FUNDAMENTAL RIGHTS SERIES

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
(CFR-CDF)
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION IN 2003

January 2004

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*This report is submitted to the Network by Prof. dr. Olivier De Schutter, UCL, co-ordinator of the EU Network of Independent Experts on Fundamental Rights. The author thanks Prof. dr. H. Labayle, member of the Network, for the information he contributed in the field of asylum.

Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice et affaires intérieures), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Elvira Baltutyte (Lithuanie), Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), M. Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Dean Spielmann (Luxembourg), Pavel Sturma (Rép. tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par O. De Schutter, assisté par V. Verbruggen.
Les documents du Réseau peuvent être consultés via :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

The **EU Network of Independent Experts on Fundamental Rights** has been set up by the European Commission (DG Justice and Home Affairs), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

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TABLE OF CONTENTS

INTRODUCTION

The work programme 2003-2004 of the EU Network of Independent Experts in Fundamental Rights provides that the preparation of a synthesis report, which will be presented to the Commission in March 2004, will be preceded by the elaboration of a series of 25 reports on each of the Member States of the Union as well as of a report focussing on the activities of the institutions of the Union. It is in this framework that the present Report should be situated. The Report takes as reference the EU Charter of Fundamental Rights. It examines, in the light of the provisions of the Charter, the initiatives which the institutions of the Union have taken, during the year 2003.

Three themes are central in the present Report: that of the anchoring of the Charter of Fundamental Rights in the international law of human rights; that of the need to integrate the concern for fundamental rights from the early stages of the elaboration of European law, according to an approach to fundamental rights which must be more preventive, and not simply remedial; at last, that of the role the respect for fundamental rights has to play in the monitoring of the application or implementation of European law by the Member States. This Introduction seeks to announce and develop these different themes. However, the Introduction also seeks to locate the EU Network of Independent Experts in Fundamental Rights in its context: it will relate the contribution of the Network to the general policy of the Union in the field of fundamental rights.

The first part of the Introduction describes the current work of the Network and proposes avenues for its future development. With a view to clarifying the role of an independent mechanism monitoring the respect for fundamental rights in the Union, the Introduction first recalls the Communication which the Commission has presented to the Council and the European Parliament on Article 7 of the Treaty on the European Union, "Respect for and promotion of the values on which the Union is based »[1] (I.1.). The task which this communication defines for the Network is distinct from the other missions it fulfils: to encourage, by the comparison of experiences, mutual learning between the Member States in the field of fundamental rights (I.2.); and that of advising the institutions of the Union on proposals which could have an impact on the rights listed in the Charter of Fundamental Rights (I.3.). In the future, these different missions will be fulfilled in close cooperation with an EU Human Rights Agency, of which the Network of Independent Experts could be an important tool, in particular for the identification of questions which the comparison of national situations would demonstrate as relevant and for the expert legal opinions it will continue to deliver (I.4.). At last, it should be emphasized that the enlargement of the Union makes it particularly urgent to arrive at the institutionalisation of a mechanism of evaluation of the Union and its Member States (I.5.).

The second part of the Introduction identifies the directions which the fundamental rights policy of the Union could take in the future. In fulfilling its missions, the EU Network of Independent Experts in Fundamental Rights has been careful to maintain a link between international and European human rights law and EU Law. This concern, for instance, guides its reading of the Charter of Fundamental Rights. The same concern explains why the Introduction insists on launching a reflection on the relationships between the Union/Community and the international instruments which exist in the field of human rights protection (II.1.). The Introduction also examines how the Union or the Community could contribute better, in the exercise of their attributed competences, to facilitating the respect by the Member States of the obligations which they are imposed by the international law of human rights (II.2.). As the very framing of this question already may reveal, the Report conceives of the fundamental rights which the EU institutions must *respect* as, also, imposing

[1] COM (2003) 606 final, of 15.10.2003.

on those institutions certain *obligations to act*, although always in the strict boundaries set by the principle of attributed competences and, for what concerns the competences shared between the Union and the Member States, the principles of subsidiarity and proportionality. Indeed, this Report highlights that the risks of fundamental rights violations resulting from the activities of the Union reside, rather than in what the institutions of the Union have *done*, in what they have *failed to do*, especially where it would have been possible to better clarify the obligations to respect fundamental rights which are imposed on the Member States when they implement Union law. The question of which positive obligations the Charter of Fundamental Rights may impose on the institutions of the Union is the subject of the last section of the Introduction (II.3.).

The main lesson to be drawn is this one. Article 7 EU, although it may now fulfil a preventive function, could not constitute the exclusive instrument, nor even the main instrument, of the fundamental rights policy of the Union. Such a policy should first be based on the idea that, *where they act and to the extent that they act, the institutions of the Union are under an obligation to contribute to the respect for fundamental rights by preventing the risk of violations occurring*. This Report seeks to show what could have been done – what should have been done, sometimes – to ensure that, by a better inclusion of the concern for fundamental rights from the early stages of the legislative process, Union law fulfils this preventive function of human rights violations in its field of application.

I. AN INDEPENDENT MECHANISM FOR THE EVALUATION OF THE RESPECT OF FUNDAMENTAL RIGHTS IN THE UNION

I.1. The contribution of the Network to the identification of situations where emerges a clear risk of a serious breach of fundamental rights by a Member State

Since the entry into force of the Nice Treaty on 1 February 2003[2], Article 7 EU gives the Council the possibility to determine that there exists a clear risk of a serious breach by a Member State of the common values on which the Union is based – democracy, respect for human rights and fundamental freedoms, the rule of law[3] –, values the respect for which are a condition for membership of the Union[4]. This preventive mechanism, provided for in Article 7(1) EU, now complements the possibility of adopting sanctions against a State which, according to the determination made by the Council, has seriously and persistently breached the principles mentioned in Article 6(1) EU[5].

The communication which the Commission presented to the Council and the European Parliament on Article 7 EU, "Respect for and promotion of the values on which the Union is based »[6], identifies the two missions which the EU Network of Independent Experts in Fundamental Rights can fulfil, in the specific context of that Article. First, the Network may contribute 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 » : this is the monitoring function of the Network. Second, the Network can « help in finding solutions to remedy confirmed anomalies or to prevent potential breaches » : this is its recommendation function. This definition of the tasks the Network can fulfil in the framework of Article 7 EU calls for three observations.

[2] OJ C 180, of 10.3.2001.
[3] Article 6(1) EU.
[4] Article 49 EU.
[5] Article 7(2) to (4) EU and, for the implementation of these sanctions in the framework of the EC Treaty, Article 309 EC.
[6] COM (2003) 606 final, of 15.10.2003.

1° Article 51 of the Charter of Fundamental Rights limits the invocability of the Charter only to those situations which concern the activities of the Union or those of the Member States where they implement Union law. This provision however cannot be seen as constituting an obstacle to the monitoring of the respect by the Member States of fundamental rights, also in domains which present no relationship to the law of the Union[7]. As the communication of the Commission notes, to justify the use of Article 7 EU, it is not necessary that the "clear risk of a serious breach" or the "serious and persistent breach" are located in the field of application of EU Law. In fact, because of the specific nature of the violations of fundamental rights or of other principles enunciated in Article 6(1) EU which Article 7 EU seeks to prevent or to sanction, we may even consider that, where a Member State breaches the fundamental rights inscribed in the Charter when acting in the field of application of EU Law, it would be preferable to rely on the usual mechanisms which should sanction any breaches of Union/Community law by a Member State. In particular, where the breach occurs in the application or the implementation of Community law, the European Commission should act in conformity with its role under Article 211 EC : it should request its observations from the State concerned, and possibly, after having giving its reasoned opinion to the State, launch proceedings before the European Court of Justice as provided under Article 226 EC. Of course, such procedures should remain exceptional. To all the extent achievable, a solution founded on the cooperation between the Member States and the Commission should be preferred, to avert the risk that situations which are not in conformity with Community law persist[8]. This is true also where the breach of EC Law has its sources in the violation of fundamental rights. The EU Network of Independent Experts in Fundamental Rights considers however that it should alert the Commission to those situations where a dialogue between the Member State and the Commission could be indicated. The Network could also recommend to the Commission the presentation of interpretative communications, where the Member States would risk committing breaches of fundamental rights in the implementation of secondary EC Law, because of the lack of precision of certain provisions contained in those instruments or because of the exceptions they provide for in favour of the Member States.

2° The "common values" which are formulated in Article 6(1) EU are defined in broader terms than would suggest the list of provisions of the EU Charter of Fundamental Rights. For instance, the clear risk that the rights of national minorities may be violated, provided these violations may be considered "serious", could justify resorting to the preventive mechanism of Article 7(1) EU, despite the fact that the rights of minorities are not guaranteed, as such, in the Charter[9]. This results, first, from the fact that the two relevant instruments adopted within the Council of Europe on this question – the Framework Convention on the protection of national minorities, of 1 February 1995 and the European Charter for European or Minority Languages, of 5 November 1992 – are instruments to which the Member States have acceded or to the elaboration of which they have cooperated ; second, it is a consequence of the

[7] See EU Network of Independent Experts in Fundamental Rights, *Report on the situation of fundamental rights in the European Union and its Member States in 2002*, p. 17.

[8] Commission Communication « Better Monitoring of the Application of Community Law », COM(2002)725 final/4, of 16.5.2003.

[9] However, Article 21 of the Charter protects from discrimination based on membership of a national minority : the commentary of Article 21, hereunder, will seek to identify the consequences which follow from such a protection in terms of minority rights. Moreover, Article 22 of the Charter says that the Union shall respect cultural, religious and linguistic diversity ; Article 3(3), al. 4, of the Draft Treaty establishing a Constsitution for Europe states that « The Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced ». The conception of the requirements of diversity thus expressed remain unsufficient in comparison to the requirements which would be imposed, in particular, by the Framework Convention on the protection of national minorities, of 1 February 1995 (ETS, n° 157), and the European Charter for European or Minority Languages, of 5 November 1992 (ETS, n° 148).

protection of ethnic, religious, or linguistic minorities in Article 27 of the International Covenant on Civil and Political Rights[10].

3° Article 7(1) EU provides that the Council the Council may address appropriate recommendations to a Member State, once it is determined that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1) EU. This possibility is not limited by the extent of the competences attributed to the Union / European Community. Thus for example, although the EC Treaty expressly excludes an intervention of the Community on the right to strike[11] – even only to complete the action of the Member States –, it would not be impossible for the Council to address recommendations to the Member State which, for instance, adopts a legislation seriously restricting the right to strike, or whose authorities remains passive in the face of a multiplication of situations where employers obtain from the judge injunctions ordering the cessation of the strike, in the name of freedom of occupation or of the right to property. These situations lead to a clear risk of violation of Article 28 of the Charter and of Article 11 of the European Convention on Human Rights which, if the violation is considered to be sufficiently serious, may justify the use of Article 7(1) EU. Similarly, the Council may on the basis of this Article address recommendations to the Member States whose places of detention clearly do not meet the minimal standards set by the Council of Europe, in particular such as these are defined by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, despite the uncertainty surrounding the competence of the Union to adopt measures seeking to ensure that persons deprived of their liberty – either before trial, or after being convicted by a criminal court – will benefit minimal conditions of detention throughout the Union.

On the basis of its examination of the situation of fundamental rights in the Union and its Member States, the EU Network of Independent Experts in Fundamental Rights could therefore express its concern with respect to situations which create a clear risk of serious breaches of fundamental rights in the meaning of Article 7(1) EU, including where such situations would not constitute, strictly speaking, a violation of the Charter of Fundamental Rights, even if the risk were to materialize. In order to evaluate the reality of the risk of such a breach, the Network shall attach particular importance to the circumstance that a Member State of the Union has repeatedly been found to be in violation of its international obligations in the field of human rights, by international jurisdictions or control mechanisms, and yet has abstained from adopting the remedial measures these findings would seem to call for. In such a situation, the risk of a breach is clearly established: if the concerned State has adopted no measure to comply with a determination according to which, for instance, it should adopt a particular legislation or modify the legislation in force, the violation which has led to such a determination obviously risks repeating itself in the future.

I.2. The contribution of the Network to the mutual learning by comparisons between the Member States

The recommendations of the EU Network of Independent Experts in Fundamental Rights, although they may contribute to the mechanism set up by Article 7(1) EU, also may fulfil another function. The communication of the Commission underlines that even in the absence of a clear risk of a serious breach, the monitoring by the Network

> 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

[10] Indeed, the communication of 15 October 2003 notes that in order to evaluate the « seriousness » of a breach to the principles of Article 6(1) EU, « the analysis could be influenced by the fact that they are vulnerable, as in the case of national, ethnic or religious minorities (…) » (p. 8).
[11] Article 137(5) EC, as modified by Article 2(9) of the Nice Treaty.

> standards of protection between Member States which could imperil the mutual trust on which Union policies are founded.

This function is indeed distinct from that of identifying situations which may lead to using Article 7 EU, as a preventive mechanism or, in the face of a persistent and serious breach, for the suspension of certain rights of the State concerned under the EU Treaty or the EC Treaty. This function resembles more that which is defined, for the Working Party on Data Protection instituted by Article 29 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[12], by Article 30(2) of this Directive, which states that « If the Working Party finds that divergences likely to affect the equivalence of protection for persons with regard to the processing of personal data in the Community are arising between the laws or practices of Member States, it shall inform the Commission accordingly ».

It is clear that the establishment of an area of freedom, security and justice, offering a high level of protection to the citizens, like that of a single market where competition is free and undistorted, may be encouraged by the definition of fundamental rights at a comparable level throughout the Union. This however does not mean that each time significant differences are found to exist between the Member States, an initiative from the Union is called for. First, the Union only may exercise those competences which the Member States have attributed to it, and any infringement of the principle of attributed competences may be sanctioned by the European Court of Justice. Second, in the field of fundamental rights, the existence of an equivalent level of protection is compatible with a diversity of practices or approaches: that we ought to guarantee throughout the Union a same level of protection, does not mean that the solutions to given problems must be in all cases uniform. Where noteworthy divergences occur between Member States, therefore, it should be examined whether these divergences correspond to different national traditions, answering to specific circumstances, or whether they truly create a risk for the unity of the area which the Member States of the Union now share – and, if this indeed appears to be the case, whether the Union has the competences required to remedy to such a situation. In principle, an initiative from the EU institutions will be appropriate only when two conditions are fulfilled: divergences between the Member States represent a threat to the unity of the area which they share, either because they shake the mutual confidence the States have in their respective police and judicial systems, or because they threaten the unity of the single market; and the Union / the Community have a competence which make it possible for them to counter this risk.

The comparison of national situations which the EU Network of Independent Experts in Fundamental Rights presents at least on an annual basis for all the rights listed in the Charter of Fundamental Rights, does not have as unique objective to identify the initiatives which, within the boundaries which have just been recalled, the Union could take to preserve the unity of the area of freedom, security and justice and of the internal market. Such a comparison also has another function to perform, where the Union does not have the required competences to react to emerging divergences between the Member States in the field of fundamental rights and where the comparison does not indicate a clear risk of a serious breach of fundamental rights which could justify the use of Article 7(1) EU. Indeed, the comparison could be an occasion for mutual learning, by the sharing of experiences which it makes possible and more systematic.

[12] OJ L 281 of 23.11.1995, p. 31. The Working Party « Article 29 » also exercices this mission under the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ n° L 201, 31.7.2002, p. 37), in accordance with Art. 15(3) of this Directive.

This latter function will not however be fully performed until the Member States are more closely implicated in the exercise of mutual evaluation in the field of fundamental rights. In its communication of 15 October 2003, the Commission proposes in this respect – to improve such an implication – to organise regular meetings, with a view to exchange information and share experiences, with the national instances competent in the field of fundamental rights, around the information collected by the Network. In the *Report on the situation of fundamental rights in the European Union and Its Member States in 2002*, the EU Network of Independent Experts in Fundamental Rights already had noted why such an initiative should be encouraged.

The creation of such a dialogue, on the initiative of the Commission, between the Network and the Member States, should go hand in hand with a more systematic consultation between the Network and the human rights non-governmental organisations representative at EU level[13]. It could also be combined with the organisation, by each Independent Expert, in his/her own country, of consultations both with the civil society as with the public authorities. In particular, each individual Expert could in the future be requested to set up an annual hearing with a view to identifying the questions relating to the protection of fundamental rights at the national level which are of European interest. This specificity must be particularly emphasised[14]. The questions relating to fundamental rights which, although they are located in one Member State (and therefore in principle concern only the situation of fundamental rights in that State), acquire a European dimension, belong to four categories: 1° breaches of fundamental rights which are situated in the field of application of EU Law and, therefore, are violations of EU Law in their own right (for example, these breaches occur in the course of the application of a regulation or of the implementation of a directive or a framework decision); 2° situations revealing a clear risk of a serious breach of human rights and fundamental freedoms, or a persistent and serious breach of such values, which could justify the use of Article 7 EU; 3° situations which lead to the creation of divergences between the Member States, affecting the mutual confidence on which the area of freedom, security and justice is based or threatening the unity of the internal market; 4° initiatives adopted at the national level which could be considered best practices, the dissemination of which in other States could be encouraged. These annual forums held at national level could be organized around these different categories, although the latter two categories would normally be, quantitatively, the richest.

I.3. The contribution of the Network to the prevention of breaches of fundamental rights by the formulation of independent opinions

The EU Network of Independent Experts in Fundamental Rights fulfils its two above-mentioned missions by the preparation of annual reports on the situation of fundamental rights in the Union and in each of its Member States. The Network however is also regularly requested by the Commission to prepare opinions on questions relating to the protection of fundamental rights in the Union. These opinions are fully independent. They are binding neither on the Commission, nor on the European Parliament. In most cases, they are based on a comparison, as complete as possible, of the situations which exist in the different Member States on a given question. They systematically seek to take into account the state of the international and European law of human rights, rather than only the fundamental rights already explicitly recognized in the legal order of the European Union. Indeed, the

[13] The Network has organized a hearing of a limited number of non-governmental organisations in the human rights field on 16 October 2003, in the premises of the European Parliament.

[14] Were such a suggestion to be retained, it will be important to define precisely the purpose of such hearings by relating them to the competences of the Union. Such a mechanism should only be instituted if it truly adds value to the mechanisms which exist already in that field. The experience of the « organized roundtables » set up in the Member States by the European Monitoring Centre on Racism and Xenophobia are a useful reference point : these roundtables have finally been considered disappointing once their results were compared with the investment they required.

Independent Experts composing the Network consider that the rights of the EU Charter of Fundamental Rights should be interpreted in conformity with the corresponding provisions of the relevant international and European instruments adopted in the field of human rights protection. They also consider, in conformity with Article 53 of the Charter, that where the Charter offers either a lesser protection or a protection which is formulated in more vague terms, it would not be justified to use the Charter as a pretext to diminish the level of protection offered at least by the instruments to which all the Member States are parties.

