data; and the Racial Equality and Employment Equality Directives have influenced the case-law of the European Court of Human Rights in the interpretation of Article 14 of the European Convention on Human Rights (see, e.g., Eur. Ct. HR (GC), *Nachova and Others v. Bulgaria* (Appl. Nos 43577/98 and 43579/98), judgment of 6 July 2005, § 80).

⁵⁰ See PACE Resolution 1210 (2000), *Charter of fundamental rights of the European Union*, § 5 (in which the Parliamentary Assembly ‘draws attention to the risks of having two sets of fundamental rights which would weaken the European Court of Human Rights’).

⁵¹ PACE Res. 1427(2005), para. 10. This argument is also briefly mentioned in the Council of Europe Memorandum of 8 September 2005 (at para. 12).

⁵² See Article 49 EU, which, since it was amended by the 1997 Treaty of Amsterdam, includes a reference to the fact that the European State seeking to apply for membership of the EU must respect the principles set out in Article 6(1) EU (comp. with Article 0 of the Treaty on the European Union signed in Maastricht, which did not contain a similar reference); and the so-called ‘political criterion’ included among the criteria defined for accession by the Copenhagen European Council of 21-22 June 1993 (Conclusions of the Presidency, p. 44), referring to the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. On the use of the Copenhagen criteria, see C. Hillion, ‘The Copenhagen criteria and their progeny’, in C. Hillion (ed.), *EU enlargement: a legal approach*, London and Portland-Oregon, Hart Publ., 2004, p. 13.

⁵³ The principle of autonomy is derived from Articles 220 EC and 292 EC. See Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] ECR I-6079 (14 December 1991); Opinion 1/92, (Second) Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area [1992] ECR I-2821 (10 April 1992).

⁵⁴ It would also be in violation of the principle of autonomy of the legal order of the Union to entrust bodies of the Council of Europe with the task of deciding whether there exists in a Member State a clear risk of a serious breach of the values on which the Union is based, or whether a Member State has been persistently in serious breach of those values, under Article 7 EU.

legal order implies that ‘only the institutions of the particular legal order are competent to interpret the constitutional and legal rules of that order’.⁵⁵ It would thus not be compatible with this principle to attribute to Council of Europe bodies tasks which would imply that they interpret and apply Union or Community law, with results binding on the EU institutions. On the other hand, it may perfectly be envisaged that the Council of Europe bodies be entrusted with fact-finding tasks, on the basis of which the Agency could report back to the Union institutions. Indeed, in its Memorandum of 8 September 2005, the General Secretariat of the Council of Europe proposed that, ‘instead of multiplying monitoring mechanisms’, we should ‘build on the successful experience regarding the preparation of candidate countries for EU accession. Findings of the Council of Europe human rights mechanisms have been central elements in the Commission’s assessment of the human rights situation in the candidate countries. If necessary, such findings could be presented in a more targeted way, and the details of such co-operation could be specified in an exchange of letters’ (at para. 9).

Such a delegation to the Council of Europe mechanisms of fact-finding tasks, not implying authoritative interpretation and application of Union law, may be seen as contributing to a more rational use of the available resources. On the other hand, it is not required, for the coherence and the credibility of the European system for the protection of human rights, that the EU Fundamental Rights Agency abstain from all monitoring activities which might overlap with forms of monitoring already performed by the Council of Europe bodies. The next section explains why.

3.3. The risk of weakening the European system of human rights protection

The Parliamentary Assembly of the Council of Europe took the view that the creation of institutions with mandates which overlap with those of existing ones could result in ‘the dilution and weakening of their individual authority, which in turn will mean weaker, not stronger, protection of human rights, to the detriment of the individual’.⁵⁶ The Council of Europe Memorandum of 8 September 2005 explains that any duplication of the role of the Council of Europe bodies by a general monitoring of the EU Member States or even, under the circumstances described above, of non-member countries, would ‘entail a real risk of undermining legal certainty. A situation where assessments made by the Agency would diverge from, or even contradict, assessments made by Council of Europe monitoring bodies would result in considerable confusion for individuals and Member States. It would also be highly detrimental to the overall coherence and effectiveness of human rights protection in Europe’.⁵⁷ Whether or not this will be the case will depend on the strength of the links between the EU Fundamental Rights Agency and the Council of Europe, considered both in its standard-setting and in its fact-finding functions.

a) The reality of the risk

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

⁵⁵ Th. Schelling, “The Autonomy of the Community Legal Order : An Analysis of Possible Foundations”, *Harvard Int’l L. J.*, vol. 37, n° 2, 1996, p. 389. In addition, the principle of autonomy of the EU legal order is only one implication of the monopoly which Articles 220 and 292 EC reserve to the European Court of Justice in the final interpretation of the EC Treaty : attributing to the Agency for Fundamental Rights the task of deciding whether a Member State complies with its human rights obligations under EU or EC law would not be compatible with this monopoly. Article 4(2) of the Regulation establishing the Agency states in this respect that the conclusions, opinions and reports adopted by the Agency ‘shall not deal with the legality of acts within the meaning of Article 230 or with the question whether a Member State has failed to fulfil an obligation under the Treaty within the meaning of Article 226 of the Treaty’.

⁵⁶ PACE Res. 1427(2005), para. 11.

⁵⁷ *Id.*, para. 12.

Human Rights ; the UN Committee on Economic, Social and Cultural Rights monitors them under the International Covenant on Economic, Social and Cultural Rights, the substantive guarantees of which largely intersect with those of the 1961 and 1996 European Social Charters ; many other examples could be given. Similarly, the European Court of Justice, which has included fundamental rights among the general principles of law which it ensures the respect of in the scope of application of Union law, routinely bases itself on the European Convention on Human Rights in situations where the European Court of Human Rights may also have to exercise its jurisdiction.⁵⁸ Indeed, even within the Council of Europe, such ‘overlapping’ takes place : the European Committee for the Prevention of Torture and Inhuman and Degrading Treatments and Punishments (CPT), in its country reports following its visits in the States parties’ places of detention, makes recommendations which contribute to the implementation of Article 3 of the European Convention on Human Rights ; the Advisory Committee created under the Framework Convention for the Protection of National Minorities has interpreted this instrument in its opinions on the States parties, although the European Court of Human Rights has read Article 8 of the European Convention on Human Rights, as well as, with respect to religious minorities, Article 9, in combination or not with Article 14, as protecting similar rights than those listed in the Framework Convention. Far from this ‘duplication’ resulting in a lowering of the overall level of protection of human rights, this has been beneficial, as these different bodies have sought inspiration from one another and have been regularly referring to one another’s interpretation of the respective instruments which they seek to ensure the compliance with by the States parties, thus ensuring the progressive development of a ‘ius commune’ of international human rights through such dialogue between different jurisdictions.⁵⁹

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

If, on the other hand, in exercising its tasks – even where those include monitoring Member States of the Council of Europe with respect to situations where the Council of Europe bodies also exercise monitoring in a comparable form –, the EU Agency for Fundamental Rights systematically refers to the findings of the Council of Europe bodies, this may strengthen, rather than weaken, the authority recognized to the interpretation by those bodies of the instruments they apply, and contribute to an improved follow-up upon the recommendations they address to the States parties. For instance, in interpreting Article 3 of the EU Charter of Fundamental Rights (right to the integrity of the person), the Agency should take into account the corresponding provisions of the 1997 Council of Europe Convention on Human Rights and Biomedicine ; in applying Article 26 of the Charter (integration of persons with disabilities), it should be guided by Article 15 of the Revised European Social Charter and the corresponding case-law of the European Committee of Social Rights ; in identifying the implications of Article 4 of the Charter (prohibition of torture and inhuman or degrading treatment or punishment), it should take into account the findings of the European Committee on the Prevention of Torture and its general reports. Indeed, at least as regards the rights and freedoms recognized in the

⁵⁸ See O. De Schutter, “L’influence de la Cour européenne des droits de l’homme sur la Cour de justice des Communautés européennes”, in : G. Cohen-Jonathan and J.-Fr. Flauss (dir.), *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l’homme*, Bruxelles, Bruylant, 2005, pp. 189-242.

⁵⁹ See further on this theme Christopher McCrudden, ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’, 20 *Oxford Journal of Legal Studies* 499 (2000); Ann-Marie Slaughter, ‘A Typology of Transjudicial Communication’, 29 *University of Richmond Law Review* 99 (1994); Anne-Marie Slaughter, ‘A Global Community of Courts’, 44 *Harvard International Law Journal* 191 (2003).

European Convention on Human Rights, the Agency will be under a legal obligation to base itself on the case-law of the European Court of Human Rights.⁶⁰ In addition, the practice of the European Court of Human Rights is generally to interpret the Convention by referring to findings of other Council of Europe bodies such as, for instance, the European Committee for the Prevention of Torture or the European Committee of Social Rights.⁶¹ This practice should be replicated by the EU Fundamental Rights Agency in the interpretation it gives either to the Charter or to fundamental rights recognized in EU Law.

As clearly illustrated by the practice of the EU Network of Independent Experts on Fundamental Rights, such a systematic referral to the findings of the Council of Europe bodies, and to the authoritative interpretation by those bodies of the Council of Europe instruments which have constituted the source of inspiration for the EU Charter of Fundamental Rights when it was drafted, would contribute to the effectiveness of the European system of human rights, rather than produce the negative consequences feared by the Parliamentary Assembly of the Council of Europe. What is required, therefore, is the establishment of a clear link between the the Agency and the Council of Europe, both at the substantive level (in the interpretation of the EU Charter of Fundamental Rights and in the evaluation of specific situations occurring in individual States to which the remit of the Agency will extend) and at the institutional level. At the substantive level, it is crucial, first, that the interpretation of the EU Charter of Fundamental Rights takes into account the human rights instruments adopted within the Council of Europe; second, that the findings of the Council of Europe bodies be relied upon in any monitoring of individual Member States by the EU Fundamental Rights Agency. And the institutional link will result from the representation of the Council of Europe in the structure of the Agency, which should contribute to prevent any risk of diverging understandings of the requirements of fundamental rights.

b) Substantive coherence

Substantive coherence between the EU Fundamental Rights Agency and the Council of Europe bodies requires, first, that the interpretation of the EU Charter of Fundamental Rights take into account the human rights instruments adopted within the Council of Europe. The draft Regulation initially presented by the European Commission, on 30 June 2005, mentions that the Agency shall refer to fundamental as defined in Article 6(2) of the EU Treaty and as set out in the EU Charter of Fundamental Rights.⁶² In the future, the EU Fundamental Rights Agency will base itself on the European Convention on Human Rights and on the common constitutional traditions of the Member

⁶⁰ This follows from the reference made to the EU Charter of Fundamental Rights and to Article 6(2) of the EU Treaty in the Regulation establishing the Agency for Fundamental Rights : Article 52(3) of the Charter prescribes a reading of the rights of the Charter which correspond to rights of the ECHR in accordance with the case-law of the European Court of Human Rights, and Article 6(2) of the Treaty also refers directly to the European Convention on Human Rights as a source of human rights and fundamental freedoms recognized as general principles of Union law.