By the formulation of such opinions, the Network can contribute to a better taking into account of the requirements of fundamental rights from the initial stages of the legislative process. This function of the Network should be developed in the future. It is essential if, as proposed in this Report, the European legislator meets up to the challenge of better circumscribing in the future the margin of appreciation of the Member States in the implementation of the instruments adopted within the Union, where such implementation could lead to breaches of fundamental rights by the Member States. The last section of this Introduction seeks to identify better the preventive function which a better identification of the obligations imposed on the Member States in the field of fundamental rights could fulfil, where the national authorities act in the field of application of Union law. This would be favourable not only to an improved protection of fundamental rights in the Union, but also to legal certainty, including that of the Member States (see hereunder, II.3.).

I.4. The institutionalisation of monitoring in the field of fundamental rights: the independent Human Rights Agency of the EU

In 2005 or 2006, an independent Human Rights Agency may offer the Network the institutional support it requires to take account the expansion of its missions and the need, therefore, to provide it with supplementary means, especially with respect to the collection of data concerning the practice of national authorities and the use of indicators to monitor the evolution of these practices and compare these evolutions across the Member States. The conclusions adopted by the Member States' Representatives at the Brussels Council of 12-13 December 2003 call for the creation of such an Agency, which should result from an enlargement of the competences of the EU Monitoring Centre created by the Council Regulation (EC) 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia[15]. This choice could seem at first surprising. On the basis of an external evaluation of the activities of the EUMC between its creation in 1998 and end 2001[16], the Commission has considered, indeed, in its communication of 5 August 2003, that « the Centre should continue to concentrate on racism and that an extension to other fields would be an unwelcome distraction within the limits of the resources likely to be available to the Centre and that it would lead to a weakening of the emphasis on racism »[17]. It is evident that the specialisation of the activities of the EUMC, which demonstrates the importance which the institutions attach to the need to combat the phenomena of racism and xenophobia, as well as the definition of its main task, which resides in the collection and processing of informations rather than in the preparation of legal opinions[18], seem to clearly distinguish the activities of the EUMC from those of an independent Human Rights Agency for the Union.

[15] OJ L 151 of 10.6.1997, p. 1.
[16] http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/origin/eumc_eval2002_en.pdf
[17] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Activities of the European Monitoring Centre on Racism and Xenophobia, together with proposals to recast Council Regulation (EC) 1035/97, COM(2003)483 final of 5.8.2003.
[18] According to Article 2(1) of its instituting Regulatin, the EUMC must « provide the Community and its Member States (…) with objective, reliable and comparable data at European level on the phenomena of racism, xenophobia and anti-Semitism in order to help them when they take measures or formulate courses of action within their respective spheres of competence ».

For the new Agency, the challenge will be to build on the experience of the Vienna EUMC on Racism and Xenophobia – especially in the field of collection and analysis of data, which requires the definition of indicators bot reliable and comparable throughout all the Member States – whilst organising its relationship to the Network of Independent Experts in Fundamental Rights, whose tasks could be focused on the delivery of an expert legal advice on the fields covered by the Charter. This would of course require the confirmation in its role of the Network of independent experts in fundamental rights, covering all the Member States and capable of monitoring the situation of fundamental rights in all the domains covered by the Charter, in conformity with the form of monitoring called for by the communication presented by the Commission on 15 October 2003. The prospect of such an Agency also calls for a new reflection on the functions of the EU Network of Independent Experts in Fundamental Rights. Thus for example, it could be envisaged to give the possibility to the Network to deliver opinions on its own initiative on any question relating to the impact of initiatives of the Union on fundamental rights recognized in the Charter, between two periodical reports. It should also be examined whether, when an opinion is requested from the Network, it would not be desirable and in the logic of the monitoring mechanism, that the Commission inform the Network of the follow-up made of the opinion, in a report which could be transmitted also to the European Parliament and the Council[19]. Moreover, the relationship of the EU Network of Independent Experts in Fundamental Rights and the Independent Agency with the Ombudsman of the European Union and with the European Commission should be organised so that the complaints filed with these institutions can contribute effectively to the information provided to the Agency and to the Network as to the fundamental rights issues faced by the European citizens. Finally, the Agency should establish structural links with the competent instances of the Council of Europe in the different domains which the Charter of Fundamental Rights covers[20].

I.5. The lessons from enlargement: from mutual confidence to mutual evaluation

The integration of a preventive dimension in the fundamental rights policy of the Union now becomes all the more urgent with the enlargement of the Union to ten new Members. The new Member States are all parties to the main international instruments for the protection of human rights. Their achievements in that field have been regularly monitored by the European Commission as well as by the Council, through the "Collective Evaluation" (Coleval) Group entrusted with the preparation of evaluation reports for the Committee of permanent representatives. This follow-up has focussed not only on the respect of the so-called "political" criteria defined at the Copenhagen European Council of June 1993, but also on the capacity of the new Member States to integrate the acquis of the Union in the fields of Justice and Home Affairs. However, despite the quality of the precautions which have been taken, enlargement necessarily augments the diversity of traditions and of judicial and administrative systems. Potentially at least, divergent standards therefore may appear between the Member States. They can threaten the uniformity of application of Union law.

There have been two reactions to this situation. First, we have witnessed recently a multiplication of evaluation mechanisms, devised to ensure a better monitoring of the instruments adopted in the field of Justice and Home Affairs[21]. The draft Treaty establishing a

[19] Comp. Article 30 (3) and (5) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23.11.1995, p. 31.

[20] The Vienna EUMC can constitute a useful example in this respect : the Council of Europe is represented in its board of directors.

[21] See, e.g., the Joint Action (97/827/JHA) of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime, OJ L 344 of 15.12.1997, p. 7 ; Joint Action (98/429/JHA) of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for collective evaluation of the enactment, application and effective implementation by the applicant countries of the acquis of the European Union in the field of Justice and Home

Constitution for Europe intends to systematize such a mechanism, under Article III-161 of the Constitution:

> …the Council of Ministers may, on a proposal from the Commission, adopt European regulations or decisions laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Chapter by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and Member States' national Parliaments shall be informed of the content and results of the evaluation.

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

These different evaluation mechanisms and safeguard clauses, whether applicable only with respect to the new Member States or inspired by the perspective of enlargement but by which the States impose themselves a collective constraint, may also contribute to guarantee a better respect of fundamental rights. Perhaps this is not their main or primary purpose. Fundamental rights could nevertheless be, in the future, their privileged field of application. The enlargement has convinced the Member States of the Union that the mutual confidence on which the area of freedom, security, and justice is based, cannot be given once and for all, and cannot be simply stipulated as an article of faith. It must be accompanied by mechanisms for mutual monitoring, without which mutual confidence may progressively be eroded.

II. FUTURE DIRECTIONS OF THE FUNDAMENTAL RIGHTS POLICY OF THE UNION

II.1. Anchoring the activities of the Union in the international law of human rights

This Report examines the activity of the institutions of the Union in 2003 in the light of the requirements of the Charter of Fundamental Rights. The setting up of an internal monitoring mechanism on the institutions, coupled with a preventive mechanism when the EU Network of Independent Experts in Fundamental Rights is requested to deliver opinions on initiatives taken by the institutions, appears all the more indispensable if one considers that neither the Community, nor the Union are subject to an external control of their activities, with regard to the requirements of the international law of human rights. Although both the European

Affairs, OJ L 191 of 7.7.1998, p. 8 ; Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/ Com-ex (98) 26 def.), OJ L 239 of 22.9.2000, p. 138 ; Council Decision (2002/996/JHA) of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism, OJ L 349 of 24.12.2002, p. 1.

Community and the European Union are to be considered as having an international legal personality[22], there still lacks any general reflection within the institutions of the Union as to either accession to the international instruments in the field of human rights to which the Member States are parties, or even the elementary requirement to integrate the requirements of the international law of human rights in the activities of the Union.

As it has already noted in its first Report, concerning the situation of fundamental rights in the Union and its Member States during the year 2002, the EU Network of Independent Experts in Fundamental Rights considers that it is part of its objectives to encourage such an integration. Soon however, the process of constitutionalization of the law of the Union calls for a renewed reflection on the relationship of the Union to the international law of human rights. Of course, the external competences of the Union remain regulated, as are its internal competences, by the principle of attribution. However, the competence of the Union to conclude international agreements, like that of the European Community, "arises not only from an express conferment by the Treaty (…) but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions"[23]. The existence of an implicit external competence of the European Community, today, is admitted either where it corresponds to internal competences of the Community (first hypothesis), or where the conclusion by the Community of an international agreement is necessary in the functioning of the common market, to the realisation of an object of the Community defined by the Treaty (second hypothesis).

The first hypothesis corresponds to the idea that "with regard to the implementation of the provisions of the Treaty the system of internal Community measures may not (…) be separated from that of external relations"[24]. Therefore, "whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection"[25]. This is the case either when the internal power "has already been used in order to adopt measures which come within the attainment of common policies", or, even in the absence of such internal measures, "in so far as the participation of the Community in the international agreement is […] necessary for the objectives of the Community"[26].

The second hypothesis is based on the use of Article 308 EC (ex-Article 235 of the EC Treaty), concerning the implicit powers of the Community, which provides that the unanimous Council can take the required measures "If action by the Community should prove

[22] The Treaty of Rome attributes such an international legal personality to the European Community : see Article 281 EC (ex-Article 210 of the EC Treaty). With respect to the Union, this personality derives from the competence which it has since the entry into force of the Treaty of Amsterdam on 1 May 1999, at Article 24 EU, to conclude international agreements with States or international organisations. Such an agreement binds the Union as such, and not only the Member States who act together in the framework of the EU Treaty: indeed, the State which abstains from voting within the Council when the Council concludes an international agreement can make a formal declaration in which case "it shall not be obliged to apply the decision, but shall accept that *the decision commits the Union* » (Article 23(1), al. 2, EU). The existence of such a competence to conclude international agreements suffices to create the international legal personality. There is no requirement of a formal attribution of such personality, for instance in the Act constituting the international organisation. See ICJ, opinion *relating to the reparation of damages incurred in service of the United Nations*, 11 April 1949, *Reports*, 1949, p. 174.

[23] ECJ, 31 March 1971, *Commission v. Council (« European Road Transport Agreement »),* Case 22/70, ECR 265, Recital 16.

[24] ECJ, 31 March 1971, *Commission v. Council (« European Road Transport Agreement »),* Case 22/70, ECR 265, Recital 19.

[25] ECJ, 26 April 1977, Opinion 1/76, ECR 741, Recital 3.

[26] ECJ, 26 April 1977, Opinion 1/76, ECR 741, Recital 4.

necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and [the EC Treaty] has not provided the necessary powers (…) »[27].

The draft Constitution for Europe confirms this reading in Article III-225(1) :

> The Union may conclude agreements with one or more third countries or international organisations where the Constitution so provides *or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives fixed by the Constitution*, where there is provision for it in a binding Union legislative act or where it affects one of the Union's internal acts.

In the absence of a general power of the Community or the Union in the field of fundamental rights[28], the limits imposed on the exercise of the international powers of the Community or the Union are a serious obstacle to their accession to international instruments for the protection of human rights[29]. However, even under the present definition of the external powers of the Union / Community, the accession to a number of international instruments in the field of human rights protection may be envisaged, at least from the point of view of Union law[30] : just like the achievements of the European Community in the field of data protection has been deemed sufficient for the accession of the Community to the convention concluded on this question in the framework of the Council of Europe[31], similarly the acquis of EC Law in the field of equal treatment between women and men and in the field of non-discrimination on grounds of race or ethnic origin would appear sufficient to identify a power of the Community to accede to the United Nations Conventions on the Elimination of All Forms of Discrimination against Women (CEDAW)[32] and on the Elimination of All Forms of Racial Discrimination (CERD)[33]. The Communication which the Commission presented on 24 January 2003 to the Council and the European Parliament, "Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities"[34], fits into this evolution, which must be approved of and further deepened. Nor can we exclude that, in the areas covered by the Revised European Social Charter of 3 May 1996 (ETS, n° 163) or the Geneva Convention on the status of refugees of 28 July 1951, the exercise by the Union/Community of its powers – which it shares with the Member States – could lead to recognize it a power to accede to these instruments.

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[27] On the use of this provision in such a context, see ECJ, 24 March 1995, *Power of the Community or of one of its institutions to participate in the third revised decision of the OECD Council on national treatment*, Opinion 2/92, ECR I-521.

[28] ECJ, 28 March 1996, *Accession of the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/94, *ECR* I-1759, Recital 20.

[29] Comp. with Article 7(2) of the Draft Constitution for Europe, providing that « The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution ».

[30] The accession of the Community / the Union to international agreements of course presupposes that the other parties to these agreements consent to such an accession. As the Community / Union are not « States » under international law, this will require in most cases amending protocols, where the agreement provides only for the accession of States. In certain cases, this particularly heavy procedure can be dispensed with by a procedure of « negative notification » (« opting out »), under which an amending protocol providing for the accession of the Union / Community will enter into force at the expiration of a defined period, unless one of the Contracting Parties to the initial agreement has notified its objection prior to the expiration of that period.

[31] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, of 28 January 1981 (E.T.S., n°108). The Amendements to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data authorizing the accession of the European Communities have been adopted by the Committee of Ministers of the Council of Europe at its 675th meeting, on 15 June 1999. All the States parties should notify their acceptation of these amendments before these can enter into force. Only once they have entered into force, will it be possible for the European Communities to accede to the Convention.

[32] UN Gen. Ass. Res. 34/180 of 18 December 1979. All the 25 Member States of the EU have ratified this instrument.

[33] UN Gen. Ass. Res. 2106 A(XX) of 21 December 1965. All the 25 Member States of the EU have ratified this instrument.

[34] COM(2003)16 final.

More fundamentally perhaps, it may be worth questioning the adequacy of the classical case-law of the European Court of Justice concerning the extent of the external powers of the Community, where the question of accession to an international instrument protecting human rights is posed. By acceding to such instruments, the States parties undertake to respect certain minimal standards for the benefit of the persons under their jurisdiction, which implies in the first place that they will not adopt any measures which derogate from these standards. Insofar as the undertaking is purely negative (formulated as an obligation to abstain from), it is irrelevant whether or not the Party has the competence to take measures which implement the given standard. It is only where the undertaking is also to adopt certain measures – to fulfil positive obligations (to act) – that the question of competences may play a role. The accession of the Union to international instruments adopted in the field of human rights must not necessarily have an impact on the extent of its competences, quite to the contrary, such an accession must in principle be considered neutral from the point of view of the division of competences between the Union and the Member States[35]. If necessary, a specific clause could recall this neutrality[36]. This however results from the very principle of attributed competences, according to which the Union could not exercise competences which are not attributed to the Union by the Member States, even for the sake of better complying with obligations the Union has contracted on the international plane.

If the accession to the international instruments for the protection of human rights cited above may only be envisaged at a later stage, for reasons ideological rather than because of legal obstacles, at least it is important immediately to reflect upon the means to articulate better the fundamental rights recognized within the Union and the international law of human rights. The EU Network of Independent Experts in Fundamental Rights is favourable to a systematic indexation of the provisions of the Charter of Fundamental Rights to the international law. To the extent that the rights of the Charter correspond to rights which are recognized under international law, and particularly in human rights instruments to which the Member States are parties, the Network will interpret the rights of the Charter to ensure that their meaning and scope are those which are recognized to them by these treaties.

Other mechanisms however could be envisaged which ensure this articulation of the European Union to the international law of human rights. For instance, in the fields which belong to the competences shared between the Union and the Member States, the Union could consider contributing to the preparation of the reports which the States must submit periodically to the committees created by the six main treaties of the United Nations in the field of human rights. The preparation of a report concerning specifically the contribution of the European Union to the implementation of the provisions contained in those treaties would present major advantages. Presented in the form of an annex to the reports of the 25 Member States, such a contribution would make visible to the community of States the role of the Union in the protection of fundamental rights by its Member States. Such a contribution by the Union would also greatly facilitate the task of the national administrations who are entrusted with the preparation of these periodical reports. As such a contribution by the EU should be regularly updated, it would encourage the Union to take better account of the impact its action may have on the enjoyment of fundamental rights, which may in turn lead to formulate a diagnosis on this impact and to reorient the European public policies accordingly. Finally, the

[35] *Mutatis mutandis*, Article 28 of the International Covenant on Economic, Social and Cultural Rights for instance, adopted by the Gen. Ass. of the United Nations on 16 December 1966 (Res. 2200 A (XXI)), states that "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions". This provision however cannot be construed as having the effect to invest the federative entities within each State with competences which theses entities are denied under the constitutional organisation of the State.

[36] Such a clause could seek inspiration from Article 7(2), 2nd sentence, of the Draft Treaty establishing a Constitution for Europe, which says that the accession of the Union to the European Convention on Human Rights « shall not affect the Union's competences as defined in the Constitution ». It could also be formulated along the lines of Article 51 of the Charter of Fundamental Rights.

contribution of the Union to the reports States submit periodically in the existing system of human rights treaties would encourage the Union to better take into account in the formulation of European legislation the nature and the scope of the international obligations imposed on the States in the field of human rights, which may prevent the risk that States will face contradictory international obligations.

II.2. Contributing to the respect by the Member States to their international obligations in the field of human rights

Paying more attention to the international human rights instruments binding upon the Member States may be an incentive for the Union to exercise its attributed competences so as to help the Member States to better comply with the obligations which these instruments impose upon them. Insofar as it is obliged to respect the fundamental rights inscribed in the Charter, the Union will in general abstain from making it impossible for the Member States to respect those obligations; under Article 307 EC, this is even a legal obligation for the institutions acting in the framework of the EC Treaty, at least as long as there remains an incompatibility between the international undertakings accepted by the Member State before its accession to the Union and the obligations imposed by the Union. However, apart from the fact that this latter obligation is not unconditional – as it was noted already in the Report by the EU Network of Independent Experts on the situation of fundamental rights in 2002[37] –, it could be useful to redefine it as a *positive* obligation imposed on the Union: an obligation to adopt the measures which may facilitate the respect by the Member States of their international obligations in the field of human rights, where the Union may, by exercising its competences, contribute to fulfilling this end.

This is not to say, of course, that the EU would be under such an obligation, in the international legal order[38] ; it is doubtful even that the Charter imposes such an obligation on the institutions of the Union, despite the fact that the Charter could in principle be the source of positive obligations[39]. Rather the purpose here is to indicate one avenue through which, first, the risk of tension between the membership of a State to the Union and its capacity to fully respect its international undertakings in the field of human rights could be attenuated; and through which, second, the Union could contribute to a better respect for international human rights through a better integration of their requirements in the definition of its policies and, generally, in the exercise of its powers. By their membership of the Union, the Member States share a common area in which the free movement of persons is guaranteed, the mobility of factors of production ensured, and within which cooperation takes place between States in the civil and criminal judicial field and in the field of police. This results in a strong interdependency between the States, which may affect their capacity to fully comply with the international obligations they are imposed in the field of human rights. Where the Union has the required powers to act, it should exercise these powers to avoid this interdependency from becoming an obstacle to the possibility for the States to further realize the human rights recognized in international law. Three examples may be given. They are borrowed from the activity of the year under scrutiny in this report.

[37] See the *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002*, p. 22.

[38] Comp. ECJ 14 October 1980, *Attorney General v. Juan C. Burgoa*, 812/79, *ECR* 2787 (Recital 9) ; or ECJ, 18 October 1982, *Dorca Marina*, Joined Cases 50 to 58/82, *ECR* 3949 (Recitals 6 and 7).

[39] The Charter of Fundamental Rights imposes on the institutions, bodies and agencies of the Union an obligation to promote the application of the Charter, in the exercise of their attributed powers (Article 51(1) of the Charter). This implies that the Charter can constitute for the institutions of the Union, like for the Member States when they act in the scope of application of EU law, the source of positive obligations : they may be under an obligation to act to realize the rights and principles enunciated in the Charter, where, in the absence of any initiative from their part, these rights or these principles would be threatened.

Encouraging the fight against racial and xenophobic hatred and violence

The first example is that of the debate on the adoption of a penal instrument of the Union aimed at approximating the State laws combating racism and xenophobia. Article 29 of the Treaty on European Union provides, as a means to achieve the Union objective of offering all citizens a high level of protection in an area of freedom, security and justice, for the elaboration of common action between the Member States in the field of police and judicial cooperation in criminal matters and the prevention of racism and xenophobia. This objective should be achieved through the approximation, where appropriate, of the rules of criminal law of the Member States, in accordance with Article 31, e), of the Treaty on European Union. This clause provides that common action on judicial cooperation in criminal matters includes progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field of organized crime, among others. At Union level, the Council on 15 July 1996 adopted, on the basis of Article K3 of the Treaty on European Union, a joint action concerning action to combat racism and xenophobia[40]. This initiative was justified by the observation that the existing differences between certain criminal legislations in terms of the penalties on certain kinds of racist and xenophobic behaviour could form an obstacle to international judicial cooperation, in such a way that the perpetrators of such offences were liable to move from one Member State to another in order to avoid criminal prosecution or the execution of sentences and so to continue their activities unpunished. The Joint Action of 15 July 1996 called upon the Member States to "ensure effective judicial cooperation in respect of offences based on the following types of behaviour, and, if necessary for the purposes of that cooperation, either to take steps to see that such behaviour is punishable as a criminal offence or, failing that, and pending the adoption of any necessary provisions, to derogate from the principle of double criminality" for certain behaviour enumerated in the Joint Action, such as incitement to racial, religious or national hatred, public condoning of crimes against humanity and human rights violations, or the "participation in the activities of groups, organizations or associations, which involve discrimination, violence, or racial, ethnic or religious hatred". Point B of Title I of the Joint Action provides that, in the case of investigations into, and/or proceedings against, offences based on the types of behaviour listed, the Member States take appropriate measures in order to improve judicial cooperation by seizure and confiscation of tracts, pictures or other material containing expressions of racism and xenophobia intended for public dissemination, acknowledgement that the types of behaviour listed should not be regarded as political offences justifying refusal to comply with requests for mutual legal assistance, providing information to another Member State to enable that Member State to initiate, in accordance with its law, legal proceedings or proceedings for confiscation in cases where it appears that tracts, pictures or other material containing expression of racism and xenophobia are being stored in a Member State for the purposes of distribution or dissemination in another Member State, and the establishment of contact points in the Member States which would be responsible for collecting and exchanging any information which might be useful for investigations and proceedings against offences based on the types of behaviour listed. Point C of Title I of the Joint Action specifies that nothing in that Joint Action may be interpreted as affecting any obligations which Member States may have under, among others, the United Nations Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965.

On 28 November 2001, following a European Parliament Resolution adopted on 21 September 2000[41], the Commission adopted a proposal for a Framework Decision on combating racism and xenophobia, based on Articles 29, 31 and 34 of the Treaty on European Union[42]. The proposal is aimed at approximating the laws and regulations of the Member

[40] OJ L 185 of 24/7/1996, p. 5.
[41] OJ C 146 of 17/5/2001, p. 110.
[42] COM(2001) 664 final.

States regarding racist and xenophobic offences by defining minimum criteria common to all Member States to ensure that racism and xenophobia are punishable in all Member States by effective, proportionate and dissuasive criminal penalties, which can give rise to extradition or surrender[43], and to improve and encourage judicial cooperation by removing potential obstacles. The Explanatory Memorandum of the proposal explicitly refers to the United Nations Convention for the Elimination of All Forms of Racial Discrimination, and in particular to Article 4 (a) of this Convention, which stipulates that the States Parties "shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as actions of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof", as well as to paragraph (b) of the same article, which states that States Parties "shall declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law"[44].

In early 2003, the Council was unable to agree on the text of a Framework Decision on combating racism and xenophobia. One of the obstacles encountered, besides a Commission reservation about the use of Article 34 § 2, b), of the Treaty on European Union, in attempting to approximate the national laws on the criminalization of pubic incitement to discrimination - an initiative which, according to the Commission, required the choice rather of Article 13 EC as legal basis -, was particularly the difficulty of imposing on certain Member States, whose law or national practices offered greater guarantees for freedom of expression, the criminalization of certain types of behaviour that could, in their view, derive from the exercise of this freedom[45]. It is regrettable that no agreement could emerge on this question. However, it is also important to draw lessons from this failure.

Given the diversity of concepts of the relationship between the extent of the freedom of expression and the need to combat incitement to racial and xenophobic hatred and violence, joint action is difficult or has been made impossible. The result, taking into account the facilities that may be offered to persons having committed such offences by the divergences between the different laws of the Member States, is that the Member States are prevented from fully taking up their international obligations. Article 4 of the Convention for the Elimination of All Forms of Racial Discrimination has already been mentioned. Article 20 of the International Covenant on Civil and Political Rights provides, "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law"[46]. In a judgment where it asserted that the States Parties to the European Convention on Human Rights may be bound by a positive obligation to take action

[43] Racism and xenophobia are among the offences that may entail surrender on the basis of a European arrest warrant, if they are penalized in the issuing Member State by a sentence or security measure involving detention for at least three years as defined by the issuing Member State: see Article 2 § 2 of the Framework Decision of the Council 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. The coming into effect of the European arrest warrant partly compensates for the failure to arrive at an agreement on the Framework Decision proposed by the Commission.

[44] The Commission notes in this respect, "The Convention has been ratified by all EU Member States. Some Member States have entered reservations on Article 4, which refer to the conciliation of obligations imposed by this Article with the right to freedom of expression and association".

[45] Thus the proposal for a Framework Decision submitted to the Council of the European Union of 27 and 28 February 2003 (DROIPEN 14) contained an Article 7, "Constitutional Rules and Fundamental Principles", worded as follows: "La présente décision-cadre n'a pas pour effet d'obliger les États membres à prendre des mesures contraires à leurs règles constitutionnelles et aux principes fondamentaux relatifs à (….) la liberté d'association, à la liberté de la presse et à la liberté d'expression dans d'autres médias ou à des règles régissant les droits et responsabilités de la presse ou d'autres médias, ainsi que les garanties de procédure y afférentes, lorsque ces règles portent sur la détermination ou la limitation de la responsabilité".

[46] In its General Comment n°11, adopted at its nineteenth session (1983), the Commission for Human Rights recalled, "These required prohibitions are fully compatible with the right to freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities".

against political parties that threaten, if they come to power thanks to forthcoming elections, to challenge the rights and freedoms of the Convention, the European Court of Human Rights emphasized that those States may be obliged to take measures to protect individuals under their jurisdiction from hostile behaviour: "A Contracting State may be justified under its positive obligations in imposing on political parties, which are bodies whose *raison d'être* is to accede to power and direct the work of a considerable portion of the State apparatus, the duty to respect and safeguard the rights and freedoms guaranteed by the Convention and the obligation not to put forward a political programme in contradiction with the fundamental principles of democracy"[47].

The difficulty of reconciling the necessity of taking measures against incitement to racial and xenophobic hatred or violence with the requirements of the freedom of expression and association should certainly not be underestimated. However, the identification of the latter requirements should not depend on the assessment that each individual Member State makes of them. At both the international and the European level, we have common points of reference which might have served better as starting points and which might have constituted a real lever in the process of finding an agreement. In other words, a common reference to the requirements of international human rights law, which has adopted a position on the appropriate balance between the conflicting values - by considering that freedom of expression cannot extend its scope of protection to incitement to racial and xenophobic hatred or violence -, might have helped to settle the discussion between the Member States, provided that, from the outset, international human rights law has been accepted as common point of reference.

Helping to combat impunity for crimes under international law

A second example is a possible initiative of the European Union aimed at helping to combat impunity for crimes under international law - genocide, crimes against humanity, war crimes. The institutions of the Union have already expressed their readiness to combat impunity for the perpetrators of such crimes, and have voiced their support for the institution of the International Criminal Court[48].

When it adopted its Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (2002/494/JHA)[49], the Council of the European Union based itself on the consideration that all Member States of the European Union had either signed or ratified the Rome Statute, which states that the International Criminal Court established under it is to be complementary to national criminal jurisdictions, to conclude that as « Member States are being confronted with persons who were involved in such crimes and are seeking refuge within the European Union's frontiers », « the successful outcome of effective investigation and prosecution of such crimes at national level depends to a high degree on close cooperation between the various authorities involved in combating them ». The Council therefore provided that each Member State shall « designate a contact point for the exchange of information concerning the investigation of genocide, crimes against humanity and war crimes such as those defined in Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court of 17 July

[47] Eur. Ct. H.R. (GC), *Refah Partisi (The Welfare Party) and others v. Turkey*, judgment of 13 February 2003, § 103.

[48] See , e.g., the Council Common Position 2001/443/CFSP of 11 June 2001, on the International Criminal Court (OJ L 155, 12.6.2001, p. 19), amended by the Council Common Position of 20 June 2002 amending Common Position 2001/443/CFSP on the International Criminal Court (OJ L 64, 22.6.2002, p. 1), now replaced by the Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court (OJ n° L 150 of 18.6.2003, p. 67) ; and the answer given by Mr Vitorino on behalf of the Commission (3 September 2002) to the written question E-2063/02 by Pere Esteve (ELDR) to the Commission, on harmonised jurisdiction on genocide, crimes against humanity and war crimes (OJ n° C 161 E , 10.7.2003, p. 12).

[49] OJ n° L 167 of 26.6.2002, p. 1. The Decision is based on Article 30 and Article 34(2)c), EU.

1998 », to ensure exchange of information and cooperation between the national authorities entrusted with the inquiry and prosecution over such crimes. In its later Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes[50], the Council sought to further increase cooperation between national authorities « in order to maximise the ability of law enforcement authorities in different Member States to cooperate effectively in the field of investigation and prosecution of persons who have committed or participated in the commission of genocide, crimes against humanity or war crimes ». Therefore, the Decision prescribes that the Member States shall take the necessary measures « in order for the law enforcement authorities to be informed when facts are established which give rise to a suspicion that an applicant for a residence permit has committed [genocide, crimes against humanity or war crimes] which may lead to prosecution in a Member State or in international criminal courts », and to regularly exchange information in that respect. Council Decision 2003/335/JHA of 8 May 2003 also provides that national authorities shall assist each other in the prosecution of these crimes.

It would be in keeping with the intention already shown by these instruments that European Union law helps, in a yet more complete way, to combat impunity for perpetrators of international crimes who seek refuge on the territory of the Member States. The Statute of the International Criminal Court, adopted in Rome on 17 July 1998, recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". One of the considerations on which Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court is founded is, "The serious crimes within the jurisdiction of the Court are of concern to all Member States, which are determined to cooperate for the prevention of those crimes and for putting an end to the impunity of the perpetrators thereof". The adoption of a Framework Decision which provides that the Member States give their courts the power to prosecute and sentence persons held responsible for international crimes who are found on their territory, irrespective of their links in terms, for example, of nationality or place of residence with the victims or of the place where the crime has been committed, would be a step in that direction[51]. The very possibility for the Union Member States to adopt an extraterritorial legislation allowing them to prosecute international crimes cannot be seriously contested[52]. In a Recommendation adopted on 23 June 2003 with regard to serious violations of human rights committed in areas where the European Convention on Human Rights cannot be implemented, the Parliamentary Assembly of the Council of Europe recalled that, where it is first and foremost the responsibility of those States on whose territory violations occur to instigate the necessary investigations and to bring proceedings against the presumed perpetrators, yet those States fail to do this, "third

[50] OJ n° L 118 , 14.5.2003, p. 12.

[51] We may refer to the joint study by Redress and the International Federation of Human Rights Leagues, "Legal Remedies for Victims of International Crimes. Fostering an EU Approach to Extraterritorial Jurisdiction", prepared with the support of the Grotius II programme of the European Commission and the Community Fund.

[52] In a separate common opinion on the judgment delivered by the International Court of Justice on 14 February 2002 in the Case relating to the arrest warrant of 11 April 2000, judges Higgins, Kooijmans and Buergenthal inferred from the Geneva Conventions of 12 August 1949 and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (see below), that "universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful. The duty to prosecute under those treaties which contain the *aut dedere aut prosequi* provisions opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality (whether as perpetrator or victim)" (here par. 49). International legal doctrine is in keeping with this: *Princeton Principles on Universal Jurisdiction*, Principle 1, §§ 1-2 (2001); as well as the *Brussels Principles Against Impunity and for International Justice*, adopted by the Brussels Group for International Justice in March 2002 (Principle 13 stipulates that any State may, under international law, "institute legal proceedings and to try the presumed author of an offence, irrespective of the place where the said offence has been committed, the nationality or the place of residence of its presumed author of of the victim", and that this jurisdiction is exercisable "regardless of whether or not the presumed author is present on the territory of the forum State"; whereas Principe 14 §1 provides, "By virtue of international law, any State has the obligation to exercise universal jurisdiction in relation to the presumed author of a serious crime from the moment the said author is present on the territory of that State").

party States have a responsibility to act. In order to be able to discharge these responsibilities, they should have the option of exercising universal jurisdiction for all international crimes, including terrorist crimes"; consequently, the Assembly "recommends (…) that the Member States [of the Council of Europe] introduce legislation on universal jurisdiction, which would enable them to take proceedings against the perpetrators of international crimes"[53]. The amendment made in July 2002 to the Statute of the International Criminal Tribunal for Rwanda confirms the viewpoint that States may, at least for certain categories of crimes, assume universal jurisdiction[54]. An obligation to enable the prosecution of the presumed perpetrators of international crimes who are found on the territory of a State is also asserted by several instruments of international humanitarian law or aimed at protecting human rights.

Obligation of universal jurisdiction under international law

On the subject of *war crimes committed during an international armed conflict*, the Article (49 (I), 50 (II), 129 (III) and 146 (IV) respectively) common to the four Geneva Conventions of 12 August 1949, whose scope has been extended by Article 85 § 1 of the First Additional Protocol of 1977 to the offences enumerated therein, stipulates:

"Each High Contracting Part shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case".

On the subject of *torture*, Article 5 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984, stipulates that each State Party "shall take such measures as may be necessary to establish its jurisdiction over the offences [referred to in article 4 of the Convention] in the following cases: a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; b) When the alleged offender is a national of that State; c) When the victim is a national of that State if that State considers it appropriate" (§ 1). § 2 adds[55]:

"Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article".

As regards *crimes of genocide* and *crimes against humanity*, international law does not impose any obligation on the States to establish their jurisdiction to prosecute individuals suspected of having committed such crimes if they are on their territory. Article VI of the Convention of 9 December 1948 on the prevention and punishment of the crime of genocide imposes an obligation of prosecution solely on the State on whose territory the act was committed; the other States cannot refuse to extradite a perpetrator of crimes of genocide on

[53] Parliamentary Assembly of the Council of Europe, Recommendation 1606 (2003), "Areas where the European Convention on Human Rights cannot be implemented".

[54] The new Article 11b of the Statute of the ICTR expressly cites the concept of universal jurisdiction by recalling the referral to the domestic courts of certain cases that had been submitted to the Tribunal. See *http://www.ictr.org/FRENCH/index.htm*

[55] See also Article 7 § 1 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that the case of a person alleged to have committed acts of torture and found in the territory shall, if he is not extradited, be submitted to the competent authorities of the State in whose territory he has been found for the purpose of prosecution.

the pretext that such crimes constitute political crimes (Article VII), which ensures the universal punishment[56] of the crime of genocide through the collaboration of all States with the State where the crime has been committed, so as to allow the latter to carry out prosecution proceedings. As regards *crimes against humanity*, there is no regulation of international conventional law that obliges a State to exercise its criminal jurisdiction vis-à-vis persons accused of crimes against humanity who are on its territory, although in the particular case where the crime against humanity is committed in the form of torture, it follows from Article 5 of the above-mentioned Convention of 10 December 1984 against torture that if a State does not extradite a person accused of torture to a State that has jurisdiction to prosecute this person and that requests his extradition, it has the obligation to prosecute this person. It should be added, however, that an important doctrine considers that crimes against humanity constitute crimes under international law which, insofar as they infringe the imperative regulations of international law (*jus cogens*), impose an obligation on the States to assist in the punishment thereof, which rules out that States can allow individuals suspected of having committed such crimes of enjoying impunity on their territory (see Bassiouni, "Crimes against Humanity: The need for a specialized Convention", Columbia Journal of Transnational Law, 1994, pp. 480-481; K.C. Randall, "Universal Jurisdiction Under International Law", 66 Texas L. Rev.785, 829-830 (1988)). Such an obligation of establishing universal jurisdiction in order to avoid situations of impunity also derives from the Resolution of the United Nations General Assembly, "Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity" (G.A. Res. 3074 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973)).

In the absence of an initiative from the European Union seeking to harmonize the criminal legislations of the Member States to ensure extra-territorial incrimination of international crimes, presumed authors of such crimes will continue to be able to seek refuge in the territory of a State whose authorities will not have the required competence to prosecute them. Such a situation is particularly intolerable where the presumed authors of such crimes – although they may not be recognized as refugees[57] – may be neither extradited, in the absence of a request from a foreign authority, nor sent back to their State of origin, where they run a real risk of serious ill-treatment in that State[58]. The adoption of the above-mentioned Decision of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes shows that the concept of "organized crime", which may justify the adoption of measures establishing between the Member States minimum rules relating to the constituent elements of criminal acts and to applicable penalties (Article 31, e), TEU), is extended to crimes under international law[59].

Imposing respect for human rights on businesses

On 13 August 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted with the unanimous vote of the independent experts the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to

[56] The obligations under the Convention of 9 December 1948 are in fact incumbent *erga omnes*, including on States that are not parties to this Convention: ICJ, judgment of 11 July 1996, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia),* Preliminary Objections, *Rec.*, 1996, pp. 615-616, par. 31.

[57] See Article 1(2), F, of the Geneva Convention of 28 July 1951 on the status of refugees.