⁶¹ However, this practice is far from uniform in the case-law of the Court. For instance, in *D.H. and Others v. Czech Republic* (Appl. N° 57325/00), a Chamber of the Court (2nd sect.) notes in a judgment of 7 February 2006 that ‘several organisations, including Council of Europe bodies [other parts of the judgment refer to the reports of the European Commission against Racism and Intolerance (ECRI) and to the reports submitted by the Czech Republic under the Framework Convention for the Protection of National Minorities – although, perhaps tellingly, not to the opinions of the Advisory Committee established under the Framework Convention : see §§ 24-27], have expressed concern about the arrangements whereby Roma children living in the Czech Republic are placed in special schools and about the difficulties they have in gaining access to ordinary schools. The Court points out, however, that its role is different from that of the aforementioned bodies and that [...] it is not its task to assess the overall social context. Its sole task in the instant case is to examine the individual applications before it and to establish on the basis of the relevant facts whether the reason for the applicants’ placement in the special schools was their ethnic or racial origin’ (§ 45). This judgment is current referred to the Grand Chamber of the European Court of Human Rights. In another case, the FCNM was considered by the European Court of Human Rights to set out only ‘general principles and goals’, illustrating perhaps an emerging consensus within the Council of Europe in favour of the recognition of ‘the special needs of minorities and an obligation to protect their security, identity and lifestyle’ but betraying at the same time a lack of agreement on concrete means of implementation (Eur. Ct. HR (GC), *Chapman v. the United Kingdom*, Appl. N° 27238/95, judgment of 18 January 2001, §§ 93-94).

⁶² Article 3(2) of the proposed Regulation. The reference to the Charter in the operative part of the Regulation was removed in the course of the discussions within the Council *Ad hoc* working group, but the Charter is still referred to in the Preamble.

States, as well as on the Charter. As to the other Council of Europe instruments, two avenues could be explored.

In its resolution 1427(2005), the Parliamentary Assembly of the Council of Europe took the view that not only the European Convention on Human Rights, but also the other human rights instruments of the Council of Europe should be referred to by the Agency.⁶³ The view of the Parliamentary Assembly was that using these other instruments alongside the European Convention on Human Rights would ensure that, in the legal order of the Union, all the instruments which are binding on the Member States will be complied with (and taken into account in the adoption of legislation and policies), thus avoiding what some observers refer to – mistakenly in the view of this author – as a ‘two-speed Europe of human rights’.

This however may be an impractical solution. Apart from the European Convention on Human Rights, the main human rights instruments of the Council of Europe are : the European Social Charter of 1961 and the Revised European Social Charter of 1996⁶⁴; the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981⁶⁵ ; the Framework Convention for the Protection of National Minorities of 1995⁶⁶ ; the Convention for the protection of Human Rights and dignity of the human being with regard to the application of biology and medicine (Convention on Human Rights and Biomedicine) of 1997⁶⁷ ; as well as the additional protocols to those instruments.⁶⁸ But for a variety of reasons, it seems implausible that these instruments can be relied upon by the Fundamental Rights Agency.

The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981 has been ratified by all the Member States of the European Union. But all its principles have been developed and extended in European Community law, especially through the adoption of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.⁶⁹ Article 8 of the EU Charter of Fundamental Rights moreover guarantees the protection of personal data, as defined under this Directive. Therefore, although there is no obstacle in doing so, there would be little added value in including the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data among the reference instruments of the EU Fundamental Rights Agency.

As to the other instruments adopted within the Council of Europe in the field of human rights, the level of acceptance of these different instruments by the EU Member States still varies relatively widely.⁷⁰ For instance, while all the Member States are parties either to the 1961 European Social Charter or to the 1996 Revised European Social Charter, Austria, the Czech Republic, Denmark, Germany, Greece, Hungary, Latvia, Luxembourg, Poland, Slovakia, Spain and the United Kingdom have not ratified the Revised European Social Charter. And both within the 1961 and the 1996 European Social Charters, the commitments of the States parties are variable, as they may upon ratification accept only a limited number of the provisions of these instruments. Belgium, France,

⁶³ This was also noted in the Council of Europe Memorandum of 8 September 2005 (para. 14).

⁶⁴ CETS n°35 and n°163 respectively.

⁶⁵ CETS n°108.

⁶⁶ CETS, n°157.

⁶⁷ CETS n°164.

⁶⁸ Of course, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, opened for signature on 26 November 1987 (CETS n°126), also plays a very important role in the European system for the protection of human rights. However this Convention essentially sets up a mechanism for the protection of the right of persons in detention not to be subjected to torture or to forms of inhuman or degrading treatment or punishment; it does not add new substantive norms beyond those contained in Article 3 of the European Convention on Human Rights.

⁶⁹ OJ L 281 of 23.11.1995, p. 31. The Preamble of Directive 95/46/EC states that ‘the principles of the protection of the rights and freedoms of individuals, notably the right to privacy, which are contained in this Directive, give substance to and amplify those contained in the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data’ (11th Recital).

⁷⁰ State of ratifications on January 1st, 2007.

Greece and Luxembourg, have not ratified the Framework Convention for the Protection of National Minorities. Belgium, Finland, France, Germany, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Sweden and the United Kingdom have not ratified the Convention on Human Rights and Biomedicine. Of course, it would not be acceptable for the Union to impose on its Member States any obligations which would run counter to these instruments.⁷¹ But the legitimacy of the Union in seeking to impose on its Member States that they comply with those instruments, in particular in the implementation of Union law, may be questioned, as regards those provisions which have not been included in the Charter of Fundamental Rights and are not otherwise recognized as forming part of the general principles of Union law which the Court of Justice ensures respect of.⁷²

Another, perhaps more advisable solution, which would meet the concerns expressed within the Council of Europe and ensure that the Council of Europe instruments will be taken into account to the extent that they are relevant in the law- and policymaking in the Union, would be to encourage a reading of the EU Charter of Fundamental Rights in conformity with those instruments. This has been the option chosen by the EU Network of Independent on Fundamental Rights.⁷³ The provisions of the Charter which correspond to equivalent provisions of the European Convention on Human Rights are to be read in accordance with this latter instrument, and of the case-law of the European Court of Human Rights. This is an implication of Article 52(3) of the EU Charter of Fundamental Rights. A similar link must be created, in the interpretation of the Charter, with the other Council of Europe instruments on which the EU Charter of Fundamental Rights is based.

But ensuring the substantive coherence between the EU Fundamental Rights Agency and the Council of Europe *acquis* does not require only that the Council of Europe standards be taken into account. It also would seem to imply that the findings of the bodies of the Council of Europe be systematically taken into account where the activities of individual States are concerned, whether this refers to the EU Member States in the implementation of Union law, or to candidate or pre-candidate countries to which the remit of the Agency would extend. Article 6(2)(c) of the initial draft Regulation proposed

⁷¹ This is implicitly acknowledged in Article 307 EC (ex-Article 234 EC Treaty), which provides that ‘The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty’, and imposes on the EU Member States an obligation to denounce treaties binding on them concluded prior to their accession to the EU where an incompatibility would exist with their obligations under European Community law ; and it follows from Article 30 of the Vienna Convention on the Law of Treaties. See, on the significance of this provision as regards preexisting human rights international obligations of the EU Member States L. Besselink, “Entrapped by the Maximum Standard : On Fundamental Rights, Pluralism and Subsidiarity in the European Union”, *C.M.L.R.*, 1998, p. 629 ; and, for a more general analysis, P. Manzini, “The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law”, *12 European Journal of International Law*, 781 (2001).

⁷² A different situation may arise where an international human rights treaty has been explicitly referred to either in the Treaties or in an instrument of secondary EU Law. For example, the Geneva Convention on the Status of Refugees, signed on 28 July 1951, is cited in Article 63 EC (which states that ‘measures on asylum [may be adopted by the Council of the EU] in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties’, within certain areas which it goes on to enumerate); the 1961 European Social Charter and the 1996 Revised European Social Charter are mentioned in the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12), which states in Article 3(4) that its provisions are ‘without prejudice to more favourable provisions of: (a) bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other; (b) the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987 [*sic*] and the European Convention on the legal status of migrant workers of 24 November 1977’. It may be argued on the basis of the existing case-law, which implicitly relies on the *patere legem quam ipse fecisti* rule (see C.F.I., Case T-105/95, T.P.I., 5 mars 1997, *WWF UK v. Commission*, [1997] ECR II-313, paras. 53-55 (judgment of 5 March 1997)) that in such cases, the ECJ may impose on the EU and on the EU Member States implementing EU law that they comply with these instruments : see in the case-law of the European Court of Justice, where reliance on the Charter of Fundamental Rights is considered justified since it was referred to in the Preamble of the challenged instrument, Case C-540/03, *European Parliament v. Council*, nyr, judgment of 27 June 2006 (action for annulment of the Family Reunification Directive cited above), para. 38 (‘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’).