[58] This point has been eloquently made by the representative of Amnesty International at the hearing organised by the EU Network of Independent Experts on Fundamental Rights on 16 October 2003 in the European Parliament.

[59] In the Draft Treaty establishing a Constitution for Europe, it is provided that the Council of Ministers may unanimously identify the areas of "particularly serious crime with cross-border dimensions resulting from the nature or impact of such offences or from a special need to combat them on a common basis", with a view to enabling the adoption of a European framework law establishing minimum rules concerning the definition of criminal offences and sanctions in those areas (Article III-172).

Human Rights"[60]. This development offers a third example of the role that the European Union can play in the implementation of international human rights law, there also addding a real added value to the action of Member States. The adoption of these Norms represents a major step forward compared to the attempts which, since the adoption of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy by the International Labour Organization (1977) and the Guidelines for Multinational Enterprises by the Organization for Economic Cooperation and Development (1976, revised in 2000) essentially sought to combat behaviour of international companies leading to violations of human rights by using instruments without binding legal effect, relying on the goodwill of companies to comply with them. The Global Compact proposed to the business community by United Nations Secretary General Mr Annan in 1999, and the concept of corporate social responsibility[61], are based on the same idea. The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, on the other hand, are intended to recall the obligations which, under international human rights law, are directly incumbent on non-State players, including corporations. They have been adopted on the basis of the postulate that "transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments" (Preamble, fourth recital). The adoption of the Norms is not coupled with the adoption of a specific monitoring mechanism - although they suggest that several existing mechanisms may be used to oversee compliance with the obligations that they set forth. Nevertheless, the Norms provide that transnational corporations adopt, disseminate and implement internal rules of operation in compliance with the Norms, that they periodically report on and take other measures fully to implement the Norms, and that they incorporate these Norms "in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms" (Principle 15).

The universal formulation of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights codifies the obligations that are already incumbent on those enterprises under international law. This clarification of existing obligations might serve as a source of inspiration for European Union initiatives[62]. In view of the existence of wide disparities between the legislations currently in force in the Member States with regard to corporate responsibility for human rights, both as regards the activities carried out on the territory of Member States and activities carried out in third countries, directly or through the establishment of branches with a distinct legal personality, and the risk of distortion of competition within the common market created by such a disparity, Article 95 EC constitutes the appropriate legal basis for the adoption of a Directive transposing these Norms with regard to corporations domiciled in a Member State of the Union. Alternatively, Articles 31, e), and 34 TEU should not be ruled out as a possible legal basis for the adoption of a Framework Decision providing that Member States criminalize serious infringements of human rights committed by corporations having their registered office, principal place of business or centre of operations in a Member State of the European Union, irrespective of where these infringements have been committed[63], and without prejudice to the possibility of

[60] E/CN.4/Sub.2/2003/12/Rev.2 (2003) and, for the commentary (26 August 2003), (2003)E/CN.4/Sub.2/2003/38/Rev.2 (2003). The text has been submitted for approval at the next session of the United Nations Human Rights Committee (March-April 2004).

[61] See Communication from the Commission concerning Corporate Social Responsibility, COM(2002) 347 of 2/7/2002.

[62] The European Parliament wishes to receive proposals in this connection: Resolution on EU standards for European Enterprises operating in developing countries: Towards a European Code of Conduct (A4-0508/98) (rapp. R. Howitt), 15 January 1999, OJ C 104 of 14/4/1999, p. 180, specifically § 11.

[63] We should not forget that the European Commission could have challenged the broad interpretation of Article 31 TEU, which sometimes encroaches on the powers granted to the European Community under the EC Treaty. See for example the Amended proposal for a Directive of the European Parliament and of the Council on the

involving the civil or criminal liability of the natural persons who are directly responsible for the violations[64]. Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law[65] could serve as a useful model, not only for the broad interpretation that this Framework Decision gives to Article 31, e) TEU, but also for the way it combines the liability of natural persons with that of legal persons, and the wide-ranging jurisdiction over serious environmental offences which it calls upon the Member States to establish for their authorities, in such a way as to avoid that natural or legal persons would escape prosecution by the simple fact that the offence was not committed in their territory. Furthermore, this instrument refers to the Convention on the protection of the environment through criminal law, adopted on 4 November 1998 by the Council of Europe. Here the European Union expresses its willingness to contribute to the implementation of international environmental law. The adoption, during the period under scrutiny in the present report, of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector[66] provides another relevant comparison, since this instrument was adopted on the basis of Articles 29 and 31, e), EU, and encourages the Member States to take the necessary measures to establish their jurisdiction where the offence has been committed by one of their nationals or for the benefit of a legal person that has its head office in their national territory (Article 7 § 1, b) and c)).

In its Resolution of 6 February 2003 on corporate social responsibility[67], the Council encourages « facilitating convergence and transparency of CSR practices and tools, which should, inter alia, build on the fundamental ILO Conventions and on the OECD Guidelines for Multinational Enterprises, as minimum common standards of reference ». However, while reaffirming the voluntary nature of CSR, the Resolution also states that « CSR is behaviour by businesses over and above legal requirements, which should continue to be properly enforced ». The adoption of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights may signify that time has now come to act.

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These examples could be multiplied. They illustrate the advantage there would be in better indexing the policy of the European Union in the field of fundamental rights – i.e., the exercise by the Union of the powers which the Member States have attributed to it, in the limits of those attributed powers, and, where the powers are shared with the Member States, taking into account the principles of subsidiarity and proportionality, in order to promote fundamental rights – on the developments of the international law of human rights, despite the fact that the international law of human rights is directed to the Member States rather than to the Union as such. It is time to move away from a conception of the international obligations of the Member States in the field of human rights which see these obligations simply as imposing limits to the Union, which it must respect in order to avoid situations where conflicts would arise between those obligations of the States and the requirements of Union law. On the contrary, where these international obligations develop, the institutions of the Union must ask themselves which initiatives they could take, to favour their implementation by the Member States, where the Union has the required powers to act and where exercising these powers could truly add value to the protection of fundamental rights in the Union. This

Protection of the Environment through Criminal Law (presented by the Commission pursuant to Article 250 (2) of the EC-Treaty) (COM(2002)544 final, OJ *C 020 E, 28.1.2003, p. 284, praa. 3.4).*

[64] See Article I, 5, of Recommendation R(88)18 of 20 October 1988 of the Committee of Ministers of the Council of Europe to Member States concerning liability of enterprises having legal personality for offences committed in the exercise of their activities.

[65] OJ L 029 of 5.2.200,3 p. 55 – commented under Article 37 of the Charter in this Report.

[66] OJ L 192 of 31.07.2003, p. 54.

[67] 2003/C 39/02, OJ C 39, 19.2.2003, p. 3.

change of perspective is what the emergence of a human rights policy in the EU. Fundamental rights ought to be respected, of course: the Charter of Fundamental Rights simply confirms this obligation. However fundamental rights also should be promoted, insofar as the institutions of the Union remain, by ensuring that they are effectively guaranteed, in the limits of the powers which have been attributed to them[68].

II.3. Preventing the risk of violation of fundamental rights in the implementation of Union Law

The notion of positive obligation, which has been used here to describe what may result from a better integration of the international law of human rights in the activities of the Union, is at the centre of this report. The report examines the activities of the institutions of the Union under the obligations imposed by the Charter of Fundamental Rights, during the year 2003. The report finds that, with few exceptions, the violations of the Charter may result not *directly* from the activities of the Union – as would be the case in particular if the secondary law of the EU were to impose to the Member States to commit violations of fundamental rights –, but rather could originate in the margin of appreciation which is left to the Member States by EU instruments. Directive 2003/86/EC of 2 September 2003 on the right to family reunification, for instance, offers no guarantee that in adopting measures for its implementation, the Member States will not commit direct discrimination based on sexual orientation or indirect discrimination against women; neither does it exclude that, while conforming to the directive, the Member States will be acting in violation of the right to respect for family life. Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air is not sufficiently explicit about the obligation of the State to refuse to assist a removal by air of a third country national in situations where he/she would run a real risk of ill-treatments in the State of destination. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time comprises a large number of exceptions which the States to which it is addressed may seek to use, and it cannot be excluded that in using these exceptions, the States will be acting in violation of Article 2(1) and (3) of the European Social Charter. The present report details these concerns and other concerns of similar nature. What they have in common, is that they locate the risk of violations in the way Member States will implement Union law: the risk is located, rather than in what Union law prescribes, in the situations where it has remained silent. How should this be appreciated? Which solutions should be envisaged?

The limits which derive from the attributed character of the powers of the Union/Community should not be seen as standing in the way of the affirmation of such positive obligations. The Union/Community would be imposed such a positive obligation to adopt measures only to the extent that the constituting treaties provide the necessary powers to this effect[69]. Once the Community/Union has intervened in a particular field, the question of powers has been answered in the affirmative. What matters then, is that in exercising these powers, the

[68] Although human rights probably could not be considered as an objective of the Community at the present stage of developement of EC law, despite the ambiguity on this point of the Opinion 2/94 of the European Court of Justice (Accession of the European Community to the European Convention on Human Rights, ECR p. I-1759, Recital 32, and on this see the Report on the situation of fundamental rights in the European Union and its Member States in 2002, cited above, p. 15) – the draft Treaty establishing a Constitution for the Union does not list "fundamental rights" among the objectives of the Union (Article 3) –, this does not mean that, *where the conditions of exercise of the powers of the Community/Union are realized*, the objective to promote fundamental rights would not constitute a legitimate objective.

[69] This paraphrases deliberately the presentation which was made of the same question by the Working Group II "Incorporation of the Charter/accession to the ECHR" within the European Convention. See the Final Report of the Working Group II, WG II 16, CONV 354/02, 22 October 2002, p. 13, about the consequences which could result from the accession of the Union to the European Convention on Human Rights : « …the Union would be imposed a 'positive' obligation to act to conform itself to the ECHR only to the extent that the treaty comprises the powers authorizing it to act ».

Community/Union fully respects the Charter of Fundamental Rights. It is not sufficient in this respect that the rights and principles of the Charter are not violated. It should also be ensured that, in the field in which the Community/Union has intervened, it does not tolerate such violations by the Member States acting as a decentralized European Administration. The European Court of Human Rights considers that a State whose internal legal order does not prohibit violations of the rights and freedoms protected by that instrument when they are committed by federated entities or private parties, in fact is violating the European Convention on Human Rights, because such violations have at least their indirect source in the failure of the legislator, a State organ, to take appropriate measures[70]. As an instrument for the protection of human rights, the Charter of Fundamental Rights of the European Union should give rise to obligations which are to be identified according to the same criteria. Moreover, as the Charter should be interpreted in accordance with the principles of international law, in particular those relating to the international protection of human rights, the extent of the positive obligations it may impose should be identified on the basis of those principles and the instruments which codify them[71].

It therefore should be verified whether, when it has intervened in particular field, the European legislator has indeed adopted all the measures which could reasonably prevent the risk of a violation of fundamental in the field in question. It is true that whenever it intervenes in a field where it does not have an exclusive power, the Community may only act, in conformity with the principles of subsidiarity and proportionality, if and to the extent that the objectives of the action envisaged cannot be sufficiently realized by the Member States and can therefore, because of the scope or the effects of the action envisaged, be better realized at the level of the Community; and only insofar as its action does not exceed what is necessary to fulfil the objectives of the EC Treaty (Article 5 EC). Moreover, the principles of subsidiarity and proportionality regulate not only the content, but also the form of Community intervention, so that directives should be preferred to regulations, and framework directives preferred above more detailed directives[72]. But the interpretation of these principles must take into account the obligations imposed by the Charter of Fundamental Rights. It would be incorrect to consider that the Community is violating these principles in ensuring more completely, in the instruments it adopts, that the Member States will respect the fundamental rights of the Charter in the course of their implementation. In addition, the *general* obligation which is imposed on the Member States to respect fundamental rights when they act in the field of application of Union law[73] is not a substitute for ensuring, in each *specific* situation, that these rights will indeed be fully respected by the Member States in this framework. Indeed :

- Where a European legislative instrument provides an exception for the benefit of the Member States, this creates the impression that when they will be acting in conformity with the exception which is provided, within the limits it imposes, they

[70] See, e.g., Eur. Ct HR, *Young, James et Webster v. United Kingdom* judgment of 13 August 1981, Series A n° 44, § 89 ; Eur. Ct. HR, *X and Y v. the Netherlands* judgment of 26 March 1985, Series A n°91, § 23 ; Eur. Ct. HR, *Lopez Ostra v. Spain* judgment of 9 December 1994, Series A n° 303-C, § 51 ; Eur. Ct. HR, *A v. the United Kingdom* judgment of 23 September 1998.

[71] Comp. Eur. Ct. HR., *Iglesias Gil and A.U.I. v. Spain* judgment of 29 April 2003 (Appl. n° 56673/00), §§ 51-52.

[72] *Protocol on the application of the principles of subsidiarity and of proportionality*, annexed to the EC Treaty by the Treaty of Amsterdam, para. 6.

[73] This concerns not only the provisions of the Charter of Fundamental Rights (Article 51(1) of the Charter), but also the fundamental rights which are part of the general principles of Union law and the respect of which the European Court of Justice controls on the basis of Article 220 EC, in all situations where the Member States implement European law (see, e.g., the judgment of 13 July 1989 in Case 5/88, H. Wachauf, (1989) ECR 2609 (Recital 19) ; or the judgment of 3 December 1992 in Case C-97/91, *O. Borelli SpA*, (1992) *ECR* 6313 (Recitals 14 and 15)), where they make use of an exception provided by the treaties (judgment of 28 October 1975, Case 36/75, *Rutili*, (1975) *ECR* 1219 (Recital 32) ; judgment of 18 June 1991, Case C-260/89, ERT, (1991) *ECR* I-2925 (Recital 43)) or by the case-law of the European Court of Justice (judgment of 26 June 1997, Case C-368/95, *Familiapress*, (1997) *ECR* I-3689, Recitals 18 and 19 ; judgment of 12 June 2003, Case C-112/00, *Schmidberger*, Recitals 71 to 78).

will be per definition acting in conformity with the requirements of fundamental rights. This however will not always be the case. Where such an impression risks being created, it should be removed.

• The general obligation imposed on the Member States to respect the fundamental rights when they act in the field of application of Union law is verified *post hoc*, and may be subjected to the control of the European Court of Justice, in the limits of its jurisdiction. But a control *ex ante*, of a preventive nature, imposing on the legislator of the Union to act with precaution and to better delineate the margin of appreciation of the States with respect to the requirements of fundamental rights, offers better guarantees of legal certainty. Moreover, this may avoid having to request the European Court of Justice to intervene, and this avoids making the effectiveness of the protection of fundamental rights depend on the scope of the jurisdiction of the European Court of Justice.

• The norms relating to fundamental rights are generally formulated in vague and general terms. The intervention of the European legislator offers an opportunity to examine, in a more specific and contextualized, the requirements which derive from those norms. In the course of such specification moreover, the interpretation given to those norms by jurisdictions or by expert committees should be taken into account, whose work however may be underestimated or insufficiently known because of the specialized character of their task of clarification of the States' obligations. Such a specification, by the European legislator, of the obligations which are imposed on the Member States with respect to fundamental rights in the implementation of Union law, may limit the risk that these rights are violated by the national authorities, even where such violations are to be explained by the sheer lack if knowledge about the norms which regulate a particular question. Another advantage of this clarification occurring at the level of the Union is that this limits the converse risk, that the authorities of the Member States offer a particularly large interpretation of the requirements of fundamental rights, thereby – under the pretext of respecting these rights – escaping or limiting their obligations under EC or EU Law.

• Finally it should be considered that a gap exists between the situation where an instrument of secondary EU/EC Law risks being annulled or found by the European Court of Justice to be invalid, on the one hand, and the situation where, without running this risk, a legislative act of the Union/Community could have ensured a better protection of fundamental rights, by detailing, in a more detailed manner, the fundamental rights requirements which are imposed on the Member States when they implement such an act. Where the European legislator has clearly violated his duty to protect, for example by adopting an act which provides for an exception for the benefit of the Member States which these would not be able to rely upon unless in violation of fundamental rights[74], the said act could be challenged by a direct action for annulment of its validity contested in a referral for a preliminary ruling. In this case, it would not seem to matter that the member States simply have been afforded the possibility to make use of the exception, without being obliged to do so: the act in question has indeed made possible the violation of fundamental rights, and this alone may suffice to find it being invalid.

[74] This could be the case, for instance, of Article 14(2) of Directive 2003/86 of 22 September 2003 on the right to family reunification, which says that « Member States may decide according to national law the conditions under which family members shall exercise an employed or self-employed activity. These conditions shall set a time limit which shall in no case exceed 12 months, during which Member States may examine the situation of their labour market before authorising family members to exercise an employed or self-employed activity. ». It appears difficult to conceive of a use of this clause by the Member States which would not result in an indirect discrimination against women, in violation of the general principles of Community law and of Article 23 of the Charter of Fundamental Rights.

Of course, not all the violations committed by the Member States in the implementation of EU/EC Law could be imputed to the legislator of the Union: the positive obligation imposed on the European legislator must be understood reasonably, and it particular, it should take into account the fact that the instruments adopted at the level of the European Union will have to apply to very diverse situations, which per necessity will lead them to use vague and flexible notions. This has been adequately underlined by the European Court of Justice in the judgment it delivered on 6 November 2003 in the case of *Lindqvist*[75]. As Ms Lindqvist, who had been convicted for having violated the Swedish legislation on the protection of personal data adopted in implementation of Directive 95/46/EC, argued that this Directive could be in violation of freedom of expression, as it does not define itself where the balance should be located between freedom of expression and the right to privacy, the Court answers that the Community legislature may not always be capable of deciding in advance on all the contentious situations which could present themselves. The Court notes that the provisions of Directive 95/46/EC "are necessarily relatively general since it has to be applied to a large number of very different situations […] the directive quite properly includes rules with a degree of flexibility and, in many instances, leaves to the Member States the task of deciding the details or choosing between options » (Recital 83), and therefore, although « in many respects, the Member States have a margin for manoeuvre in implementing Directive 95/46 », nevertheless « there is nothing to suggest that the regime it provides for lacks predictability or that its provisions are, as such, contrary to the general principles of Community law and, in particular, to the fundamental rights protected by the Community legal order » (Recital 84).

It is perfectly common that the obligation to protect fundamental rights is defined as having to be "reasonably" understood: such an obligation is an obligation of means, rather than of result. Nevertheless, in obliging the European legislator to guarantee a high degree of protection of fundamental rights in the instruments it adopts, to remove *to all the extent possible* the risk of violation of these rights in the implementation of Union law by the Member States, the global level of fundamental rights will be improved.