⁷³ EU Network of Independent Experts on Fundamental Rights, *Report on the situation of fundamental rights in the Union and its Member States in 2002*, p. 22-23.

by the Commission stated that the Agency shall, ‘in order to avoid duplication and guarantee the best possible use of resources, take account of existing information from whatever source, and in particular of activities already carried out by (...) the Council of Europe and other international organisations’. In the Regulation adopting following the discussions within the Council, an explicit reference is made not only, in general terms, to the ‘activities’ of Council of Europe, but more specifically to ‘the findings and activities of the Council of Europe's monitoring and control mechanisms, as well as of the Council of Europe Commissioner for Human Rights’; in addition, a reference to the activities of the Organisation of Security and Co-operation in Europe (OSCE), the United Nations and unspecified ‘other international organisations’ has been included.⁷⁴

It is difficult to be more explicit. Once the principle is agreed upon that the EU Fundamental Rights Agency should base itself on the findings of the Council of Europe bodies, what becomes crucial for the implementation of this provision is that the Council of Europe is adequately represented within the management structure of the Agency in order to ensure that all the findings of the Council of Europe are carefully considered and that any risks of diverging approaches or duplication in fact-finding are avoided.⁷⁵ It is to this question that we now turn.

c) Institutional Coherence

The draft Regulation proposed by the Commission on 30 June 2005 provided that the Council of Europe shall appoint an independent person to the Management Board of the Agency, but that, in contrast to the current situation existing within the EUMC,⁷⁶ that person shall not necessarily be a member of the Executive Board. As correctly pointed out by the Council of Europe General Secretariat,⁷⁷ this was not satisfactory. The day-to-day business of the Agency, as well as the definition of the position of the Agency on what may be politically extremely sensitive points, will be defined within the Executive Board, rather than by the Board of Management. Therefore it was felt necessary to widen the composition of the Executive Board, in order to ensure that the independent person appointed by the Council of Europe (in all likelihood, the Council of Europe Commissioner for Human Rights) will be in a position to contribute effectively to the coherence of the approaches adopted by the EU Fundamental Rights Agency on the one hand, and by the Council of Europe bodies on the other hand. In the compromise proposed by the Austrian presidency on 9 June 2006, it was stipulated that, although not formally a member of the Executive Board, ‘The person appointed by the Council of Europe in the Management Board may participate in the meetings of the Executive Board’.⁷⁸ That solution has now been confirmed.⁷⁹

4. Conclusion

In his report on the future of the relationships between the European Union and the Council of Europe ‘A sole ambition for the European continent’, which he released on 11 April 2006,⁸⁰ Prime Minister Jean-Claude Juncker proposes that a working rule be established, according to which ‘the decisions, reports, conclusions, recommendations and opinions of [the Council of Europe] monitoring bodies: 1. will be systematically taken as the first Europe-wide reference source for human rights; 2. will be

⁷⁴ See Article 6(2), (b) and (c) of the Regulation establishing the Agency.

⁷⁵ As already mentioned, while the duplication of monitoring is not in principle problematic, as any monitoring performed by the EU Agency would be for other purposes than the monitoring performed by the Council of Europe bodies, duplication in fact-finding and in the evaluation of specific situations should be avoided as it may be seen as an unnecessary waste of resources and as creating a risk of divergent conclusions. In this author’s view, the EU Agency should systematically refer to the findings made within the Council of Europe, but the EU Agency may process this information, collected by the Council of Europe bodies, in order to draw the necessary conclusions which are relevant to the fundamental rights policies of the European Union.

⁷⁶ Article 9(1) of Regulation No. 1035/97 establishing the EUMC.

⁷⁷ In the Council of Europe Memorandum of 8 September 2005 referred to above, n. 22.

⁷⁸ Article 12(1) of the draft Regulation, Council of the European Union, doc. 10289/06, 9 June 2006.

⁷⁹ Article 12(1) of the Regulation establishing the Agency for Fundamental Rights.

⁸⁰ ‘A sole ambition for the European continent’, report prepared by Jean-Claude Juncker to the attention of the Heads of State or Government of the Member States of the Council of Europe, 11 April 2006 (hereafter referred to as the ‘Juncker report’).

expressly cited as a reference in documents which they produce'. As noted by the report, this 'merely confirms existing practice. But it does mean taking something which today is simply a practice, and turning it into a rule for EU institutions on all levels. This explicit formula will enhance the status of the Council of Europe's human rights instruments and monitoring machinery in all its member states, both EU members and others. It will also make for more effective co-operation between the two organisations'. This working rule proposed by the Juncker report was endorsed by the Parliamentary Assembly of the Council of Europe.⁸¹ It should guide, first and foremost, the future Agency for Fundamental Rights. It could be included in the cooperation agreement which the European Community should conclude with the Council of Europe according to the procedure provided for under Article 300 EC, as envisaged in Article 9 of the Regulation establishing the Agency.

III. From Competition to Cooperation between the European Union and the Council of Europe in the debate on the relationship of Union law to the Council of Europe standards

It is perhaps ironic that, whereas the establishment of the EU Fundamental Rights Agency has raised the fear that the EU might be transforming itself into a human rights organization, competing with the Council of Europe for setting the standards and monitoring human rights in Europe, this happens at a time when the EU is suspected of doing not too much, but too little, to ensure that it effectively complies with the requirements of human rights in its law- and policy-making. The debate on the insertion of disconnection clauses in treaties concluded in the framework of the Council of Europe – the other highly sensitive issue in the recent history of the relationship between the Council of Europe and the European Union – is, indeed, about the risk that, as integration between the EU Member States deepens, this may be detrimental to an international human rights regime based on State responsibility. Indeed, in the form it is taking in the European Union, deepened integration means that the EU Member States develop relationships based on mutual trust rather than on the need to ensure, on an *ad hoc* and case-to-case basis, that in each instance of cooperation between the Member States, human rights are fully respected. Thus, at a fundamental level, the question has arisen whether the relationships built between the EU Member States in the establishment between themselves not only of an internal market, but also of an area of freedom, security and justice, may be reconciled with the *individual* responsibility of each State under the instruments negotiated within the Council of Europe, to respect, protect and promote human rights under their jurisdiction. The following sections move from an examination of the debate on the 'disconnection' clauses, to the broader but closely related question of mutual trust between the EU Member States. They conclude that, while the evolution from the individual responsibility of each EU Member State for any human rights violations resulting from integration within the EU to a form of joint responsibility may be inevitable, this should not lead to the lowering of the overall level of protection of human rights : rather, it implies that the EU itself should come to accept that it has human rights obligations, over and above the obligations imposed on the EU Member States considered individually.

1. The 'disconnection clause'

According to the precedents set by Article 28(3) of the European Convention on Extradition of 13 December 1957,⁸² Article 27(1) of the European Convention on Transfrontier Television of 5 May

⁸¹ See PACE, Recommendation 1743 (2006), *Memorandum of understanding between the Council of Europe and the European Union*, in which the PACE recommends to the Committee of Ministers to propose to the European Union to formally acknowledge in the memorandum of understanding between the two organisations that that 'the Council of Europe must remain the benchmark for human rights, the rule of law and democracy in Europe, in particular ensuring that the European Union bodies recognise the Council of Europe as the Europe-wide reference in terms of human rights and that they systematically act in accordance with the findings of the relevant monitoring structures'. This Recommendation was adopted on 13 April 2006, immediately following the presentation by Mr Juncker of his report before the Parliamentary Assembly of the Council of Europe. It was based on a report prepared within the Political Affairs Committee by Mr Kosachev (rapp.).

⁸² CETS no. 24 (entered into force on 18 April 1960). This provides that 'Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention. The

1989⁸³ and the Protocol to the Convention on Insider Trading of 11 September 1989,⁸⁴ the three conventions opened for signature on 16 May 2005 at the Third Summit of Heads of State or government of the Member States of the Council of Europe contain a clause withdrawing the mutual relations between Member States of the European Union and the relations between Member States and the European Community from the scope of the rules laid down in those instruments. Article 40(3) of the Council of Europe Convention on Action against Trafficking in Human Beings⁸⁵ provides:

Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.⁸⁶

As part of the compromise which allowed the inclusion of this clause and the conclusion of the negotiations despite the reservations of certain Member States of the Council of Europe, when the Committee of Ministers of the Council of Europe adopted the Convention on 3 May 2005, the European Community and the Member States of the European Union made the following statement, which forms part of the ‘context’ of the Convention within the meaning of Article 31(2)(b) of the Vienna Convention on the Law of Treaties and should therefore guide its interpretation⁸⁷:

The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a “disconnection clause” is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.

This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.

The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community/Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community/Union). This does not detract from the fact that the Convention applies fully between the European Community/European

same principle shall apply as between two or more Contracting Parties each of which has in force a law providing for the execution in its territory of warrants of arrest issued in the territory of the other Party or Parties.’

⁸³ CETS n° 132. According to this provision : ‘In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned’.

⁸⁴ CETS No. 133. The Protocol was adopted for the sole purpose of inserting into the Convention on Insider Trading (CETS No. 130) a disconnection clause, stating (in Article 16bis of the Convention) that ‘In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned’.

⁸⁵ CETS No. 197. See also, for similar clauses, Article 26(3) of the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) and Article 52(4) of the Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198).

⁸⁶ The final part of the sentence was included at a late stage of the negotiations, as a result of the insistence by certain States represented within the Committee of Ministers of the Council of Europe that ‘the EU should give a guarantee that the clause cannot lead to the adoption and application of Community or EU rules which override the minimum standards laid down in the convention in question. For example, in the case of the draft Convention against Trafficking in Human Beings, it is a question of obtaining confirmation that, as a matter of principle, the clause could not allow the drafting and application of rules less favourable than the standards for the protection of victims’ rights enshrined in the convention’ (Note prepared by Directorate General I - Legal Affairs and Directorate General II - Human Rights of the Council of Europe, containing a Proposal aimed at facilitating the conclusion of the negotiations concerning the three draft conventions of the Council of Europe, 623d meeting of the Ministers’ Deputies, CM(2005)58, 6 April 2005).

⁸⁷ See paragraphs 375 and 376 of the Explanatory Report of the Council of Europe Convention on Action against Trafficking in Human Beings.