Thus, to impose to the institutions of the Union an obligation to prevent the risk of violations of fundamental rights in the implementation of European law by the Member States, by a more detailed specification of the requirements derived from fundamental rights which the States must respect, would have a number of advantages. Two institutional translations could follow. First, this would require that during the legislative procedure, the institutions systematically identify the risks of fundamental rights violations the States could commit in the implementation of the instrument in preparation, and that they prevent this risk from materialising by inserting the appropriate clauses in the instruments they adopt. Since March 2001, the Commission systematically accompanies with a reference to the Charter the instruments which could present a link to fundamental rights. This undertaking to verify the compatibility of the legislative proposals from the Commission with the Charter should translate into the precise identification of the requirements of fundamental rights in each specific domain, and the reformulation of these requirements in the instrument proposed for adoption by the European legislator[76]. Purely general statements, for instance by a simple reference to the applicable international instruments, are of limited usefulness; instead, an effective prevention of violations would suppose a more detailed description of the requirements which follow from these instruments, to avoid the risk that the States will only

[75] Case C-101/01.

[76] This would imply for instance that a directive on the right to family reunification restate the relevant norms of the international law of human rights in this field, defining clearly which limits the States may not ignore in the implementation of the directive; or that a directive on on assistance in cases of transit for the purposes of removal by air makes explicit the exceptions to the obligation to assist imposed on the State of transit in such cases, which are imposed by the obligation for that State to respect internationally recognized human rights, including the interpretation thereof, for instance by the UN Committee Against Torture; or that the Working Time Directive details the rules which follow from the reading by the European Committee on Social Rights of the European Social Charter.

conform to those requirements after being incited to do so following a judgment of the Community judicature. Second, the legislative instruments adopted within the Union provide, more frequently than was previously the case, a follow-up of their application, so that these instruments may be revised in the light of the experience gained in the course of this application[77]. The question of the respect of fundamental rights in the application of the instruments which such reports seek to evaluate must be seen as a priority. If it appears that difficulties have occurred, because of the lack of precision of these instruments on the fundamental rights requirements relevant to their implementation, this should then be remedied. The templates of such reports should be conceived to effectively fulfil this function: these templates should comprise an evaluation specifically on the fundamental rights impact, and this should be done with specialized tools. In fact, many of the recommendations made in this report are deliberately situated in the perspective of such evaluation mechanisms of existing instruments.

The finding that the risk of violations of fundamental rights in European law essentially reside in the manner in which the Member States will ensure its implementation, produces a last consequence. Where such a violation occurs in the framework of the EC Treaty, it falls upon the Commission, in conformity with the role Articles 211 and 226 EC attribute to it, to examine whether it should launch infringement proceedings against the Member State whose implementation of Union law, in that respect, is not satisfactory. It would not be justified to limit to the sole hypothesis of Article 7 EU the possibilities for the European Commission to react to the violation by a Member State of the fundamental rights which belong to the common values on which the Union is founded. Where such a violation occurs in the field of application of Community law, it is, in the first instance, a violation of EC Law itself; and it must be treated accordingly, and not as an exceptional situation, distinct for instance from the banal hypothesis of a directive which has been incorrectly transposed[78]. Where the violation is situated in the implementation of an instrument adopted under titles V or VI of the Treaty on the European Union, the Commission is not recognized the power to launch an action against the Member State in violation of its obligations under the TEU, for example where a Framework Decision adopted under Articles 29 and following EU has been inadequately transposed. Article 35(7) EU provides that each Member State may introduced such infringement proceedings against another Member State, where no agreement could be found within the Council after a period of six months. This alternative to infringement proceedings as they exist under the EC Treaty is not satisfying. In the absence of mechanisms ensuring that the implementation by the Member States of instruments adopted under Titles V and VI EU will be adequately monitored, therefore, it is even more important that these instruments

[77] See, e.g., Article 17 of 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; Article 19 of 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; Article 17 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.5.2001, p. 43) ; Article 34(2) of the Framework Decision of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JAI, OJ L 190 of 18.7.2002) ; Article 33 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281 of 23.11.1995, p. 31); or Article 15 of the new instrument proposed in the Commission proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to, and the provision of, goods and services (COM(2003)657 final).

[78] In the case of *Lindqvist* referred to above, the European Court of Justice insists on the obligation imposed on the national authorities, in the implementation of Community law, especially with regard to fundamental rights: « it is for the authorities and courts of the Member States not only to interpret their national law in a manner consistent with Directive 95/46 but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law, such as inter alia the principle of proportionality » (Recital 87).

include from the early stages, since the moment of their initial conception, the requirement of a high level of protection of fundamental rights.

III. CONCLUSION

The establishment between the Member States of the Union of an area of freedom, security and justice, does not mean that the protection of fundamental rights must be ensured everywhere in an equivalent manner. Diversity itself is a source of learning for all, and can contribute to the progress of rights. Three reservations should be made, however. First, where the intervention of the Union – in the limits imposed by the principle of attributed powers – could facilitate the compliance by the Member States with their international undertakings, the opportunity of such an intervention must at least be carefully considered: although the Union is not bound itself, in the international legal order, by the same instruments – also this report calls for a renewed reflection on that question (hereabove, II.1.) –, it cannot remain passive in situations where the fact that the Member States share a common area cuts through their efforts to better conform themselves the international instruments for the protection of human rights to which they are parties (hereabove, II.2.). Second, in the fields where the institutions of the Union have not acted to define a harmonized or a minimum level of protection of fundamental rights, by lack of powers or by political choice, at least should they closely monitor the compliance with fundamental rights of the Member States, when they act in the field of application of Union law. Anchoring fundamental rights in the EU legal order requires, at a minimum, that the violations of these rights which the national authorities could commit in the implementation of Union law be treated with the same severity as would be, for instance, the inadequate transposition of directives which result in distortions of competition between the Member States or in obstacles to trade within the internal market. Third, in the fields where the institutions of the Union intervene, they must seek to ensure a high level of protection of fundamental rights, rather than to content themselves with a vague and general requirement that these rights be respected and with the control, in the last instance, which the Court of Justice can perform within the boundaries of its jurisdiction. This would translate into a better prevention of the risks of violations by a more systematic clarification of the limits which the Member States cannot ignore when they implement Union law. The advantages of such an approach have been described (hereabove, II.3.). This report will seek to identify what would be gained by such an approach, in the analysis it presents of the activities of the Union in the year 2003.

CHAPTER I : DIGNITY

Article 1. Human dignity

For a presentation of the debate concerning the Community funding of research on human embryonic stem cells, the reader is referred to the commentary of Article 13 (Freedom of the arts and sciences). No other significant evolution has taken place during the period under scrutiny.

Article 2. Right to life

The integrated control of the external borders of the Union

The area where the right to life is under the most serious threat is in the operational measures taken to ensure the control of the external borders of the Union. In May 2002, a Communication of the Commission had announced its intention to propose a European Corps of Border Guards, as well as an External borders practitioners' common unit entrusted with managing operational co-operation at the external borders of the Member States[79]. It now has proposed to build upon the previous experience of the Common Unit of external borders practitioners to create a European Agency for the Management of Operational Co-operation at the External Borders, also entrusted with the co-ordination and organisation of return operations of Member States and with the identification of best practices on the acquisition of travel documents and removal of third country nationals from the territories of the Member States[80]. The Council on Justice and Home Affairs of 27-28 November 2003 welcomed this initiative, noting in particular in its conclusions that « the Agency should facilitate the operational cooperation between Member States and third countries, in the framework of the European Union external relations policy in the Justice and Home Affairs field »[81] - an aspect of the tasks of the Agency which the draft regulation proposed by the Commission does not allude to[82]. This development should be related to the conduction of a "Feasibility study on the control of the European Union's maritime borders" by Civipol Conseil to the Commission[83] as well as to the adoption of a "Programme of measures to combat illegal immigration across the maritime borders of the European Union"[84].

The relationship of these developments to the right to life is too well known to emphasize. The Civipol feasibility study notes (at p. 15):

> On the maritime borders of Spain and Italy, there were a hundred accidental deaths a year for about forty thousand crossings in 2001 and 2002. The increasing deterrent effective of improving the surveillance and control mechanisms of the Spanish and Italian authorities on the Straits of Gibraltar and the Sicilian Channel is shifting the focus towards riskier passages, the Canary Islands Channel and the Gulf of Sirte. There were consequently a number of serious accidents in the first half of 2003 and an estimate of 400 drowned does not seem exaggerated. On the Greek-Turkish border, the absence of figures does not necessarily mean that there were no accidents.

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[79] Communication from the Commission to the Council and the European Parliament - towards integrated management of the external borders of the member states of the European Union, COM(2002)233 final.

[80] Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders, COM(2003)687 final, of 11.11.2003. The question of expulsion of third-country nationals will be dealt with under Article 19 of the Charter.

[81] 2548th Council meeting - Justice and Home Affairs - Brussels, 27 and 28 November 2003 (PRES/03/334).

[82] See also the Programme of measures to combat illegal immigration across the maritime borders of the European Union (Doc. 13791/03, FRONT 146, COMIX 631, 21.10.2003), para. 29 and para. 33.

[83] Doc. 11490/1/03, Rev. 1, FRONT 102, COMIX 458, 19.9.2003. This study was prepared for the Commission upon request of the JAI Council.

[84] Doc. 13791/03, FRONT 146, COMIX 631, 21.10.2003.

The Programme of measures to combat illegal immigration across the maritime borders of the EU envisages the possibility of inspecting ships on the high seas which are suspected to bring illegal migrants to the a port located in the EU. Although the Montego Bay Convention on the Law of the Sea normally does not authorize such inspections by a State other than the flag State, the Programme notes that such inspection is possible under that Convention a) where the vessel has no nationality or its nationality is in doubt (Article 110) or b) where the flag State has consented to such inspection, either by writing or orally, in which case "the two States can also determine the subsequent action to be taken with regard to any illegal immigrants found on board" (par. 18). In fact, both the possibility of such interceptions at sea and the cooperation with third States are essential to the programme of measures proposed, as these include the exercise of "pre-border" checks and "joint processing of illegal immigrants intercepted at sea" (par. 26). The Programme proposes, inter alia, "providing non-member countries with technical and organisational assistance in stepping up surveillance of coasts from which illegal migrants leave", "joint sea patrols carried out by the navies of Member States and or non-member countries concerned by illegal migration flows", "conducting naval operations to intercept and restrain vessels carrying illegal immigrants", "ordering intercepted vessels into safe ports", "arranging for immigrants found on board vessels to be processed and for traffickers to be brought to justice".

It is premature to study in detail these proposals. However, the requirements imposed by the European Convention on Human Rights on the Member States of the European Union should be recalled, as the proposals which this rapporteur has seen appear to underestimate the difficulty of fully complying with those requirements in the organisation of such a protection of the maritime borders from illegal immigration. States of course exercise a sovereign control on whom they wish to admit on their territory. The European Court of Human Rights has stated that, when they refuse access to their territory, they are not violating the "freedom to leave any country, including his own", which Article 2 of Protocol 4 ECHR recognizes[85]. However, any measure they adopt in exercising this power must comply with their international obligations, especially human rights. It is of course evident that States must protect the right to life of persons under their jurisdiction, and this would appear to apply to the situation of a boat being intercepted at sea: when making such interception, the State authorities are obliged to take all the necessary measures to avoid, in particular, drowning[86]. Moreover, even where they act outside the national territory, State agents may engage the international responsibility of the State of which they are the organs[87]: this is the case, in particular, where the effectively exercise a control on a person, acting as if on the basis of sovereign powers[88]. It should be clear therefore that, whether they act "preventively", intercepting a vessel on the high seas for instance to return immediately the vessel to its port of origin if it appears that it has illegal candidate immigrants on board, the State authorities are to comply with precisely the same obligations as those imposed on them when third-

[85] See Eur. Ct. HR, *Xhavara and Others v. Albania and Italy*, Appl. n° 39473/98 (inadmissibility decision of 11 January 2001).

[86] See Eur. Ct. HR, *Xhavara and Others v. Albania and Italy*, cited above. This case concerned the deaths of a number of Albanians seeking to enter Italy illegally by boat, after that boat was intercepted and sank.

[87] See Eur. Ct. HR, *Halima Musa Issa and Others v. Turkey*, Appl. n° 31821/96 (admissibility decision of 30 May 2000) (Turkish Army intervening against shepherdesses in Northern Iraq).

[88] Voy. Cour eur. D.H. (1ière section), arrêt *Ocalan c. Turquie* (req. n° 46221/99) du 12 mars 2003, § 93, à propos de l'arrestation par les autorités turques du requérant, alors qu'il se trouvait encore en territoire kenyan : « Le requérant, dès sa remise par les agents kenyans aux agents turcs, s'est effectivement retrouvé sous l'autorité de la Turquie et relevait donc de la « juridiction » de cet Etat aux fins de l'article 1 de la Convention, même si, en l'occurrence, la Turquie a exercé son autorité en dehors de son territoire. La Cour estime que les circonstances de la présente affaire se distinguent de celles de l'affaire *Bankovic et autres* [bombardement de la radio-télévision serbe à Belgrade par les forces de l'OTAN : la Cour européenne de droits de l'homme avait refusé de considérer que les requérants, qui se plaignaient notamment d'une atteinte au droit à la vie, se trouvaient sous la « juridiction » des membres de la coalition, au sens de l'article 1er de la Convention], notamment en ce que le requérant a été physiquement contraint à revenir en Turquie par des fonctionnaires turcs et a été soumis à leur autorité et à leur contrôle dès son arrestation et son retour en Turquie ». Cette affaire a fait l'objet d'un renvoi devant la Grande Chambre de la Cour.

country nationals arrive at the national border. All their human rights must be respected. They also must have the right to claim asylum upon being intercepted. On 31 October 2003, the Committee on Migration, Refugees and Population of the Parliamentary Assembly of the Council of Europe unanimously approved a draft recommendation « Access to assistance and protection for asylum seekers at European seaports and coastal areas »[89]. It is useful to reproduce its operative part here, although par. j) of the draft recommendation is the most relevant to the question under examination here. The draft recommendation invites the Committee of Ministers of the Council of Europe to call upon the member states to:

> *a*. ensure that those who wish to apply for asylum at seaports and coastal areas are granted unimpeded access to the asylum procedure, including through interpretation in their language or, if not possible, in a language they understand and to free and independent legal advice;
>
> *b*. ensure that every person seeking entry at seaports or coastal areas be given the possibility of explaining in full the reasons while s/he is trying to do so, in an individual interview with the relevant authorities;
>
> *c*. set up a system to ensure the permanent availability of independent and professional legal advice and representation in the field of asylum and migration at seaports and coastal areas, and monitor its quality;
>
> *d*. take full responsibility for immigration control at seaports including through the investment in methods of prevention and detection and, where necessary, the increase of police and immigration staff, working in partnership with private actors involved in seaport activities;
>
> *e*. improve international co-operation between police, judicial and immigration authorities through the exchange of intelligence and information with a view to dismantling networks of smugglers operating at European and international level;
>
> *f*. introduce harmonised criminal legislation to punish the smuggling of migrants and the trafficking of human beings;
>
> *g*. ensure that vulnerable persons such as unaccompanied minors/separated children, the elderly, the sick and pregnant women who arrive at seaports or coastal areas, even if they do not apply for asylum, be given appropriate assistance and accommodation pending their removal or the granting of legal status; in addition, unaccompanied minors/separated children should be provided with effective legal guardianship as soon as their presence comes to the attention of the authorities of a member state;
>
> *h*. establish appropriate and permanent reception structures in coastal areas and near seaports, to provide accommodation to the newly-arrived, whether they apply for asylum or not;
>
> *i.* accept responsibility for processing asylum applications of stowaways when they are the first port of call of the planned route of the ship;
>
> *j*. in the context of their responsibilities for immigration control, conduct sea patrolling operations in such a way as to fully comply with the 1951 Refugee Convention and the

[89] Doc. 10011, 5 December 2003 (rapp. F. Danieli). The draft recommendation is submitted to the Parliamentary Assembly for discussion in January 2004. This report is closed before the Parliamentary Assembly could examine the proposed recommendation. [NOTE. Since this report was completed, the Parliamentary Assembly adopted this recommendation without modification].

1950 European Convention on Human Rights, by avoiding that people are returned to countries where they would be at risk of persecution or human rights violations.

On the more specific question of patrolling operations and interception at sea, the rapporteur of the committee considers (§ 22 of the Report) that « that patrolling operations should not have the aim of diverting the vessel from the territorial waters before a screening has taken place to ascertain the nationality and identity of the passengers, as well as the reasons why they were seeking entry into a Council of Europe member state. (…) failure to do so would be an implementation in bad faith of member states' obligations under the 1951 Refugee Convention on refugee status: once a vessel is in the territorial waters of a state it is in that country. Therefore *diverting the vessel outside territorial waters would imply refusing to receive potential applications for protection from those on board, and therefore returning potential refugees*. ». The Report adds that « the interception of a vessel transporting potential illegal migrants to prevent its entry into territorial waters could be in contravention of Council of Europe member states' international obligations when there is a risk that, by so doing, those on board may be returned to a country where they could face persecution under the 1951 Refugee Convention or human rights violations under the European Convention on Human Rights. Besides, a situation which should be avoided in all circumstances is that the vessel is left 'in orbit', because no state accepts the entry of the vessel in its territorial waters and the subsequent screening of immigration applications, including potential asylum applications. This situation is in breach of fundamental principles of humanity and dignity of the human being. » (§ 23) The rapporteur therefore considers that « initiatives such as Ulysses [joint patrolling in the Mediterranean by Spain, France, Italy, Portugal and the United Kingdom to intercept vessels transporting irregular migrants], as well as other future initiatives of joint patrolling, should be closely monitored to avoid that they are conceived as a sheer barrier to the entry of all those who try to seek entry into a country by sea in a clandestine manner, including potential asylum seekers » (§ 26).

Prevention of violence against children, young people and women, and protection of victims and groups at risk

The assessment of the first phase of the Daphne programme (2000-2003), which was completed on 31 December 2003, has made it possible to highlight the added value which the Community initiative represents in the support, co-ordination and exchange of experiences aimed at preventing violence against children, young people and women, and the protection of victims and groups at risk. This assessment is shared by the European Parliament, which has asked for an increase in the budget earmarked for the second phase of the programme[90] – planned for a five-year period from 1 January 2004 (2004-2008) –.

The objectives of the programme are still the same, although its instruments will be somewhat modified in the proposal for a decision which the Commission has submitted[91]: in particular, more ambitious projects may be considered for Community support, while the proposed programme may also develop - through complementary actions such as studies, seminars, formulation of indicators, or meetings of experts (Article 2 § 2, b, of the amended proposal for a decision) - the dimension of sharing and disseminating the knowledge contained in the programme, with a view to mutual instruction on the good practices to be followed with a view to the prevention of violence. Article 2 §1 of the decision proposed by the Commission

[90] Resolution of 4 September 2002 (2001/2265(INI)).