Union and its Member States on the one hand, and the other Parties to the Convention, on the other ; the Community and the European Union Members States will be bound by the Convention and will apply it like any party to the Convention, if necessary, through Community/Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union parties.

The disconnection clause provides, in sum, that the objectives of the instrument in which it is incorporated are fully maintained, but that as far as the Member States of the European Union and the Community/European Union are concerned, the obligations imposed by that instrument on its Parties may be performed by the Member States or by the Union according to how their respective competences develop as will ensue in particular from the adoption of legislation by the Union.⁸⁸ It should be emphasized that, whether the obligations imposed by those instruments are fulfilled by the EU Member States acting individually or by their joint action in the framework of the Union, this should make no difference for the beneficiaries of the instrument in question, for example the victims of acts of terrorism or of trafficking in human beings. The disconnection clause does not affect the scope of the obligations that are taken on, but simply the means through which those obligations shall be implemented. It does not seek to introduce an exception to the obligations stipulated by the instrument in which it is incorporated, but to meet the needs of the integration of that instrument within the European Union by taking into account the evolutionary nature of the division of competences between the Member States and the Community/Union.

Contrary to certain fears which have been expressed,⁸⁹ such a clause does not necessarily imply that the EU Member States would be exempting themselves from the obligations imposed to the other States parties to the Council of Europe Convention ; it does not create a 'double standard-setting' within the wider Europe.⁹⁰ The EU Member States who become parties to the Council of Europe Convention on Action against Trafficking in Human Beings would be in violation of their obligations under this instrument if, due to the content of their obligations under Union law (to which they afford priority, in conformity with the 'disconnection' clause, in their mutual relations), they were unable to comply with the obligations imposed under this convention. The 'disconnection clause' relates thus, not to the *content* of the obligations imposed by the Council of Europe convention, but to the *means* through which these obligations shall be fulfilled, either through national legislation or through Union

⁸⁸ It has been noted in another context that 'A general disconnection clause is more efficient than trying to identify for each aspect of a Convention possible inconsistencies with EC law. In addition, this is a difficult exercise, given that the Convention provisions are general and that EC legislation may evolve. Because the Convention provisions are so general, incompatibility with EC law could arise from their implementation into domestic law. A disconnection clause is also helpful in re-assuring all interested parties that the Convention will not usurp existing Community law instruments' (Recommendation of the European Parliament on the Strategy for Creating a Safer Information Society by Improving the Security of Information Infrastructures and Combating Computer-related Crime (2001/2070(COS)) (rapp. C. Cederschiöld), EP doc. A5-0284/2001, fn. 1).

⁸⁹ See, for instance, the statement by Serhiy Holovaty, Chairperson of the PACE's Committee on Legal Affairs, delivered at the 26th Conference of European Ministers of Justice, 7-8 April 2005, Helsinki (Finland): 'The position of the European Commission is seen by many as potentially undermining the Council of Europe's *acquis*. Here I refer, in particular, to the so-called "disconnection clauses", which, if applied, could result in these conventions not being applicable to the European Community's "constitutional context". If the Council of Europe does not pay sufficient attention to the question, it may then in the near future permit the EU member states to apply – potentially – lower standards than those negotiated within the Council of Europe. Thereby introducing different standards for different groups of European countries. A line is drawn between EU member states and those not members of the EU. One group of states may in the future not be subject to the same obligations as the other group. This would be the end of effective treaty-making in the Council of Europe. This would be the beginning of double-standards setting within the common legal area in Europe. It is our deep conviction in the Assembly that for the sake of the greater and united Europe, this must not happen. Any disconnection clause, if deemed appropriate must be understood clearly to mean that no parallel system of protection can be allowed which is less favourable to that negotiated under the auspices of the Council of Europe.'

⁹⁰ When presented with the draft of the declaration made by the European Community and its member states and relating to the disconnection clause, to be included in the Explanatory Report, the Secretary General of the Council of Europe reportedly stated that the said declaration 'provided the assurance asked for by the Secretariat that the clause could not lead to the adoption and implementation of Community and Union rules which derogated from the minimum standards laid down in the conventions under consideration'. See Committee of Ministers of the Council of Europe, Notes on the 923rd meeting of the Ministers' Deputies, CM/Notes/923/2.4/4.2/10.4 Addendum 11 April 2005.

law. In order to alleviate any fears in this regard, it would of course be highly advisable for the relevant instruments of EU Law to be interpreted in the light of the Council of Europe instruments concerning the same subject matter.⁹¹ In addition, it is important that the European Community becomes a party to this instrument, whenever there is such a possibility.⁹²

Things, unfortunately, are not so simple. No particular concerns arise from the disconnection clauses inserted into the Council of Europe conventions opened for signature at the Warsaw Summit on 16 May 2005, including the Council of Europe Convention on Action against Trafficking in Human Beings. At the same time however, if the insertion of such clauses were to become systematic, this would raise certain questions. It is well established in international law that human rights treaties 'are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction'⁹³. For instance, in concluding the European Convention on Human Rights, 'the purpose of the High Contracting Parties (...) was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests, but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law (...). The obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves'⁹⁴. Disconnection clauses, however, appear to be based on an understanding of international treaties as purely reciprocal commitments between States. Where such clauses are inserted in treaties which recognize certain rights to individuals, this may be problematic where the law regulating the mutual relations of the 'disconnected' States offer only a lower degree of protection. The impact of such clauses therefore should be examined, on a case-by-case basis, in order to ensure that they will not have such impact.

⁹¹ For instance, Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, cited above, should be implemented taking into account the requirements of the Council of Europe Convention on Action against Trafficking in Human Beings, where the Framework Decision is less extensive in the obligations it imposes or resorts to terms which may be vaguer.

⁹² See Art. 42(1) of the Convention, providing for the possibility for the Community to become a Party. In future similar instruments, it should be explored whether not only the European Community, but also the European Union should not be defined as a potential party to agreements such as the Convention on Action against Trafficking in Human Beings, which relate to competences the Member States exercise jointly within the framework of the European Union. It follows from Article 24 EU and, indeed, from its practice, that the Union has an international legal personality allowing it to conclude international treaties with other international organisations or States. See St. Marquardt, "The Conclusion of International Agreements under Article 24 of the Treaty on European Union", in V. Kronenberger (ed.), *The European Union and the International Legal Order : Discord or Harmony ?*, T.M.C. Asser Press, The Hague, 2001, p. 333, *ici pp.* 342-343 ; and O. De Schutter, *Ancreur les droits fondamentaux dans l'Union européenne*, report prepared for the European Commission, DG Justice and Home Affairs, March 2002, in the framework of the Convention on the future of Europe, available online on www.cpdr.ucl.ac.be/cridho ; and the opinion of the legal service of the Council of the Union, doc. SN 1628/00, 16 February 2000. This position is based on the recognition that, in order for the Union to have international legal personality allowing it to become a party to international instruments, it is not required that it be formally attributed such personality; it is enough that it be attributed a competence to conclude such agreements. See generally J. Charpentier, "Quelques réflexions sur la personnalité juridique des organisations internationales : réalité ou fiction ?", in : *Le droit des organisations internationales. Recueil d'études à la mémoire de Jacques Schwob*, Bruxelles, 1997, p. 13 ; N. Neuwahl, "Legal Personality of the European Union – International and Institutional Aspects", in V. Kronenberger (ed.), *The European Union and the International Legal Order : Discord or Harmony ?*, T.M.C. Asser Press, The Hague, 2001, p. 3, at pp. 7-8 ; K. Yasseen, "Création et personnalité juridique des organisations internationales", in R.-J. Dupuy, *Manuel sur les organisations internationales*, Dordrecht, Nijhoff, Académie de droit international, 1988, p. 43, at p. 47; E. Bribosia et A. Weyembergh, "La personnalité juridique de l'Union européenne", in M. Dony (dir.), *L'Union européenne et le monde après Amsterdam*, éd. de l'U.L.B., 1999, p. 37.

⁹³ Inter-American Court of Human Rights, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Art. 74 and 75)*, Advisory Opinion OC-2/82 of 24 September 1982, Series A n°2, para. 29.

⁹⁴ Eur. Commiss. HR, *Austria v. Italy ('Pfunders case')*, Appl. No. 788/60, 4 *Eur. YB of Human Rights* (1961) 116, at para. 138-140.

It has been proposed, both by the Juncker report and by the Parliamentary Assembly of the Council of Europe, that the ‘disconnection’ clauses receive an other denomination, such as ‘modulation clauses’ or ‘EU clauses’.⁹⁵ It has also been suggested that it be clearly stated in any such clause that the EU Member States are to abide by the Council of Europe conventions they accede to, although they may do so partly through the adoption of EU instruments :⁹⁶ ‘the wording of these modulation clauses’, it has been noted, ‘should be reviewed to avoid giving the impression that member states of the European Union are trying to shirk their responsibilities under the convention in question’.⁹⁷ But the question raised by the insertion of disconnection clauses is not one of symbols ; it is one of content. Only an enhanced commitment of the EU itself to comply with the Council of Europe instruments concerned, ensuring that the level of protection achieved by Union law will be at least as high as those defined in those instruments themselves, will effectively respond to the concerns which the use of disconnection clauses in human rights treaties have raised.

2. *Mutual recognition and mutual trust*

2.1. *The problem*

While it may not be entirely new, the debate on the acceptability of the disconnection clauses where agreements are concluded in areas which are shared between the EU Member States and the European Union has grown in importance since a few years as part of a much wider debate on the extent to which it is allowable for the EU Member States to establish among themselves an area in which inter-State cooperation is possible without verifying, on a case-to-case basis, whether fundamental rights are respected. The establishment of an area of freedom, security and justice between the Member States of the European Union⁹⁸ is based on the idea that national courts and administrations of the different Member States, as well as law enforcement authorities, should cooperate with one another, in particular by exchanging information and by mutually recognizing judicial decisions in civil and criminal matters. Such cooperation in turn is based on a presumption that all the EU Member States comply with certain values, including fundamental rights, which they are trusted to respect. However, three questions arise as to the status and function of fundamental rights in the establishment of the area of freedom, security and justice.