[91] Proposal for a Decision of the European Parliament and of the Council establishing a second phase of a programme of Community action (2004-2008) to prevent violence against children, young people and women and to protect victims and groups at risk (the Daphne II programme), COM(2003)54 final of 4/2/2003; subsequently, after receipt of the opinion of the European Parliament formulated in a resolution of 3 September 2003, Amended Proposal for a Decision of the European Parliament and of the Council establishing the second phase of a programme of Community action (2004-2008) to prevent violence against children, young people and women and to protect victims and groups at risk (the Daphne II programme), COM(2003)616 final of .

undoubtedly contains the most precise formulation of the programme's objectives and, consequently, of the actions that it is designed to support. The aim of Daphne II "shall be to prevent and combat all forms of violence against children, young people and women by taking preventive measures and by providing support for victims, including in particular the prevention of future exposure to violence, and to assist and encourage non-governmental organizations and other organizations active in this field".

On 1 December 2003, the Council on Employment, Social Policy, Health and Consumer Affairs adopted the Daphne II programme (2004-2008)[92], and approved a proposal for a budget of 50 million euros for the five years of the programme.

Article 3. Right to the integrity of the person

Combating trafficking in human organs and tissues

Article 3 § 3 of the Charter contains a prohibition on making the human body and its parts as such a source of financial gain. This provision faithfully adopts the wording of Article 21 of 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), concluded in 1997 within the Council of Europe[93]. On 24 January 2002, an Additional Protocol to this Convention, on transplantation of organs and tissues of human origin, was opened for signature by the States parties. Articles 21 and 22 of this Additional Protocol detail the prohibition contained in Article 21 of the main Convention.

It is in this context that the initiative of the Greek Republic for the adoption of a framework decision on the prevention and control of trafficking in human organs and tissues is situated[94]. The initiative finds its legal basis in Articles 29 and 31, e), EU, which is justified by including in the notion of "trafficking in human beings" trafficking in human organs and tissues[95], as well as by the observation in the Preamble that the trafficking in question "is an area of activity of organized criminal groups who often have recourse to inadmissible practices such as the abuse of vulnerable persons and the use of violence and threats" (2nd recital). In this way, it can be approached as a form of organized crime and finds a legal basis in Article 31, e), EU. As in various other instruments adopted under Title VI of the Treaty on European Union and aimed at establishing minimum rules relating to the constituent elements of criminal acts and to penalties, the Member States should provide for the penal liability of legal persons on whose behalf offences as defined by the proposed framework decision have been committed, and extend their jurisdiction to cover situations where the offence was committed by their nationals or by legal persons established on their territory.

Although there is no reason to doubt the expediency of an initiative in this field, which affords an additional illustration of the contribution that the European Union can make by the development of its criminal law to the protection of fundamental rights, we need to highlight the paradox whereby, in order to justify an intervention by the Union in the fight against organized crime, penalties defined at a particularly high minimum level are provided for[96].

[92] 2549th meeting of the Council on Employment, Social Policy, Health and Consumer Affairs in Brussels, 1 and 2 December 2003.
[93] The Convention was opened for signature by the Member States of the Council of Europe and, at the invitation of the Committee of Ministers of the Council of Europe (Article 34), for signature by non-Member States on 4 April 1997.
[94] OJ C 100 of 26/4/2003, p. 27.
[95] As does the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.
[96] The Preamble states, "It is necessary to introduce penalties on perpetrators sufficiently severe to allow for trafficking in human organs and tissues to be included within the scope of instruments already adopted for the purpose of combating organized crime" (11th recital).

The risk of an increase in severe penalties, given that an approximation of the criminal legislation of the Union Member States seems desirable, bearing in mind the cross-border dimension of this kind of offence, shows the need for a flexible approach to the powers defined in Articles 29 and 31 EU, in which the practice is already partly defined[97].

Community funding of research on human embryonic stem cells

The controversy surrounding the financing, under the 6th Framework Programme in Research and Development of the European Community, of research on human embryonic stem cells, is discussed under Article 13 of the Charter.

Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

The question of the role of the European Union in the prohibition of torture and inhuman or degrading treatment or punishment is discussed in several places in this report, in paragraphs devoted to initiatives that the Union has taken during the period under scrutiny, but which chiefly concern other provisions of the Charter of Fundamental Rights. The questions that will be raised by the coming into effect of the European arrest warrant, particularly when a person who is handed over to the State that issued the warrant is at risk of being placed in conditions that are not in conformity with Article 3 of the European Convention on Human Rights, is discussed under Article 6 of the Charter of Fundamental Rights. Questions relating to the invocation of this clause in the context of procedures for the removal of aliens are discussed under Article 19 of the Charter. The procedural guarantees aimed at limiting the risk of ill treatment, particularly during detention on remand, of persons being charged or implicated in criminal actions are examined under Article 48 of the Charter.

Article 5. Prohibition of slavery and forced labour

Combating human trafficking

The main recent initiative in the fight against human trafficking is the Framework Decision 2002/629/JHA of the Council of 19 July 2002 on combating trafficking in human beings[98], which provides that, by 1 August 2004, the Member States shall render punishable certain acts connected with trafficking in human beings[99]. This Framework Decision, with its difficulties of interpretation that might be raised by the use of terms such as "abuse" and "vulnerability" to characterize the offence, has already been discussed in the previous report of the Network[100]. For the period under scrutiny, we should nevertheless point out that the Commission has decided to set up a consultative group called "Experts Group on Trafficking in Human Beings"[101], consisting of twenty individuals specially qualified in this field, proposed by the governments of the European Union Member States (including Candidate Countries), as well as by international, inter-governmental and non-governmental organizations active in preventing and combating trafficking in human beings. The mission of

[97] It is actually remarkable that Article III-172 of the Draft Treaty establishing a Constitution for Europe supplies, besides a list of the areas of crime where cooperation in the field of criminal law is possible, a functional criterion introducing greater flexibility in the identification of the powers of the Union, namely "areas of particularly serious crime with cross-border dimensions resulting from the nature or impact of such offences or from a special need to combat them on a common basis".
[98] OJ L 20 of 1/8/2002, p. 1.
[99] This framework decision is founded on a conventional definition of trafficking in human beings, and therefore does not include trafficking in human organs and tissues. Reference is made on this point to the commentary under Article 3 of the Charter.
[100] *Report on the situation of fundamental rights in the European Union and its Member States in 2002*, pp. 63-65.
[101] Commission Decision 2003/209/EC of 25 March 2003 setting up a consultative group, to be known as the "Experts Group on Trafficking in Human Beings", OJ *L 079 of 26/3/2003, p. 25.*

this Group is to issue opinions or reports to the Commission at the latter's request or on its own initiative, taking into due consideration the recommendations set out in the Brussels Declaration that was adopted following the "European Conference on Preventing and Combating Trafficking in Human Beings - Global Challenge for the 21st Century", which was held from 18 to 20 September 2002. One of those recommendations was precisely the setting up of such an experts group. The first task of the experts group will be to submit, on the basis of these recommendations, a report to assist the Commission with a view to launching further concrete proposals at European level.

Moreover, a Council Resolution of 20 October 2003 on initiatives to combat trafficking in human beings, in particular women[102], which in this respect quotes Article 5 § 3 of the Charter of Fundamental Rights, by which "Trafficking in human beings is prohibited", calls upon the Member States to ratify the Palermo Protocol of 2002 to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, and also recommends the use of Community structural funds - European Social Fund and European Regional Development Fund - to financially support actions to provide assistance to victims as well as to undertake prevention and facilitate the social and economic integration of victims of human trafficking. According to the Resolution, the Member States must "support and protect victims in accordance with national law in order to make it possible for them to return safely to their countries of origin or to receive adequate protection in their host countries, in the context of measures supported through the Structural Funds and Community Programme".

Naturally, in order to facilitate the fight against human trafficking, it is essential that the victims can make it easier through their testimony to take legal action against the perpetrators, and that they do not hesitate to denounce these perpetrators for fear of immediate removal to their country of origin. On 25 November 2003, the Council on Justice and Home Affairs reached an agreement[103] on a directive providing for the issue of a residence permit to nationals of third countries who are victims of human trafficking and who cooperate with the competent authorities[104]. The Directive provides for the issue of a residence permit for a renewable term of 6 months to persons who were the victims of action to facilitate illegal immigration or trafficking in human beings, provided that they cooperate with the competent authorities. Such a residence permit will allow them to stay legally on the territory of the Member State concerned during the relevant proceedings. The victims must also receive appropriate assistance from the authorities.

This development fits into the Community acquis which also will be developed and enriched through the conclusion and ratification of international instruments adopted in the field of organized crime. The Convention against transnational organised crime, which was adopted by the General Assembly of the United Nations on 15 November 2000, entered into force on 29 September 2003. It was signed in Palermo on 12 December 2000 by the European Community, which actively participated in the negotiations leading to its adoption. The Convention is accompanied by three Protocols, two of which – a protocol to prevent, suppress and punish trafficking in persons, especially women and children (Trafficking Protocol) and a protocol against the smuggling of migrants by land, air and sea (Smuggling Protocol) – were signed by the European Community on the same date as the Convention[105]. These instruments

[102] OJ C 260 of 29/10/2003, p. 4.
[103] The formal adoption of this Directive will take place after a fresh consultation of the European Parliament and after the two outstanding Parliamentary reservations have been withdrawn.
[104] For the initial Commission proposal, see Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities, COM(2002)71 final, OJ C 126 E of 28/5/2002, p. 393.
[105] The Community signed the third protocol, against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition (Firearms Protocol), which was only adopted on 31 May 2001, on 16 January 2002.

impose on the States or regional organisations which are parties to adopt legislation, corresponding to certain minimal standards, which should ensure that these forms of transnational crime – including their financing by money laundering, and corruption – are effectively combated. The Commission has submitted a proposal for the ratification by the Community of the Convention against transnational organised crime as well as for the ratification of the Trafficking and Smuggling Protocols[106]. The Smuggling Protocol essentially seeks to ensure a humane treatment for migrants and respect for their fundamental rights. The parties to the Protocol undertake to punish the illicit trafficking of human beings, including the production, possession or acquisition of falsified travel or identity documents, and to consider as aggravating circumstances putting the life or security of migrants at risk or ill-treating them. The abused migrant may not be prosecuted by the State of destination. This State must moreover ensure that the conditions for the resettlement in the country of origin are adequate, in case of forced repatriation. It should also be emphasized that the Trafficking Protocol includes a saving clause stating that its provisions are without prejudice to the obligations of States under International law, including the 1951 Geneva Convention and the 1967 Protocol relating to the status of refugees and the principle of non-refoulment contained therein. As stated in the Explanatory Memorandum to the proposal of the Commission to ratify the Protocol, although the EC is not a Party to the said Convention, it is bound by its content in particular through Article 63 point 1 EC.

CHAPTER II: FREEDOMS

Article 6. Right to liberty and security

Detention of asylum-seekers

On 16 April 2003, the Committee of Ministers of the Member States of the Council of Europe adopted a Recommendation on measures for the detention of asylum-seekers[107]. The recommendation concerns the detention of asylum-seekers upon their arrival on the territory, justified in the system provided for in Article 5 of the European Convention on Human Rights for the purpose of preventing a person from effecting an unauthorized entry into the country (Article 5 § 1, f)). Basing itself on several international texts[108] and the case law of the European Court of Human Rights[109], the Recommendation emphasizes that the aim of detention is not to penalize asylum-seekers. It emerges from Article 31 of the Geneva Convention of 28 July 1951 on the status of refugees that the asylum-seeker cannot be

[106] Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the United Nations Convention Against Transnational Organised Crime, COM(2003)512 final, of 22/8/2003 ; Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime, COM(2003)512-2 final of 22/8/2003 ; Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, supplementing the United Nations Convention Against Transnational Organised Crime, COM(2003)512-3 final of 22/8/2003.

[107] Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum-seekers (adopted by the Committee of Ministers on 16 April 2003 at the 837th meeting of the Ministers' Deputies).

[108] Article 5 of the European Convention on Human Rights constitutes the main guarantee. Other texts to be taken into consideration are Article 31 of the above-mentioned Geneva Convention, Conclusion n° 44 (XXXVII) of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the detention of refugees and asylum-seekers, the Resolution on the detention of asylum-seekers of the Sub-Commission on the Promotion and Protection of Human Rights of the United Nations Commission on Human Rights, the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Deliberation n° 5 of the United Nations Working Group on Arbitrary Detention, and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

[109] Eur. Ct. H.R., *Amuur v. France,* judgment of 25 June 1996, §§ 43 et seq.

considered to have committed a criminal offence on account of his unauthorized entry into the territory, and that restrictions on his freedom of movement shall only be permitted insofar as this is necessary. According to Recommendation Rec(2003)5 of the Committee of Ministers of the Council of Europe, measures of detention of asylum seekers may be resorted to only in the following situations: when their identity, including nationality, has in case of doubt to be verified, in particular when asylum seekers have destroyed their travel or identity documents or used fraudulent documents in order to mislead the authorities of the host state; when elements on which the asylum claim is based have to be determined which, in the absence of detention, could not be obtained; when a decision needs to be taken on their right to enter the territory of the state concerned, or when protection of national security and public order so requires.

Article 7 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers in the Member States[110] provides, "When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law" (§ 3). Furthermore, asylum seekers may be obliged to reside in a specific place, either "for reasons of public interest, public order or (…) for the swift processing and effective monitoring of his or her application" (§ 2), or "to benefit from the material reception conditions" (§ 4). Detention is therefore not justified merely on account of a person seeking asylum. The explicit incorporation of this principle in a general clause, a more precise formulation in an instrument based on Article 63, first paragraph, point 1 b, EC, of the conditions which centres for the detention of asylum seekers must satisfy – notably with regard to the situation of the most vulnerable – would be particularly welcome. Besides Recommendation Rec(2003)5 of the Committee of Ministers of the Council of Europe on measures of detention of asylum seekers, special attention should be given when defining those conditions to the recommendations formulated on this issue by the European Committee for the Prevention of Torture (CPT)[111]. The text of the current proposal for a directive on asylum procedures falls short of what is required in terms of the extent of the guarantees to be given in a uniform manner to asylum seekers who present themselves to the Member States of the European Union[112].

Detention of a person with a view to his surrender to another Member State

Article 5 § 1, f, of the European Convention on Human Rights acknowledges as an admissible reason for detention the lawful arrest of a person as part of an extradition procedure. This provision justifies the deprivation of a person's liberty by the authorities of a Member State executing an arrest warrant issued by another Member State, in accordance with the provisions of the Framework Decision of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States[113]. The Member States must implement this Framework Decision by 31 December 2003 (Article 34 § 1); the mechanism will be effective from 1 January 2004 (Article 32)[114]. Thematic Observation n°1 presented by the EU Network of Independent Experts in Fundamental Rights already contains observations

[110] OJ L 31 of 6/2/2003, p. 18.

[111] These recommendations are summarized in the 7th general report of the CPT (CPT/Inf (97) 10). These recommendations emphasize in particular the need for the asylum seeker to be able to correspond with the outside world, to have access to a lawyer with whom he can speak in private, an interpreter and a doctor. The asylum seeker must be given complete information about his rights, including the rights connected with the filing of an application for asylum.

[112] Draft Article 17: "1. The Member States cannot hold a person in detention simply because he is applying for asylum; 2. When an asylum seeker is held in detention, the Member States shall provide for the possibility of a swift judicial review".

[113] 2002/584/JHA, OJ L 190 of 18/7/2002.

[114] Austria can however maintain the requirement of double incrimination until 31 December 2008 at the latest (Article 33 § 1). Moreover, there are considerable delays in the adoption of the necessary transposition measures by the Member States.

on the European arrest warrant[115]. Furthermore, in accordance with Article 34 § 4 of the Framework Decision of 13 June 2002 on the European arrest warrant, the Council in 2003 carried out an in-depth analysis of the questions raised by the transposition of the Framework Decision and the practical issues connected with its application. The present report will therefore be confined to highlighting the questions concerning the compatibility with the requirements of the Charter of Fundamental Rights raised by the mechanism of the European arrest warrant. These observations are made in order to serve in the evaluation of the implementation of the new mechanism. This evaluation will take place before the end of 2004[116]. From the specific point of view of the fundamental rights, this evaluation should concern the following questions:

• As has already been pointed out, an arrest by the authorities of the executing Member State of a person against whom a European arrest warrant has been issued must comply with all the requirements of Article 5 of the European Convention on Human Rights[117]. In particular, any person who is arrested must be informed promptly, in a language which he understands, of the reasons for his arrest. In this connection, account must be taken in the interpretation of Article 11 of the Framework Decision (rights of a requested person) of the requirements of Article 5 § 2 of the European Convention on Human Rights. The information contained in the arrest warrant form transmitted to the executing State must be as complete as possible, both as regards the description of the circumstances in which the offence was committed and the degree of participation in the offence by the requested person, and as regards the legal classification of the offence. A person being arrested in pursuance of a European arrest warrant must also be entitled to take proceedings by which the lawfulness of his detention is decided speedily by a court of law. To this end, Article 14 of the Framework Decision must be interpreted in accordance with Article 5 § 4 of the European Convention on Human Rights[118]. If the person concerned lodges an appeal against the decision to deprive him of his liberty, he cannot be handed over to the authorities of the issuing State before the competent court has been able to give a judgment, otherwise the appeal would be pointless[119]. It should be underlined in this respect that, even if the surrender procedure is intended to take the place of the conventional extradition procedure between the Member States of the European Union, this does not affect the obligations of the Member States with respect to the European Convention on Human Rights, as Article 1 § 3 of the Framework Decision of 13 June 2002 confirms. What should be avoided is that the concern of meeting the time limits set by Article 17 of the Framework Decision for the execution of the European arrest warrant leads the authorities of the executing Member State to limit the guarantees to which the individual is entitled under Article 5 of the European Convention on Human Rights, and which the internal law of the executing State currently observes in principle in the conventional context of extradition. In this respect, it should be stressed that the time limits set by Article 17 of the Framework Decision are not imperative[120].

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[115] See pages 17-19.

[116] Article 34 § 3 of the Framework Decision provides that the Commission submits a report to the European Parliament and to the Council on the operation of the Framework Decision, at the latest by 31 December 2004.

[117] On the other hand, the rules of fair trial stipulated in Article 6 of the European Convention on Human Rights are not considered applicable to a decision of extradition, which a surrender procedure must be classed as for the purposes of the European Convention on Human Rights. See for example Eur. Ct. H.R. (4th section), *Peñafiel Salgado v. Spain*, judgment of 16 April 2002, application n° 65964/01.

[118] On the guarantees that must accompany, in the context of extradition, an appeal to *habeas corpus* provided for by Article 5 § 4 of the Convention, see Eur. Ct. H.R., *Sanchez-Reisse v. Switzerland*, judgment of 21 October 1986, series A n° 07, § 51.

[119] See Eur. Ct. H.R. (3rd section), *Conka v. Belgium*, judgment of 5 February 2002, application n° 51564/99, §§ 44-45.