A first question is whether the fact that the Member States are bound by the same international human rights instruments, in particular those concluded within the framework of the Council of Europe, constitutes a sufficient guarantee that all Member States respect and protect fundamental rights at a sufficiently high level, justifying this ‘mutual trust’ in one another’s system. Apart from the other preconditions which should be realized in order for inter-State cooperation to function smoothly – in particular through the principle of mutual recognition of judicial decisions –, should we content ourselves with the minimum level of protection ensured by these instruments, or should the European

⁹⁵ See the Juncker Report, at p. 16.

⁹⁶ While this formulation is close to that offered in para. 9.5.6. of Recommendation 1743 (2006), Memorandum of understanding between the Council of Europe and the European Union, adopted on 13 April 2006 by the Parliamentary Assembly of the Council of Europe, the view adopted in the Recommendation that ‘In the case of inconsistencies, the normal mechanism of reservations should be used’ is not tenable. The allocation of competences between the EU and its Member States is in permanent evolution. Therefore, it would probably not be possible for the EU Member States to make a general reservation in order to preserve the exclusive application of EU law in their mutual relations in subject-matters covered by the Council of Europe instruments which they would accede to in the future. Such a reservation would present a vague and unpredictable character, and would in effect allow precisely what should not be a consequence of disconnection clauses – that the protection of the individual be diminished because of the development of EU legislation in fields covered by Council of Europe instruments.

⁹⁷ Doc. 10892, 11 April 2006, Memorandum of understanding between the Council of Europe and the European Union (rapp. Mr Kosachev), para. 23.

⁹⁸ It is one of the objectives of the European Union that it should ‘maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime’ (Article 2, al. 1, 4th indent, EU).

Union instead legislate above these minimum standards, in order to facilitate such cooperation? A second question arises once all the EU Member States are bound by human rights standards defined at a sufficiently high level, whether under international instruments such as the European Convention on Human Rights or through the adoption of secondary EU legislation, for instance directives or framework decisions. Once this is the case, however, does this justify that they may cooperate with one another without a case-to-case verification that these safeguards will be fully complied with, in the particular instance where cooperation is sought? Of course, the EU itself might seek to develop evaluation mechanisms in order to reassure all States that compliance with the requirements of fundamental rights will be effective, and that any failure to comply will be addressed at an early stage. But then arises a third question, which concerns the impartiality of such mechanisms, their capacity to effectively ensure such compliance, and of course, their relationship to other evaluation mechanisms, such as those established within the Council of Europe.

It is easy to see how, as each of these questions are progressively being answered, the Council of Europe may fear that the rhetorics proclaiming that it is the ‘primary forum for the protection and promotion of human rights in Europe’,⁹⁹ will be superseded in practice by the increased role of the European Union in protecting and promoting fundamental rights. The current predicament may be summarized thus. On the one hand, if the EU Member States were to cooperate with one another without a case-to-case verification as to compliance with fundamental rights – on the basis of what might be called ‘blind mutual trust’ –, this may lead them to violate their undertakings under Council of Europe instruments, insofar as these instruments impose compliance with fundamental rights as one condition for inter-State cooperation. Partly for this reason – in order to avoid situations in which they would be bound by conflicting requirements, resulting from their undertakings in the frameworks, respectively, of the Council of Europe and of the European Union –, the EU Member States are authorized under Union law refuse to comply with the requirements of inter-State cooperation in the area of freedom, security and justice, in any situation where this might conflict with fundamental rights as recognized in the legal order of the European Union. This authorization originated in the case-law of the European Court of Justice. It now also has a constitutional basis in Article 6(2) EU, which in turn may be read in the light of the EU Charter of Fundamental Rights.¹⁰⁰ In addition, the authorization is confirmed by the various instruments that are based on the mechanism of mutual recognition of judicial decisions in criminal matters.¹⁰¹

Not only may the national authorities, including the national judicial authorities, refuse to cooperate with the authorities of another member State where this would lead to a violation of a fundamental right ; they are under an obligation to deny such cooperation, both under European Union law and under international instruments such as, in particular, the European Convention on Human Rights.¹⁰² It

⁹⁹ Following the expression used in the Action plan adopted at the Summit of Heads of State or government of the Member States of the Council of Europe, which met in Warsaw on 16 and 17 May 2005 (CM(2005)80 final 17 May 2005).

¹⁰⁰ Article 6(2) EU states : ‘The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.’

¹⁰¹ See Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190 of 18.7.2002, p. 1), 12th recital of the Preamble and Article 1, §3 (“This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union”); Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196 of 2.8.2003, p. 45), Article 1, second sentence (stating that the framework decision “shall not have the effect of amending the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty”), as well as, with regard to the *ne bis in idem* principle, the observance of which may constitute a ground for non-recognition or non-execution, Article 7 §1, c); Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76 of 22.3.2005, p. 16), 5th and 6th recitals of the Preamble as well as Articles 3 and 20 § 3 (“Each Member State may, where the certificate referred to in Article 4 gives rise to an issue that fundamental rights or fundamental legal principles as enshrined in Article 6 of the Treaty may have been infringed, oppose the recognition and the execution of decisions”); the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, p. 59), 3rd recital of the Preamble and Article 1, § 2.

¹⁰² Although the case-law of the European Court of Human Rights has not fully clarified the conditions in which such responsibility may be incurred, it is in any case clear that a Member State of the European Union cannot evade this

is simply wrong to presume, as certain national courts have done, that the establishment between the EU Member States of an area of freedom, security, and justice, would justify disapplying in their mutual relations other international instruments which may impose restrictions to the nature and extent of their cooperation.¹⁰³ While such a ‘disconnection’ may in certain cases be in conformity with the general rules of public international law,¹⁰⁴ it is deeply problematic in the context of certain Parties to a human rights instrument establishing amongst themselves a separate regime governing their mutual relations.

First, human rights are specific in that, as we have seen, they are not reducible to a set of bilateral instruments concluded between the States parties : they constitute, rather, a common undertaking of the States parties to recognize certain rights to individuals under their jurisdiction, not in the interest of the other States parties, but because of the value which is seen to attach to these rights.¹⁰⁵ In the framework of the European Convention on Human Rights, the clearest expression of this specificity resides in the establishment under that instrument of a system of collective safeguard of human rights on the continent, which translates into the possibility of an interstate remedy (Article 33 of the Convention) assuming that each State Party has an interest in all the other Parties respecting the Convention and enabling each State Party to demand this respect : in such a context, it is hard to dissociate the application of the European Convention on Human Rights in the mutual relations of the Member States of the Union from its application vis-à-vis other Parties to the Convention that are not Member States of the European Union.

Second, if we seek to transpose the idea behind the adoption of such disconnection clauses to the question of the mutual recognition of judicial decisions in criminal matters, we face the difficulty that in this case the imposition on each individual State of the obligation in question (not to grant recognition or to enforce a judicial decision delivered in another State that infringes human rights)

responsibility under the pretext of the mutual trust which the Union Member States place in each other. For an attempt to systematize this case-law, see O. De Schutter, “L’espace de liberté, de sécurité et de justice et la responsabilité individuelle des Etats au regard de la Convention européenne des droits de l’homme”, in G. de Kerchove and A. Weyembergh (eds.), *L’espace pénal européen: enjeux et perspectives*, Bruxelles, éd. de l’ULB, 2002, pp. 222-247.

¹⁰³ The reasoning underlying the judgment given by the Belgian Court of Cassation on 8 December 2004 is not acceptable on this point (see Cass. b., 8 December 2004, *J.T.*, 2005, p. 133, and comments of J. Castiaux and A. Weyembergh, ‘A propos de l’arrêt du 8 décembre 2004 de la Cour de cassation’). In this judgment, the Court of Cassation takes the view that it follows from the transposition by the EU Member States of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, that these States have withdrawn from the 1957 European Convention on Extradition as regards their mutual relations, although the Court does not verify whether the conditions imposed by Article 28(3) of the European Convention on Extradition for such a ‘disconnection’ have been complied with. After having specified the conditions under which a ‘disconnection’ could be allowed between Parties to the Convention (see above, n. 82), this provision adds : ‘Contracting Parties which exclude or may in the future exclude the application of this Convention as between themselves in accordance with this paragraph shall notify the Secretary General of the Council of Europe accordingly. The Secretary General shall inform the other Contracting Parties of any notification received in accordance with this paragraph.’ Such a condition has not been complied with by the EU Member States when they adopted and implemented the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. The disconnection of the EU Member States from the 1957 Council of Europe Convention on Extradition may not be simply presumed, although this seems to constitute the approach of the Belgian courts. It is true that, under general public international law, as expressed in Article 30(4) of the Vienna Convention on the Law of Treaties, where two successive treaties are concluded on the same subject-matter and even when the parties to the later treaty do not include all the parties to the earlier one, the more recent treaty replaces the earlier treaty, in the sense that the earlier treaty applies to the relations between States parties to both treaties only to the extent that its provisions are compatible with those of the latter treaty. However, Article 28(3) of the European Convention on Extradition establishes a special rule which should be considered as imposing a supplementary condition to the substitution of the latter treaty to the earlier treaty. See on this matter also the comments formulated by N. Angelet and A. Weerts on another judgment given by the Belgian Court of Cassation in a similar context, and which also raises the question of the relationship between the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States and the earlier treaties concluded between European Union Member States (in this case, the Benelux Extradition Treaty of 27 June 1962, approved in Belgium by the Ratification Act of 1 June 1964, *Mon. b.*, 24 October 1967): Cass. b. (vacation chamber), 24 August 2004, comments by N. Angelet and A. Weerts, ‘Les rapports entre instruments internationaux successifs portant sur une même matière’, *J.T.*, 2005, p. 322.

¹⁰⁴ See Article 30(4) of the Vienna Convention on the Law of Treaties, referred to in the preceding footnote.