[120] Although Article 15 § 2 of the Framework Decision cites "the need to observe the time limits set in Article 17", the latter provision expresses a wish rather than a legal obligation with regard to the time limits for execution. The

• The observance of the *ne bis in idem* rule is translated in the Framework Decision of 13 June 2002 by the incorporation of grounds for mandatory non-execution of the European arrest warrant[121], as well as by the option for the executing Member State to refuse to execute the European arrest warrant "where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings" (Article 4, 3)), or "if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country" (Article 4, 5)). In accordance with the *Gözutok and Brügge* judgment delivered by the Court of Justice of the European Communities on 11 February 2003[122], the transaction concluded between the prosecuting authorities of a Member State and the accused, resulting in the public proceedings being discontinued, should however be considered as allowing the accused the benefit of Article 50 of the Charter of Fundamental Rights. As a result, in the assumption referred to in Article 4, 3) of the Framework Decision, refusal to execute the European arrest warrant should be considered mandatory rather than simply optional. Moreover, we may infer from Article 20 § 2 of the Statute of the International Criminal Court, signed on 7 July 1998, that the European arrest warrant cannot be executed if it is issued against a person already convicted or acquitted by the International Criminal Court for offences for which the warrant has been issued. Article 9 § 1 of the Statute of the International Criminal Tribunal for Rwanda, annexed to Resolution 955(1994) adopted by the United Nations Security Council on 8 November 1994, as well as Article 10 § 1 of the Statute of the International Tribunal charged with prosecuting persons allegedly responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia, annexed to Resolution 827(1993) adopted by the United Nations Security Council on 25 May 1993, should lead to the same conclusion with regard to persons already convicted or acquitted by these international courts of law. The Framework Decision on the European arrest warrant was not intended to oblige the Member States to breach their obligations imposed on them as States parties to the Statute of the International Criminal Court[123] or as Member States of the United Nations Organization, and therefore bound by Chapter V of the United Nations Charter.

• The Framework Decision on the European arrest warrant and the surrender procedures between Member States provides that, if the time limits set in Article 23 for the surrender of persons are not met, the person concerned, if he has been arrested, must necessarily be released (Article 23 § 5). Bearing in mind also the time limits stipulated in Article 17 of the Framework Decision for the decision to execute the warrant issued by another Member State, this is in agreement with the requirement of the European Convention on Human Rights. Article 5 § 3 of the Convention only

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term used in Articles 17 §§ 2 and 3 is "should" and not "shall". Besides, it is up to the authorities of the issuing Member State to supply the executing judicial authority, upon request, with all the necessary information to enable the latter to decide whether or not it can execute the European arrest warrant. Delays incurred by the authorities of the issuing Member State may justify an exceeding of the time limits set by Article 17 of the Framework Decision, without the authorities of the executing Member State being held responsible (see Article 15 § 2).

[121] Article 3 § 2 of the Framework Decision provides that the judicial authority of the Member State of execution shall refuse to execute the European arrest warrant "if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State".

[122] ECJ, 11 February 2003, *Gözutok and Brügge*, joined cases C-197/01 and C-385/01, not yet published.

[123] In the specific hypothesis of several warrants concerning the same person, see Article 16 § 4 of the Framework Decision on the European arrest warrant.

provides for a reasonable term of detention in the hypothesis of the preventive detention of a person suspected of committing an offence[124]. The Court also asserted that, in the interpretation of detention by virtue of Article 5 § 1 f) as a restriction of the individual's fundamental right to freedom, detention should be strictly interpreted. Therefore, where detention is motivated by the objective of ensuring the surrender of a person against whom a European arrest warrant has been issued, it should be considered that "the detention of a person with a view to [his surrender] can only be justified from the point of view of Article 5 § 1 *insofar as such detention is connected with the procedure* [of surrender]"[125]; and if the procedure is not conducted with due care, the detention ceases to be justified with regard to the end – surrender of the person in pursuance of the European arrest warrant – that justifies it. In exceptional circumstances, namely if the authorities of the issuing State fail to supply the information duly requested, there will be a longer or shorter time between the arrest of the person and the decision to execute the European arrest warrant preceding the surrender. In such case, the necessity and the term of detention should be reviewed. If Article 5 § 1 of the Convention is strictly interpreted, detention would no longer be considered justified if the risk of escape can be avoided by means that are less restrictive of a person's liberty, or if, unless there is a real chance that the person concerned will be surrendered within a reasonable time limit, it no longer corresponds to the objective of Article 5 § 1 f) and can therefore no longer be justified from the viewpoint of that provision, or if the detention appears to be excessively long compared to what seems reasonably justified by the procedures necessary for the surrender.

• It can be inferred from Article 1 § 3 of the Framework Decision of 13 June 2002 on the European arrest warrant that the surrender of a person cannot take place if this person runs a serious and proven risk of being subjected to inhuman or degrading treatment or punishment in the issuing State[126]. Although the European Court of Human Rights has not yet had the opportunity to deduce this specific consequence, this prohibition must mean that surrendering a person to the authorities of a Member State where prisoners are subjected to conditions of detention that fall short of the standards laid down in Article 3 of the European Convention on Human Rights is equally prohibited. Bearing in mind the reports of violation of Article 3 of the Convention in connection with the conditions of detention in Member States of the European Union[127] and the often severe assessments made by the European Committee for the Prevention of Torture of the situation of penitentiary establishments in those States, such a situation cannot be considered purely hypothetical. At the same time, since all States participating in the European arrest warrant are also parties to the European Convention on Human Rights, any person who has been surrendered can always appeal to the European Court of Human Rights if he was detained in conditions that are contrary to the standards of Article 3 of the Convention[128]. In order to clarify the obligations of the Member States in this respect,

[124] Article 5 § 3 of the Convention only refers to the hypothesis of detention referred to in Article 5 § 1, c): see Eur. Ct. H.R., *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, series A n° 12, p. 39, § 71. For recent confirmation of the position of the Court, see *Raf v. Spain*, judgment of 17 June 2003, application n° 53652/00, §§ 62-66.

[125] See, *mutatis mutandis*, European Commission of Human Rights, application no. 6871/75, *Caprino v. United Kingdom*, decision of 3 March 1978, *Ann.Conv.,* 21, p. 285, here pp. 295-296 (also D.R., 12, p. 14).

[126] See also the Preamble, recitals 12 and 13. This prohibition can at any rate be inferred from Article 3 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights, and from Article 19 § 2 of the Charter of Fundamental Rights of the European Union, where the term "extradition" should be interpreted as "surrender" for the purposes of the operation of the mechanism of the European arrest warrant.

[127] See for example during the period under scrutiny, Eur. Ct. H.R. (1st section), *Van der Ven v. Netherlands* and *Lorsé v. Netherlands*, judgments of 4 February 2003 (detention in high-security units).

[128] The Court has acknowledged that the possibility of appealing to an international court of law constitutes a relevant factor in assessing the extent of the State's obligation not to expel persons to a State where they risk ill-

> it would be advisable to examine the expediency of including in Article 5 of the Framework Decision a supplementary condition among the conditions under which the law of the executing Member States could[129] make the surrender of a person conditional. Such an amendment is designed to provide for the situation where, in the event that the European Court of Human Rights or the European Committee for the Prevention of Torture[130] finds that Article 3 of the European Convention on Human Rights is infringed, given the general conditions prevailing in a particular penitentiary establishment, the issuing State has not made any improvements to the situation.

The monitoring of the respect by the Member States of the prohibition which is imposed by Article 3 of the European Convention on Human Rights with respect to the conditions of detention of persons arrested under the suspicion of having committed criminal offences or after conviction by a competent court is therefore a condition *sine qua non* of the mutual recognition of judicial decisions in criminal matters. An initiative of the European Union in favour of the definition of minimal norms applicable throughout the Member States would therefore be justified under the principle of subsidiarity. Article 31 EU states that common action on judicial cooperation in criminal matters shall include (a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions; [..](c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such co-operation". As clearly illustrated by the *Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*[131], the Union may act to detail further, for the Member States, the requirements which follow from Article 3 of the Convention. A first step towards such clarification of the requirements imposed on the Member States could consist in identifying the procedural guarantees which limit the risk of ill-treatment within penitentiary establishments. It would be useful to build in that respect of the standards set by the European Committee for the Prevention or Torture and Inhuman or Degrading Treatment or Punishment (CPT), as in its 2nd General Report of Activities[132]:

> 53. Prison staff will on occasion have to use force to control violent prisoners and, exceptionally, may even need to resort to instruments of physical restraint. These are clearly high-risk situations insofar as the possible ill-treatment of prisoners is concerned, and as such call for specific safeguards.
> A prisoner against whom any means of force have been used should have the **right to be immediately examined and, if necessary, treated by a medical doctor**. This examination should be conducted out of the hearing and preferably out of the sight of non-medical staff, and the results of the examination (including any relevant statements

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treatment: see for example Eur. Ct. H.R. (4th section), *Peñafiel Salgado v. Spain*, decision of 16 April 2002, application n° 65964/01.

[129] In actual fact, this is not simply an option for the executing State, like the other conditions enumerated in this provision: it is an obligation. The insertion of a supplementary paragraph in Article 5 of the Framework Decision is therefore advisable, stipulating, "The execution of the European arrest warrant by the executing judiciary authority shall be conditional upon the person surrendered not being detained in conditions that are contrary to Article 3 of the European Convention on Human Rights. The executing judiciary authority may refuse to execute the European arrest warrant if this condition is not satisfied".

[130] The European Court of Human Rights reports a violation of Article 3 of the Convention there where the authorities have not implemented the urgent recommendations made by the CPT in the context of the periodical visits which the latter is charged with making under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987 (E.T.S. n°126). See Eur. Ct. H.R., *A.B. v. Netherlands*, judgment of 29 January 2002, application n° 37328/97.

[131] COM(2003)75 final, of 19/2/2003. This important contrbution to the debate concerning the added value the European Union can bring to the protection of fundamental rights in Europe is discussed hereafter, under Article 48 of the Charter.

[132] Extract from the 2nd General Report, CPT/Inf (92) 3, para. 53 ff. The extracts are also reproduced in The CPT standards. « Substantive » sections of CPT's General Reports, CPT/Inf/E (2003) 1. We have identified the passages emphasized in bold characters.

by the prisoner and the doctor's conclusions) should be formally recorded and made available to the prisoner. In those rare cases when resort to instruments of physical restraint is required, the prisoner concerned should be kept under constant and adequate supervision. Further, instruments of restraint should be removed at the earliest possible opportunity; they should never be applied, or their application prolonged, as a punishment. Finally, a record should be kept of every instance of the use of force against prisoners.

54. **Effective grievance and inspection procedures** are fundamental safeguards against ill-treatment in prisons. Prisoners should have avenues of complaint open to them both within and outside the context of the prison system, including the possibility to have confidential access to an appropriate authority. The CPT attaches particular importance to regular visits to each prison establishment by an independent body (eg. a Board of visitors or supervisory judge) possessing powers to hear (and if necessary take action upon) complaints from prisoners and to inspect the establishment's premises. Such bodies can inter alia play an important role in bridging differences that arise between prison management and a given prisoner or prisoners in general.

55. It is also in the interests of both prisoners and prison staff that **clear disciplinary procedures** be both formally established and applied in practice; any grey zones in this area involve the risk of seeing unofficial (and uncontrolled) systems developing. Disciplinary procedures should provide prisoners with a right to be heard on the subject of the offences it is alleged they have committed, and to appeal to a higher authority against any sanctions imposed.

Other procedures often exist, alongside the formal disciplinary procedure, under which a prisoner may be involuntarily separated from other inmates for discipline-related/ security reasons (eg. in the interests of "good order" within an establishment). These procedures should also be accompanied by effective safeguards. [The prisoner should be informed in writing of the reasons for the measure taken against him (it being understood that the reasons

given might not include details which security requirements justify withholding from the prisoner)], be given an opportunity to present his views on the matter, and be able to contest the measure before an appropriate authority.

56. The CPT pays particular attention to prisoners held, for whatever reason (for disciplinary purposes; as a result of their "dangerousness" or their "troublesome" behaviour; in the interests of a criminal investigation; at their own request), under conditions akin to **solitary confinement**. The principle of proportionality requires that a balance be struck between the requirements of the case and the application of a solitary confinement-type regime, which is a step that can have very harmful consequences for the person concerned. Solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible. In the event of such a regime being imposed or applied on request, an essential safeguard is that whenever the prisoner concerned, or a prison officer on the prisoner's behalf, requests a medical doctor, **such a doctor should be called without delay with a view to carrying out a medical examination of the prisoner**. The results of this examination, including an account of the prisoner's physical and mental condition as well as, if need be, the foreseeable consequences of continued isolation, should be set out in a written statement to be forwarded to the competent authorities.

57. The **transfer of troublesome prisoners** is another practice of interest to the CPT. Certain prisoners are extremely difficult to handle, and the transfer of such a prisoner to another establishment can sometimes prove necessary. However, the continuous moving of a prisoner from one establishment to another can have very harmful effects on his psychological and physical well being. Moreover, a prisoner in such a position will have difficulty in maintaining appropriate contacts with his family and lawyer. The overall effect on the prisoner of successive transfers could under certain circumstances amount to inhuman and degrading treatment.

An initiative of the European Union, based on Article 31 (a) and (e) EU, with a view of clarifying these norms – which in any case are already obligatory for the Member States, which are all Parties to the European Convention on Human Rights as well as to the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment – would facilitate a more objective use of the safeguard clause of Article 1(3) of the Framework Decision on the European Arrest Warrant or, alternatively, if Article 5 of the Framework Decision were to be revised to authorise the executing Member State to refuse the surrender of a person who runs the risk of being detained in conditions contrary to Article 3 ECHR, to identify more precisely the conditions under which such clause may be relied upon.

• Article 13 § 2 of the Framework Decision of 13 June 2002 provides that, if a person is able to consent to his surrender, each Member State "shall adopt the measures necessary to ensure that [this] consent [is established] in such a way as to show that the person concerned has expressed [it] voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel". It would be useful to compare the measures taken by the Member States in order to guarantee the validity of such consent and thus to extract good practices that can be disseminated. There where the freedom of the individual is at stake, any act of renunciation should be appraised in a particularly rigorous way[133].

Article 7. Respect for private and family life

Protection of foreign nationals from expulsion

Since 1991, the European Court of Human Rights safeguards foreign nationals against expulsion measures taken against them that are liable to affect their family life or, since 1996, their private life. This case law has been further consolidated during the course of the period under scrutiny. In the *Benhebba* case[134], the Court was faced with the expulsion and prohibition of entry into French territory of a second-generation immigrant, who was a criminal offender. It applied the criteria derived from its judgment in the *Boultif* case[135], and asserted that these criteria had to constitute the blueprint for national authorities who are preparing to take an expulsion measure against a foreign national. The Court considers that there exist "guiding principles that must guide the State in its judgment when taking expulsion measures against an adult foreign national arriving on its territory". The following must be taken into account[136]: the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed between the committing of the offence and the challenged measure, as well as the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; whether there are children in the marriage and, if so, their age; the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin (judgment, § 32). It adds, "the same criteria should be used for second-generation immigrants or foreign nationals

[133] See Eur. Ct. H.R., *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A n°12, § 65 (where not the consent to surrender or expulsion was at stake, but the renunciation to the right to freedom as such).
[134] Eur. Ct. H.R. (3rd section), *Benhebba v. France*, judgment of 19 June 2003, application n° 53441/99.
[135] Eur. Ct. H.R., *Boultif v. Switzerland*, judgment of 11 July 2002, application n° 54273/00.
[136] See also on the limits to the expulsion of foreign nationals having developed family or other ties on the territory of the host country, Recommendation Rec(2000) 15 adopted on 13 September 2000 by the Committee of Ministers of the Council of Europe concerning the security of residence of long-term migrants. This Recommendation is commented on in the *Report on the Situation of Fundamental Rights in the European Union and Its Member States in 2002*, pp. 85-86. The Commission of the European Communities rightly based itself on this Recommendation in its Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents (COM(2001)127 final - CNS 2001/0074, OJ *C 240 E , 28/8/2001, p. 79) (para. 2.3.).*

who arrived in their early youth, in the event that they have started a family in their host country. If this is not the case, the Court will only pay regard to the first three criteria. To these different criteria, however, will be added the special ties which these immigrants have developed with the host country where they have spent most of their lives". On these grounds, it acknowledges the legitimacy of the national expulsion measure, giving rise to the concurrent opinion of the French court which on this occasion expressed its "firm opposition" to the system of "double punishment" affecting second-generation immigrants convicted of criminal offences[137]. Following the same line of reasoning, the Court arrived at the opposite conclusion in the *Mokrani* case[138], this time on account of the "intensity of the personal ties" of the person concerned with France and the consequences which his expulsion would have on his marital life. On the other hand, it concluded that Article 8 of the European Convention on Human Rights had been violated in the *Ylmaz*[139] and *Yakupovic*[140] cases. In the *Ylmaz* case, the Court considered that the unlimited prohibition to enter the territory was disproportionate in the given circumstances; in the *Yakupovic* case, the youth of the applicant resulted in an identical judgment.

The initial proposal for a Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[141] provides in its Article 26 § 2, "a host Member State may not take an expulsion decision on grounds of public policy or public security against EU citizens or their family members, *irrespective of nationality*, who have the right of permanent residence on its territory or against family members who are minors". This provision introduces absolute protection against expulsion for Union citizens and family members with permanent residence status and for family members who are minors. In its commentary, the Commission bases itself on the case law of the European Court of Human Rights: "In the case of minors, this protection is dictated by humanitarian considerations. People with permanent residence status are assumed to have developed very close ties integrating them into the host Member State, which would make expulsion unjustifiable. Expulsion orders have a very serious impact on the person concerned, destroying the emotional and family ties they have developed in the host country"[142].

This interpretation did not prevail, however. The political agreement that emerged from the Council on 23 September 2003 only grants Union citizens definite protection from expulsion for "imperative reasons of public safety according to national law". Although this outcome is not formally incompatible with the standards of the Council of Europe[143], it does not contribute to the legal certainty of States or of foreign nationals against whom expulsion measures have been taken, since if long-term or underage immigrants are expelled for reasons of public order, the consequences which the execution of such measures may have on the private and/or family life of the persons concerned will have to be carefully examined. On the other hand, the difference in treatment between nationals of Member States and third country nationals may be considered discriminatory in the light of a case law of the European Court of Human Rights that is increasingly critical of any difference in treatment that is based solely on the formal criterion of nationality[144].

[137] For a comparative law approach in the European Union, see: La double peine, Documents de travail du sénat, Série de législation comparée, February 2003, LC 117.
[138] Eur. Ct. H.R., *Mokrani v. France*, judgment of 24 June 2003, application n°52206/99.
[139] Eur. Ct. H.R., *Ylmaz v. Germany*, judgment of 17 July 2003, application n°52853/99.
[140] Eur. Ct. H.R., *Jakupovic v. Austria*, judgment of 6 February 2003, application n°36757/97.
[141] COM (2001) 257 of 23 May 2001.
[142] Id., p. 23.
[143] See principle 4, d), of the aforementioned Recommendation Rec(2000)15 on the security of residence of long-term migrants.
[144] Eur. Ct. H.R. (2nd section), *Koua Poirrez v. France*, judgment of 30 September 2003, application n°40892/98, § 46 ("Only very serious considerations may lead the Court to consider a difference in treatment based solely on nationality compatible with the Convention").