¹⁰⁵ See above, text corresponding to nn. 93-94.

does indeed constitute for the holder of the rights in question an additional safeguard, which would not be respected to the same degree if we were to consider that the Member States of the European Union would assume this obligation jointly with the European Union, depending on how the mechanisms of judicial cooperation in criminal matters evolve within the Union. In other words, the separation of the States as such constitutes a safeguard for the individual concerned.¹⁰⁶

So, ‘blind’ mutual trust cannot, without any compensatory measures, be reconciled with the obligation imposed on States by the international human rights instruments to which they are parties. On the other hand however, the reliance on this ‘fundamental rights exception’ in the area of freedom, security and justice may be the source of a number of difficulties. It is purely reactive and *ad hoc*, rather than proactive and systematic. It creates the risk of barriers to mutual cooperation, to the extent that national authorities may remain suspicious of one another’s ability to fully comply with the requirements of fundamental rights.¹⁰⁷ Moreover, the precise extent of the authorization given to Member States to refuse to cooperate remains a subject of debate. In principle, infringement of a safeguard contained in the national Constitution of each State cannot justify a refusal to cooperate, for instance in mechanisms of mutual recognition,¹⁰⁸ unless this safeguard corresponds to a fundamental right recognized within the Union, for instance because the right in question is enshrined in the European Convention on Human Rights or may be considered as resulting from the common constitutional traditions of the Member States. Yet, it is not necessary for such a fundamental right to be recognized an identical scope by all the Member States for it to be deemed fit to figure among the general principles of Community law. In the *Omega Spielhallen- und Automatenaufstellungs GmbH* judgment of 14 October 2004,¹⁰⁹ the Court of Justice agreed that the German authorities could justify a restriction on the freedom to provide services in the name of respect for human dignity, while recognizing that ‘the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another’ and that, therefore, the competent national authorities must be allowed ‘a margin of discretion within the limits imposed by the Treaty’.¹¹⁰ Similarly, the 6th recital of Council Framework Decision 2005/214/JHA of 24 February

¹⁰⁶ See, among many other examples, Eur. Ct. HR (4th sect.), *Pellegrini v. Italy* (Appl. N° 30882/96) judgment of 20 July 2001, § 40 (where Italy was found to have violated the right to a fair trial guaranteed in Article 6 § 1 of the Convention for having enforced a judgment delivered by the Vatican courts in violation of the rights of defence of the applicant). Similarly, in the case of *T.I. v. the United Kingdom*, where the applicant was facing the risk of being returned by the United Kingdom to Germany from where he feared he might be expelled to Sri Lanka where he believed his security would be threatened, the Court considered that ‘The indirect removal [...] to an intermediate country, which is also a contracting state [bound to respect the European Convention on Human Rights], does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention’ (Eur. Ct. HR, *T.I. v. the United Kingdom* (Appl. No. 43844/98) decision (inadmissibility) of 7 March 2000).

¹⁰⁷ While acknowledging that it is legitimate for Member States to add to the grounds for refusal to execute a European arrest warrant the ground based on *ne bis in idem* before the International Criminal Court which the Framework Decision of 13 June 2002 does not explicitly provide for, as well as to expressly introduce grounds of refusal for violation of fundamental rights, the Commission points out, ‘However legitimate they may be (...), these grounds should be invoked only in exceptional circumstances within the Union’ (Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2004) 63 final of 23.2.2005, p. 5). This is symptomatic of the ambiguous relationship which exists between the area of freedom, security and justice and the requirements of fundamental rights : while these have to be respected in order for the area of freedom, security and justice to establish itself, they may, if broadly interpreted, create obstacles to this very objective.

¹⁰⁸ The transposition by Ireland of the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States is highly debatable on this point, as the Commission pointed out in the annex to its report based on Article 34 of this instrument (pp. 5-6).

¹⁰⁹ Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH*, judgment of 14 October 2004.

¹¹⁰ At para. 31. In the immediately preceding paragraph, the Court had noted, however, that ‘the concept of ‘public policy’ in the Community context, particularly as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions’ (para. 30). The balancing between these formulae show to the hesitations of the European Court of Justice between two conflicting approaches : while one approach would restrict the possibility of Member States invoking fundamental rights as an exception to their obligations under European Union law to those rights which are recognized by all Member States and thus form part of the ‘common constitutional traditions’ referred to in Article 6(2) EU, a competing approach would leave a certain margin of appreciation to each State in determining the content of the fundamental rights to be protected under its jurisdiction, in order to ensure that European Union law will not oblige a Member State to renounce such a protection or to lower the level of protection of these fundamental rights. In *Omega*

2005 on the application of the principle of mutual recognition to financial penalties asserts that this instrument ‘does not prevent a Member State from applying *its constitutional rules* relating to due process, freedom of association, freedom of the press and freedom of expression in other media’.¹¹¹ Of course, as in the *Omega* case, it is not the national constitutional rules as such which, being in force in the executing State, would justify this State refusing to recognize and execute a decision imposing a financial penalty : those constitutional rules could only be relied upon to oppose the recognition and execution of such a decision insofar as they are a translation of fundamental rights figuring among the general principles of Community law, as embodied in particular in the European Convention on Human Rights and the constitutional traditions the Member States have in common.¹¹² The wording adopted in the Preamble of the Framework Decision nevertheless causes some ambiguity, since it suggests that a State can draw arguments from its own domestic rules to refuse to cooperate in the execution of a judicial decision delivered in another Member State, whereas such an obligation of execution is central to the concept of mutual recognition, including there where the legal system of the executing State would have led to a different outcome (such as an acquittal).

In order to avoid such anarchical consequences as may result from the absence of a common understanding of the requirements of fundamental rights between the Member States of the Union, two possible solutions may be explored : one consists in legislating in the field of fundamental rights, in order to establish standards common to the EU Member States, over and above the minimum requirements imposed by the international human rights instruments they are bound by ; another consists in setting up monitoring mechanisms, in order to ensure, through mechanisms proper to the Union, that any risk of violations of fundamental rights by one Member State which could affect the cooperation with the other Member States will be appropriately addressed. Both of these solutions may be problematic from the point of view of the relationships with the Council of Europe, however. If, in order to establish the ‘mutual trust’ the area of freedom, security and justice rests upon, the European Union legislates in the field of fundamental rights, the standards set by the Council of Europe may become progressively irrelevant, and there may be cases where, once a certain area has been preempted by European Union law, the EU Member States will believe that by being bound by that legislation, they necessarily comply with any other standards developed by the Council of Europe in the same field. As to the development of evaluation mechanisms within the EU itself, which is justified primarily as a means to strengthen the mutual trust between the Member States – and which the Treaty establishing a Constitution for Europe intends to develop into a systematic practice¹¹³ –, it may in part compensate for the risks entailed by mutual trust based on a absolute presumption of compliance with fundamental rights. But it also may come to threaten not only the monopoly, but also the authority of the Council of Europe monitoring bodies, since it results in the setting up of competing monitoring mechanisms which, in certain cases, may cover questions similar to those already monitored by the Council of Europe. Each of these complementary answers to the challenge of ensuring the protection of fundamental rights in the establishment of an area of freedom, security and justice in the EU is considered in turn.

Spielhallen- und Automatenaufstellungs GmbH, the Court clearly prefers to espouse the second branch of the dilemma : ‘It is not indispensable (...) for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. (...) [The] need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State’ (paras. 37-38).

¹¹¹ The emphasis is added.

¹¹² Article 20 §3 of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties specifies, ‘Each Member State may, where the certificate referred to in Article 4 gives rise to an issue that fundamental rights or fundamental legal principles as enshrined in Article 6 of the Treaty may have been infringed, oppose the recognition and the execution of decisions’.

¹¹³ See Article III-260 of the Treaty establishing a Constitution for Europe (OJ C 310 of 16.12.2004, p. 1), stating that the Council may lay down the arrangements whereby ‘Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in [Chapter IV: Area of Freedom, Security and Justice, in part III of the Treaty] by Member States’ authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation’.

2.2. *The approximation or harmonisation of national legislations*

As already noted, a first answer to the need to ensure that inter-State cooperation in the area of freedom, security and justice develops on the basis of a high level of protection of fundamental rights may consist in the adoption of secondary EU Law going beyond the minimum requirements imposed on the EU Member States by the international instruments they are bound by. The protection of personal data offers one illustration of the interplay between what might be called ‘negative’ integration, by the abolishment of barriers between the EU Member States (including barriers to the exchange of information or to the mutual recognition of judicial decisions), and ‘positive’ integration, by the adoption of common standards, which may be seen in certain instances as its necessary complement. Already for the purposes of the establishment of the internal market, the adoption of a directive in this field was seen as a requirement, in the face of the existence of a diversity of national legislations which might constitute an obstacle to the free movement of personal data within the European Community and thus, in particular, to the free provision of services across Member States. The adoption of the 1995 Data Protection Directive¹¹⁴ was justified in particular by the consideration that : ‘the difference in levels of protection of the rights and freedoms of individuals, notably the right to privacy, with regard to the processing of personal data afforded in the Member States may prevent the transmission of such data from the territory of one Member State to that of another Member State; [...] this difference may therefore constitute an obstacle to the pursuit of a number of economic activities at Community level, distort competition and impede authorities in the discharge of their responsibilities under Community law’.¹¹⁵

A similar dialectic is currently at play as regards the protection of personal data processed by law enforcement authorities, in the establishment of the area of freedom, security and justice. Just like the harmonization of the protection of personal data in the internal market was seen as a condition of mutual recognition of the relevant national legislations,¹¹⁶ the development of common rules on the protection of personal in law enforcement activities is considered a condition for the exchange of information between the law enforcement agencies of the Member States under what came to be called the principle of availability. As defined in the Hague Programme adopted by the European Council of 4-5 November 2004, the principle of availability means that, ‘throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State’.¹¹⁷ In other terms, information available in one Member State should be made available to the authorities of any other Member State, just as if these were authorities of the same State : ‘The mere fact that information crosses borders should no longer be relevant. The underlying assumption is that serious crimes, in particular terrorist attacks, could be better prevented or combated if the information gathered by law enforcement authorities in EU Member States would be more easily, more quickly and more directly available for the law enforcement authorities in all other Member States’.¹¹⁸ It is this principle which is currently codified in the proposal for a Framework Decision on the exchange of information under the principle of availability.¹¹⁹

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

¹¹⁵ 7th Recital of the Preamble.

¹¹⁶ Article 1(2) of the Data Protection Directive provides that ‘Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with’ the protection of the right to privacy with respect to the processing of personal data.

¹¹⁷ *The Hague Programme : Strengthening Freedom, Security and Justice in the European Union*, Annex I to the Conclusions of the Brussels European Council of 4-5 November 2004, EU Council doc. 14292/04, para. 2.1.

¹¹⁸ Impact assessment annexed to the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters - Impact assessment, COM(2005) 475 final, SEC(2005)1241, 4.10.2005, para. 2.2.

¹¹⁹ COM (2005) 490 final of 12.10.2005.

The principle of availability plays in this field the role which, in the field of judicial cooperation in criminal matters, is played by the principle of mutual recognition. It presupposes the mutual trust which should exist between the Member States' national authorities. But it is also a technique through which leverage may be exercised in favor of the adoption of common standards in order to strengthen mutual trust.¹²⁰ Indeed, as was stressed in the Hague programme itself,¹²¹ the implementation of the principle of availability requires that all Member States ensure a high level of protection of personal data, thus justifying the high level of trust which this principle presupposes between the national authorities of the different Member States. Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹²² does not apply to the processing of personal data effectuated in the course of an activity which falls outside the scope of Community law, such as the activities of the State in areas of criminal law or matters falling under Title VI EU.¹²³ Moreover, while all the EU Member States are parties to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981,¹²⁴ the principles set forth in this instrument are expressed at a relatively high level of generality, and certainly does not ensure the same level of protection as, for instance, the 1995 Data Protection Directive. Therefore, almost simultaneously to proposing an instrument implementing the principle of availability, the Commission put forward a proposal for a Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.¹²⁵ This was encouraged by the European Parliament¹²⁶ and welcomed by the European Data Protection Supervisor.¹²⁷ It illustrates the need to adopt 'flanking measures', aimed at improving the level of protection of fundamental rights in the EU Member States, when lowering the barriers to mutual recognition or exchange of information.

The attempt to harmonize the procedural guarantees given to suspects in criminal proceedings offers another illustration of this balancing between presupposing mutual trust and strengthening it. In February 2003, the Commission presented its *Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*.¹²⁸ Under Title I.7, 'Enhancing mutual trust', we read:

Mutual recognition rests on mutual trust and confidence between the Member States' legal systems. In order to ensure mutual trust, it is desirable for the Member States to confirm a standard set of procedural safeguards for suspects and defendants. The desired end result of this initiative is therefore to highlight the degree of harmonisation that will enhance mutual trust in practice. The Member States of the EU are all signatories of the principal treaty setting these standards, the European Convention on Human Rights, as are all the acceding states and candidate countries, so the mechanism for achieving mutual trust is already in place. The question is now one of developing practical tools for enhancing the visibility and efficiency of the operation of those standards at EU level. The purpose of this Green Paper is also to ensure that rights are not 'theoretical or illusory' in the EU, but rather 'practical and effective'. Differences in the way human rights are translated into practice in national procedural rules do not necessarily disclose violations of the ECHR. However, divergent practices run the risk of

¹²⁰ S. de Biolley, 'Collecte, échange et protection des données dans la coopération en matière pénale', *Journal des tribunaux-Droit européen*, 2006, p. 193, at p. 194.

¹²¹ *The Hague Programme : Strengthening Freedom, Security and Justice in the European Union*, cited above, n. 117, para. 2.1.

¹²² OJ L 281 of 23.11.1995, p. 31.

¹²³ Art. 3(2) of the Directive.

¹²⁴ CETS n°108.

¹²⁵ COM (2005) 475 of 4.10.2005.

¹²⁶ See its recommendation to the European Council and the Council on the exchange of information and cooperation concerning terrorist offences (2005/2046(INI)), adopted on 7 June 2005, in favor of harmonising existing rules on the protection of personal data in the instruments of the current third pillar, bringing them together in a single instrument that guarantees the same level of data protection as provided for under the first pillar.

¹²⁷ See his Opinion on the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (COM (2005) 475 final), OJ C 47, 25.2.2006, p. 27.

¹²⁸ COM(2003)75 final of 19.2.2003.

hindering mutual trust and confidence which is the basis of mutual recognition. This observation justifies the EU taking action pursuant to Article 31(c) of the TEU. This should not necessarily take the form of intrusive action obliging Member States substantially to amend their codes of criminal procedure but rather as ‘European best practice’ aimed at facilitating and rendering more efficient and visible the practical operation of these rights. It goes without saying that the outcome will in no case reduce the level of protection currently offered in the Member States.

Following the consultations held on the basis of the Green Paper, the European Commission put forward a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union.¹²⁹ In the Explanatory Memorandum, the Commission replies in the following terms to the question of knowing whether the proposal respects the subsidiarity principle (par. 19):

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

Remarkably, the assertion of the need to establish mutual trust justifies the adoption of European legislation not only in order to ensure that minimum thresholds of protection of the individual’s rights are respected throughout the European Union, but also to make sure that there are no excessive differences between Union Member States in the way in which the requirements under Articles 5 and 6 of the European Convention on Human Rights are transposed. The fact that the instrument proposed is not entirely faithful to the declared intention¹³⁰ should not prevent us from discerning the two principles on which the proposal is based: the European Convention on Human Rights, to which all the Member States are parties, certainly constitutes a common minimum threshold of protection, yet its requirements are not detailed enough to create the necessary cement between Union Member States justifying mutual recognition ; mutual trust between Member States could be threatened, not only when a Member State violates this minimum standard which should be respected by all, but also when there are excessive differences between Member States. In so far as the proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union is based on this logic, it is by no means exceptional. It is, instead, illustrative of an almost neofunctionalist kind of development, in which incremental steps towards further integration, since they are grounded on the presupposition of mutual trust, produce feedback effects calling for the development of standards by the EU itself in the field of fundamental rights in order to justify that very presupposition. Although we are only at the first stages of the establishment of an area of freedom, security and justice in the EU, a wealth of examples could already be provided, which further illustrate this logic at work.¹³¹

¹²⁹ COM(2004)328 final of 28.4.2004.

¹³⁰ In the Commission’s proposal, the Member States to which the Framework Decision is addressed may offer more favourable conditions to suspects (see Article 17 (non-regression clause)). This obviously creates the risk that potentially significant divergences between the levels of protection offered in different Member States will remain, or develop, following the adoption of the Framework Decision.

¹³¹ In her Opinion delivered in the *Pupino* case (Case C-105/03), Advocate General J. Kokott justified the reliance on this legal basis for the adoption of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings in the following terms: ‘...common standards for the protection of victims when giving evidence in criminal proceedings may also encourage cooperation between judicial authorities, since they guarantee that that evidence is usable in all the Member States’ (para. 51). See also, e.g., the announcement of the presentation of a proposal for a Framework Decision on the presumption of innocence and minimum standards on the gathering of evidence made in the Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States (COM(2005) 195 final of

Although the existence of an important *acquis* of the Council of Europe in the field of human rights, largely shared by the EU Member States, could be thought to facilitate this development – after all, it is easier to harmonize in fields where the Member States are already aligned with one another in some basic respects –, in fact it might constitute in other respects an obstacle, or a limit. The follow-up which was given to the proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union provides an indication of this. After it was presented to the Council, the proposal was seriously narrowed down : its scope now, it would appear, would be limited to the right to information, the right to legal assistance, the right to legal assistance free of charge, the right to interpretation and the right to translation of procedural documents – in fact, mostly procedural rights of the accused whose foreign nationality might create a vulnerability if he or she is arrested in a Member State other than his or her national state. This betrays the hesitation of the EU Member States to legislate in fields already covered by Council of Europe instruments, in the absence of any clear added value to an intervention by the Union : it is significant in this regard that, at the Justice and Home Affairs Council meeting of 4-5 December 2006, it was concluded that ‘the main outstanding issues of the proposal relate to the question whether to adopt a Framework Decision or a non-binding instrument, and the risk of developing conflicting jurisdictions with the European Court of Human Rights’.¹³² This concern may also be phrased in the terms suggested by the principles of subsidiarity and proportionality. According to these principles, made applicable to the European Union by Article 2 al. 2 of the EU Treaty, action may be taken by the Union in areas which do not fall under its exclusive competence ‘only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the [Union]’ ; moreover, any such action ‘shall not go beyond what is necessary to achieve the objectives of this Treaty’.¹³³ With the development of the activities of the EU in the field of human rights, the question which will be increasingly asked is whether the requirement of subsidiarity should not also take into account the fact that, where the EU Member States cannot act alone – where common standards should be developed in the field of fundamental rights, due to the existence of divergences between the EU Member States –, the Council of Europe may constitute a forum where common standards should be negotiated and adopted, rendering the intervention of the Union unnecessary.¹³⁴

Does the mutual trust required for inter-State cooperation to be effective in the area of freedom, security and justice, require that the national rules implementing the minimum requirements of international human rights instruments be further approximated or harmonized ? Is such approximation or harmonization required in situations where, although they are all above the minimum threshold defined by these instruments, the Member States’ approaches to fundamental rights are too widely diverging ? These questions are fundamental. They should be answered on a case-to-case basis, in accordance not only with the spirit of the principles of subsidiarity and proportionality, but also with the nature of the division of tasks between the European Union and the Council of Europe which we should develop in the future.

19.5.2005). More generally, the Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States (COM(2005)195 final of 19.5.2005) exemplifies this logic. Par. 3.1., on reinforcing mutual trust by legislative measures, says, ‘The first endeavours to apply the [mutual recognition] principle, in particular with the European arrest warrant, revealed a series of difficulties which could to some extent be resolved if the Union were to adopt harmonisation legislation [aimed at] ensuring that mutually recognised judgments meet high standards in terms of securing personal rights’. On this question, see S. Peers, ‘Mutual Recognition and Criminal Law in the EU: Has the Council got it Wrong?’, (2004) *Common Market Law Review* 5.

¹³² Press release following the 2768th meeting of the JHA Council of the EU, 15801/06, Presse 341, p. 12.

¹³³ See also Protocol (n° 30) on the application of the principles of subsidiarity and proportionality, appended to the Treaty of Amsterdam, in force since May 1st, 1999.

¹³⁴ See PACE, Doc. 10894 (11 April 2006), Follow-up to the Third Summit: the Council of Europe and the Fundamental Rights Agency of the European Union, Report to the Committee on Legal Affairs and Human Rights rapp. Mr Erik Jurgens), at para. 31 : ‘What is clearly missing from the EU definition of subsidiarity (...) is the relationship between EU action and the activities of other international organisations, notably those with an essentially inter-governmental structure such as the Council of Europe’. See also paras. 11.9 and 11.10 of Recommendation 1744 (2006), based on that report.

2.3. Monitoring the situation of fundamental rights in the EU Member States

Another possible answer to the need to firmly ground the establishment of the area of freedom, security and justice on fundamental rights – which could be either an alternative to, or combined with, harmonization –, consists in monitoring. Performed within the European Union itself, such monitoring could be justified by the need to provide each Member State with the assurance that, if a serious threat to fundamental rights exists in one Member State, this will be identified and reacted to as appropriate.

This scenario has not fully materialized yet. But the building-blocks are there, should there be a political will to explore it further. When the Treaty of Amsterdam initially formulated in Article 6(1) EU the values on which the Union was founded, this affirmation was backed up by a mechanism provided for in Article 7 EU, allowing for the adoption of sanctions against a State committing a serious and persistent breach of these values ; and, as we have seen, this mechanism was improved by the Treaty of Nice, which introduced the possibility of recommendations being adopted preventively, where a ‘clear risk of a serious breach’ of those values is found to be present. These developments raised the question whether these provisions of the Treaty on the European Union should lead to a permanent monitoring of the situation of fundamental rights in the Member States of the European Union.

The European Parliament, through its Committee on Civil liberties, Justice and Home Affairs (LIBE Committee), took the leading role in this matter. As it noted itself, the Treaty of Nice ‘acknowledges Parliament’s special role as an advocate for European citizens’ by granting the European Parliament the right to call for a procedure to be opened in the event of a clear risk of a serious breach.¹³⁵ But even before that Treaty entered into force, the European Parliament inaugurated the practice of adopting annual reports on the situation of fundamental rights in the Union after the adoption of the EU Charter of Fundamental Rights at the Nice Summit of 2000.¹³⁶ This practice was justified by the consideration that, ‘following the proclamation of the Charter, it is [...] the responsibility of the EU institutions to take whatever initiatives will enable them to exercise their role in monitoring respect for fundamental rights in the Member States, bearing in mind the commitments they assumed in signing the Treaty of Nice on 27 February 2001, with particular reference to new Article 7(1)’, and that ‘it is the particular responsibility of the European Parliament (by virtue of the role conferred on it under the new Article 7(1) of the Treaty of Nice) and of its appropriate committee [the LIBE Committee] to ensure [...] that both the EU institutions and the Member States uphold the rights set out in the various sections of the Charter’.¹³⁷ Since it soon appeared that the resources of the LIBE Committee and the expertise and time it had at its disposal were not sufficient to enable it to conduct this monitoring function in an entirely satisfactory manner, the European Parliament requested that

¹³⁵ 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).

¹³⁶ 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).

¹³⁷ 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.

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.¹³⁸

That network was set up in September 2002. In October 2003, the European Commission adopted a communication in which it set out its views about the implementation of Article 7 EU.¹³⁹ Referring to the work of the EU Network of independent experts on fundamental rights, it took the view that the information collected by the network

should make it possible to detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty. Through its analyses the network can also help in finding solutions to remedy confirmed anomalies or to prevent potential breaches. Monitoring also has an essential preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded.

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.¹⁴⁰

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

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

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

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

¹³⁸ Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000), cited above, para. 9.

¹³⁹ 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.

¹⁴⁰ At para. 2.2. of the communication, pp. 9-10.

and, where necessary, implement or continue to implement corresponding reforms.¹⁴¹

Therefore, it seems highly unlikely that, in the future, Article 7 EU will lead to the development envisaged by the European Commission in its Communication of 15 October 2003, especially since the Fundamental Rights Agency of the European Union has not received the mandate to monitor the EU Member States in situations other than where they implement European Community law.¹⁴² Although, to a large extent, the definition of the mandate of the Fundamental Rights Agency was guided by considerations of comity vis-à-vis the Council of Europe, and although the choice not to give the Agency a formal role in the implementation of Article 7 EU resulted from the doubts which were expressed about the usefulness of such an explicit attribution and about the legality thereof, this choice also corresponds to the idea expressed by the European Parliament that Article 7 EU should not become a pretext for placing the EU Member States under a permanent supervision as regards compliance with fundamental rights, since they are already subjected to such supervision in other frameworks. In sum, mutual trust may have to be strengthened in the area of freedom, security and justice, but it does not require the form of permanent monitoring of the Member States which the European Parliament, and then the EU Network of Independent Experts, have been exercising.

3. Conclusion

We can see the analogy between the idea behind – on the one hand – the adoption of the disconnection clauses inserted into Council of Europe conventions and – on the other hand – the development of forms of cooperation between the EU Member States in the area of freedom, security and justice, which result in a tension between the obligation of each Member State to comply with the requirements of fundamental rights as derived from international instruments, and its obligations under European Union law. Such a tension is perfectly illustrated by the reliance on the principle of availability in the exchange of personal data in law enforcement activities or on mutual recognition of judicial decisions in criminal matters : just like the use of disconnection clauses, these principles raise the question whether the *individual* responsibility of each EU Member State under international human rights instruments, can be replaced by a commitment of the EU Member States *jointly* to respect the substantive requirements of these instruments, while basing their mutual relations on the principle of mutual trust rather than on an obligation to control, on a case-to-case basis, whether fundamental rights are respected in the framework of their cooperation.

With the progressive establishment of the area of freedom, security and justice between the EU Member States, and the gradual substitution of a joint and several responsibility of the Member States and of the Union to the individual responsibility of each Member State, a paradigm shift is occurring. In the understanding of the nature of the relationship of the European Union to international human rights instruments, we are moving from the paradigm of interstate cooperation to that of cooperation between different entities within the same State, which at the international level will have to answer for the conduct of all those entities without being able to seek refuge behind the autonomy that may be granted to them.¹⁴³ This development may, and should, define the future stages of the relationship between the European Union and the Council of Europe. While the development of EU legislation offering a higher level of protection of fundamental rights than the minimum requirements imposed by Council of Europe instruments may be seen as threatening the unique position of the Council of Europe in setting the human rights standards for its 46 Member States, this development appears in a very different light once we realize that EU directives or framework decisions building on the instruments of the Council of Europe and moving beyond them are, in fact, more akin to framework laws being adopted by a Federal State and directed towards its federated entities, than to competing

¹⁴¹ 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.

¹⁴² See above, text corresponding to nn. 29-34.

¹⁴³ See, describing this shift, O. De Schutter, 'Globalization and Jurisdiction : Lessons from the European Convention on Human Rights', *Baltic Yearbook of International Law*, vol. 6 (2006), pp. 183-245, at pp. 227-242.

international norms adopted by another European organisation. Similarly, the monitoring mechanisms developed by the European Union do not constitute a threat to the monitoring performed by the Council of Europe bodies, any more than mechanisms developed at national level for the promotion and protection of human rights within the different Member States of the Council of Europe create such a threat.

IV. Conclusion

There are, in sum, two ways of looking at the relationship between the Council of Europe and the European Union. One is to see this as the relationship between two international organisations, with a partly overlapping membership, and a growing overlap between the fields of activities, requiring that they consult extensively with one another, in order to maximize the potential for synergies and cooperation and in order to limit the risks to legal security of diverging standards. This view is currently prevailing. In practice, cooperation is extensive, and it is growing : the recent increase in the budget for project co-operation – from 28 million Euros in 2003 to 52 million Euros in 2005 – provides a clear indication of a genuine partnership between the Council of Europe and the European Union ; this dimension of the cooperation between the two organisations should constitute one important dimension of the Memorandum of Understanding currently under negotiation between the Council of Europe and the EU.

But another view is that the European Union is not simply one international organisation among others. It is a federal State in the making. In the future, little will distinguish the nature of the relationship between Belgium and Poland in the EU from, say, the relationship of two German *Länder* or two Autonomous Communities in Spain. It is this paradigm shift which the concept of mutual recognition or the principle of availability of personal data most clearly exhibit. And it follows that, for instance, after the Union will have acceded to the European Convention on Human Rights, the European Court of Justice will stand vis-à-vis the European Court of Human Rights in a position similar to that of any Constitutional Court of the Member States of the Council of Europe; or that the establishment of the EU Fundamental Rights Agency should no more be seen as a threat to the activities of the Council of Europe in this field than when the Federal Republic of Germany set up the German Institute for Human Rights – in both cases, seeking to ensure that human rights are better complied with and taken into account in the law- and policy-making of the legal order concerned, without in any way putting in jeopardy the unique role of the Council of Europe in setting the minimum human rights standards for the European continent and monitoring respect for those standards. There is a risk in this transformation of the European Union, and there is an opportunity. The risk is that the relationships between the EU Member States will derogate from the requirements of European human rights law, which imposes certain limits to inter-State cooperation where this might result in violations to the rights of the individual, and therefore cannot be reconciled with a ‘blind’ understanding of mutual trust. The opportunity however, is that the European Union itself will come to see itself as bound by the standards of the Council of Europe precisely as its Member States have accepted obligations in this framework, and will draw the necessary institutional conclusions by agreeing to accede to all the Council of Europe instruments which are relevant to the competences it has been attributed. Jean-Claude Juncker, in his report already quoted from, sets 2010 as a date for the European Union to accede to the Council of Europe. This is the way ahead.