The case law of the European Court of Human Rights concerning the prohibition of expulsion of foreign nationals where such expulsion would constitute a disproportionate infringement of their private and/or family life also guided the Court of Justice of the European Communities in a judgment concerning the Moroccan spouse of a British national who was expelled from the United Kingdom and wished to return after a detour through another Member State in order to benefit from the judgment in the *Singh*[145] case. The Court pointed out on this occasion, "where the marriage is genuine and where, on the return of the citizen of the Union to the Member State of which he is a national, his spouse, who is a national of a non-Member State and with whom he was living in the Member State which he is leaving, is not lawfully resident on the territory of a Member State, regard must be had to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms […].Even though the Convention does not as such guarantee the right of an alien to enter or to reside in a particular country, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention […]"[146].

The right to respect for family life also led the Court of Justice of the European Communities to assert the right of residence for family members of a worker who has died. The Court pointed out, "the importance of ensuring the protection of the family life of nationals of the Member States and the right of residence of the members of their family has been recognised by the Community legislature (see, to that effect, particularly, Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 38)…", and "It is in the interest of the worker and his family that, should that worker die prematurely, his family members should, as a rule, be entitled to reside in the territory of the host Member State"[147].

Directive 2003/86/EC on the right to family reunification

The Directive on the right to family reunification, under negotiation since 1999[148], was adopted by the Council on 22 September 2003[149]. The purpose of the Directive is to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States (article 1). Directive 2003/86/EC in principle guarantees a right to family reunification to the members of the « nuclear family », i.e., the spouse of the sponsor, the minor children of the sponsor and/or his/her spouse, provided they are below the age of the majority set by the law of the Member State concerned and are not married. The Member States are not obliged to recognize unmarried partners a right to family reunification, even when they are bound by a registered partnership, and even in situations where the right to family reunification is recognized to *de facto* stable relationships under the national law of the State concerned, with respect to its own nationals or, per extension, with respect to EU. It should nevertheless be emphasized that the Member States are obliged to respect the fundamental rights when transposing the Directive. A State that chooses to recognize a right to family reunification for third country nationals living in a durable relationship with the sponsor, yet denying this benefit to same-sex couples, would be guilty of discrimination directly based on sexual orientation, contrary to Article 21 of the Charter of Fundamental Rights[150].

[145] See ECJ, 7 July 1992, *Singh*, C-370/90, *ECR* p. I-4265 (admission to the United Kingdom of a person who wished to enter as spouse of a United Kingdom national, returning or wishing to return to the United Kingdom after having exercised the rights he derived from Community law as a worker in another Member State).
[146] ECJ, 23 September 2003, *Akrich*, C 109/01, paragraphs 58 and 59.
[147] ECJ, 9 January 2003, *N. Givane*, C-257/00, paragraphs 47-48.
[148] For the initial Commission proposal, see COM(1999) 638 final of 1/12/1999, presented on 11/1/2000, OJ C 116 E of 26/4/2000, p. 66. For the amended proposal, see COM(2000) 624 final of 10/10/2000, OJ C 62 E of 27/2/2001, p. 99. A second amended version was presented on 30/4/2002 (COM(2002)225 final, OJ C 203 E of 27/8/2002, p. 136.
[149] Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251 of 3/10/2003, p. 12.
[150] See, *mutatis mutandis*, Opinion n° 1-2003 of 10 April 2003 delivered by the EU Network of Independent Experts on Fundamental Rights in response to a request from the European Commission.

It is safe to consider that the main criticism that can be levelled at the Directive is that it does not make a sufficiently clear distinction between the situation where the sponsor - the person who seeks to be reunited on the territory of a Member State with members of his family, or with whom the latter seek to be reunited - is living on the territory of the host State without it being possible for his family life to be continued elsewhere, and the situation where, on the contrary, such family life could be continued elsewhere. In the first situation, family reunification is a human right, derived from the right to respect for family life guaranteed by Article 8 of the European Convention on Human Rights; in the second situation, it is a favour from the State, which in principle is not obliged to grant it, even though, by granting it, it contributes to the flourishing of family life[151]. But the Directive as a whole - especially if one considers the exceptions that it allows the States to use - approaches the right to family reunification which it wishes to harmonize as if it is still simply a favour, which is not an entirely justifiable approach. For example, Article 8, paragraph 2, of the Directive provides that where the legislation of a Member State relating to family reunification in force on the date of adoption of the Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members. Such a waiting period is clearly disproportionate in those cases where, in the absence of the possibility for family life to be continued elsewhere, the absence of family reunification constitutes an infringement of the right to respect for family life to continue elsewhere.

The latter example concerns an *option* for the Member States to delay the granting of the right to family reunification without it being an *obligation.* From the legal point of view, the question that arises is of knowing whether Directive 2003/86/EC is liable to be criticized for infringing the fundamental rights that are recognized in the Community's legal order, notably as they are brought together in the Charter of Fundamental Rights, by not enjoining on the Member States observance of wider-ranging obligations in the area of the right to family reunification. According to this rapporteur, this is the most important question of principle which the European Court of Justice will have to answer, in examining the action for annulment of the directive lodged with the Court by the European Parliament, on the basis of the new powers recognized to the Parliament since the entry into force of the Nice Treaty on 1 February 2003, under the revised Article 230 EC. Indeed, the directive on family reunification does not affect « the possibility for the Member States to adopt or maintain more favourable provisions » (Article 3(5)). Therefore, the most disputable provisions of the Directive with regard to the requirements of the fundamental rights cannot in principle lead to an infringement of those rights if the Member States effectively observe those fundamental rights in the transposition of the Directive. Thus the Directive does not oblige the Member States to infringe any fundamental rights which they have undertaken to observe in the international legal order or which are obligations in the legal order of the European Union. For example:

- Article 14(2) of directive 2003/86 says that « Member States may decide according to national law the conditions under which family members shall exercise an employed or self-employed activity. These conditions shall set a time limit which shall in no case exceed 12 months, during which Member States may examine the situation of their labour market before authorising family members to exercise an employed or self-employed activity. ». If figures could be produced to illustrate that, in the large majority of cases, the family members concerned by this clause are women - wives joining their husbands -, Article 14 § 2 would seem to create a form of

[151] This distinction, however, is obscured when the sponsor has established such ties in the host country that he could not leave this country where he is residing without this resulting in a significant upheaval of his private and family life. Even if his family life could be continued elsewhere, the cost will be such that, in this case, family reunification should be considered a human right. See for example Eur. Ct. H.R., *Sen v. Netherlands*, judgment of 21 December 2001, application n° 31465/96 (commented on in the *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002*, p. 88).

indirect discrimination against women, contrary to the general principles of Community law and Article 23 of the Charter of Fundamental Rights. Once again, such an infringement would derive from a Member State's choice to apply this safety clause; it is not enjoined by Directive 2003/86/EC itself.

• Since the Commission felt that "the Member States should retain some room for manoeuvre to examine whether the child meets the conditions for integration beyond a certain age, provided their legislation provided for this at the time of adoption of the Directive and a case-by-case approach is followed"[152], Article 4 § 1 of Directive 2003/86/CE provides, « where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive »

There where family life cannot continue elsewhere, refusal of family reunification constitutes an infringement of the right to respect for family life as recognized by Article 8 of the European Convention on Human Rights. Such an infringement does not appear to be justifiable by one of the admissible grounds for restriction enumerated in Article 8 § 2 of the Convention. Moreover, it may be paradoxical to want to verify this "integration" whereas, by definition, a minor who requests the right to family reunification, if he wishes to be "integrated", has not had the opportunity to develop ties with the host country, and his ties with his family may have weakened as a result of the separation. This provision is therefore particularly problematical from the viewpoint of the requirements of the fundamental rights. Here too, however, the difficulty lies not in what the Directive imposes on the Member States as an obligation, but in the margin of appreciation that it allows the States.

• Directive 2003/86/EC provides, with a view to combating the phenomenon of forced marriages, Member States are authorized to set a minimum age for spouses who wish to join their husbands/wives, although this limit must not be higher than 21 years (Article 4 § 5). This restriction on the right to family reunification seems justifiable for legitimate reasons of public order, and by the concern to protect the rights of other people[153]. The Directive also provides that States may refuse the right to family reunification or refuse to renew the spouse's residence permit if it turns out that the marriage is a marriage of convenience for the sole purpose of securing family reunification (Article 16, §§ 2 and 4)[154]. Particular care is required to ensure that any investigations intended to detect fraud do not give rise to disproportionate infringements of the right to respect for the private and family life of the persons concerned[155]. Here, too, it is in the implementation of the Directive that the risk of infringements of fundamental rights by the Member States arises.

• Directive 2003/86/EC provides that Member States may refuse to renew the residence permit of the spouse or of other family members who have been admitted for the purpose of family reunification where it is found that the sponsor and his/her family member(s) no longer live in a real marital or family relationship (Article 16 §

[152] Explanatory memorandum of the second amended proposal for a Directive (COM(2002)225 final).

[153] On the phenomenon of forced marriages, see the *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002*, pp. 107-108.

[154] In a different context, the Court of Justice of the European Communities considered in its judgment in the *Akrich* case, already referred to earlier, that "there would be an abuse if the facilities afforded by Community law in favour of migrant workers and their spouses were invoked in the context of marriages of convenience entered into in order to circumvent the provisions relating to entry and residence of nationals of non-Member States" (ECJ, 23 September 2003, *Hacene Akrich*, C-109/01, paragraph 57).

[155] In particular, the restrictions imposed by Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience (OJ C 382 , 16/12/1997, p. 1), should be scrupulously respected.

1, b)), which is the case for instance if the sponsor has begun a stable long-term relationship with another person (Article 16 § 1, c)). This provision puts the spouse (or the person with whom the sponsor is living in a *de facto* long-term relationship which the Member State considers to grant a right to family reunification) - statistically, this is in most cases the wife - in a particularly vulnerable position, since he finds himself at the mercy of a cessation of marital life, the maintenance of which constitutes a condition for his continued residence. The Directive ought to have provided that the right to family reunification does not cease if the break-up of the relationship is the fault of the sponsor only. Member States which claim to rely on this exception should avoid interpreting it in a way that establishes a right of refusal.

Thus the most problematical provisions of Directive 2003/86/EC have in common that they allow certain exceptions to the Member States, which remain free to rely upon them or not. This calls for two considerations:

• Particular care should be taken that no transposition measures are taken that, by relying upon these exceptions, threaten to infringe the fundamental rights recognized in the European Union. The fact that the Directive provides for these exceptions does not mean that they are admissible from the viewpoint of the requirements of fundamental rights. In the exercise of its mission of monitoring the application of Community law, the Commission may consider that transpositions which infringe fundamental rights constitute serious violations of Community law in the same way as other infringements that undermine the foundations of the rule of law identified in its Communication of 11 December 2002 on better monitoring of the application of Community law[156].

• The question of knowing whether Directive 2003/86/EC in itself leads to an infringement of fundamental rights, and therefore whether it contains exceptions that do not appear to prevent Member States from committing such infringements, depends on the nature of the positive obligations that one would want to infer from the fundamental rights that are enshrined in the main principles of Community law, or from the Charter of Fundamental Rights[157]. There where an instrument of secondary Community law can be criticized not only for not having taken all the precautions that could have been taken in order to prevent Member States from committing infringements of fundamental rights in their implementation thereof, the existence of such a positive obligation will not always be acknowledged. On the other hand, there where the instrument in question presents certain national measures as acceptable by expressly providing for the exceptions that make them possible, it will be easier to establish that it does not guarantee the protection against the risk of infringements of fundamental rights that it could have been reasonably expected to afford.

The right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

The proposal for a Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States has partly aroused the same kind of discussions about the notion of "family" that would justify the recognition of the right to family reunification. The Council has opted to include the partner to whom a Union citizen is linked by a registered partnership or by a duly certified long-term relationship, only "where the law of the host Member State recognizes the situation of unmarried couples and in accordance with the conditions provided for in this law". In the current state of Community

[156] COM(2002) 725 final of 11/12/2002.
[157] See the Introduction to the present report, section II.3.: Preventing the risk of infringement of fundamental rights in the implementation of European law.

law, it can already be inferred from Article 7 of Council Regulation 1612/68 of 15 October 1968[158], read in the light of the *Reed* judgment[159], that a Member State which allows partnerships or other forms of relationship apart from marriage between persons of the same sex to grant a right to family reunification to its own nationals whose partner or cohabitant of the same sex has a different nationality, must extend this advantage to every citizen of the European Union who has a long-term relationship with a person of the same sex.

As it stands now, the proposal for a Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States does not follow the suggestion that was made by the European Parliament for the Directive to make reference to the spouse, "irrespective of sex, in accordance with the relevant applicable national law". In its Opinion n° 1-2003 delivered on 10 April 2003, the EU Network of Independent Experts on Fundamental Rights expressed doubts as to the justification that was given for such a refusal on the basis of the judgment in the case *D. and Kingdom of Sweden v. Council of the European Union* given by the Court of Justice of the European Communities on 31 May 2001[160]. For a presentation of this Opinion, see the commentary below under Article 45 of the Charter.

Article 8. Protection of personal data

The stakes connected with the protection of personal data in the European Union are constantly evolving. This is explained by two accelerating factors: the rapid technological progress and the adoption both by the Member States and by the European Union of a set of measures designed to increase security in the face of the risk of terrorist attacks. The current pursuit of increased security has cleared the way for initiatives which in a different context would undoubtedly have given rise to more objections and more thorough consideration[161]. The establishment of "profiles" on the basis of personal data obtained from different sources (different cross-linked databases), with the risk of discrimination that this may entail (for instance is access to bank credit or to insurance, rented accommodation, security clearance, or certain categories of employment), is becoming widespread. The proactive approach is spreading among the law enforcement authorities, and consists in the gathering and storage of personal information with a view to anticipating the risk of an offence being committed, through the identification of individuals who are deemed liable to commit such an offence, even before it is committed. It is this context that should be borne in mind when examining the threats which during the course of the period under scrutiny have come to weigh upon the protection of the individual vis-à-vis the processing of his personal data.
In the European Union, such protection is guaranteed by 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[162], extended in

[158] OJ L 57.
[159] ECJ, 17 April 1986, *Ann Florence Reed*, 59/85, *ECR,* p. 1283.
[160] ECJ, 31 May 2001, *D. v. Council of the European Union,* joined cases C-122/99 P and C-125/99 P, *ECR,* p. I-4319.
[161] An important report was submitted on this question to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (LIBE) of the European Parliament: "Security and Privacy for the Citizen in the Post-September 11 Digital Age: A Prospective Overview", Institute for Prospective Technological Studies – Joint Research Centre, European Commission, ref. Report EUR 20823 EN, July 2003.
[162] OJ L 281 of 23/11/1995, p. 31. In an important judgment given in the course of the period under scrutiny, the Court of Justice of the European Communities gave a broad interpretation of the guarantees provided by Directive 95/46/EC, by referring to: see ECJ, 6 November 2003, *Lindqvist*, C-101/01, not yet published. The Court considers that the fact of creating on one's personal computer and at one's home Internet pages referring to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies constitutes "processing" within the broad meaning of Directive 95/46/EC. The Court also considers that, in the light of its objective, which is to protect a fundamental right to respect for privacy, the Directive should be interpreted in the sense that the fact of mentioning on an Internet page

connection with the protection of privacy in the telecommunications sector by Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002, called "Directive on privacy and electronic communications"[163], and of which Regulation (EC) 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[164] extended the protection to those institutions and bodies. This is the general framework under which a number of questions were raised during the period under scrutiny.

The communication of Passenger Names Records (PNR) by airline companies operating transatlantic flights to the US Bureau of Customs and Border Protection

In its thematic Observation n°1 on the balance between freedom and security in the responses of the European Union and its Member States to the terrorist threat, the EU Network of Experts on Fundamental Rights made a review of the concerns aroused by the joint statement issued on 18 February 2003 by the European Commission and the competent authorities of the United States, in which they endeavoured to find a solution to allow the transmission of personal data of passengers by airline companies operating Transatlantic flights, using the APIS system (Advance Passenger Information System)[165]. Opinion 6/2002 of the "Article 29" Data Protection Working Party concluded on 24 October 2002, "the APIS system, though developed in the context of terrorist atrocities, would lead to the disproportionate and routine disclosure of information by airlines who are subject to the requirements of Directive 95/46/EC"[166]. The joint statement of February 2003 was issued even though the authorities of the United States had announced their intention, as from 5 March 2003, to demand that airlines operating flights to the United States transmit personal data of passengers - despite the reservations that such transmission may provoke from the viewpoint of Directive 95/46/EC and Regulation 2299/89 of 24 July 1989[167]. The situation created by the instruments adopted by the United States following the terrorist attacks of 11 September 2001 (Aviation and Transport Security Act 2001; Enhanced Border Security and Visa Entry Reform Act 2002) has put the airline companies concerned in a particularly uncertain situation, given that, by agreeing to allow access to the information contained in the booking systems (Passenger Names Records – PNR), they would render themselves open to the criticism of not observing the obligations imposed on them by the aforementioned instruments. However, if they refuse such access, they would risk having financial penalties imposed on them by the American authorities, even being prohibited from landing on United States territory. The United States have refused to postpone the imposition of the requirements linked to access to the PNR, despite the legal uncertainty that has resulted for the operators concerned.

Directive 95/46/EC prohibits the transfer of personal data from a European Union Member State to a third country, unless the third country in question "ensures an adequate level of

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that an individual has injured her foot and is on half-time on medical grounds constitutes processing of personal data "concerning health" (paragraphs 49 to 51).

[163] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201 of 31/7/2002, p. 37. This Directive replaces Directive 97/66/EC of 15 December 1997, OJ L 24 of 30/1/1998, p. 1. The transposition of Directive 2002/58/EC should have been completed by 31 December 2003. The Commission has pointed out that infringement proceedings could be initiated against no fewer than nine Member States for failing to transpose this Directive within the set time limits.

[164] OJ L 8 of 12/1/2001, p. 1.

[165] Thematic Observation 1: balance between freedom and security in the response of the European Union and its Member States to the terrorist threat, cited above, pp. 22-24.

[166] Opinion 6/2002 on transmission of Passenger Manifest Information and other data from Airlines to the United States, 24 October 2002, 11647/02/EN.

[167] Council Regulation (EEC) n° 2299/89 of 24 July 1989 on a code of conduct for computerized reservation systems, OJ L 220 of 29/7/1989, p. 1. , last amended by Council Regulation 323/1999 of 8 February 1999, OJ L 40 of 13/2/1999, p. 1. Article 6, d), of Regulation n° 2299/89 provides that « personal information concerning a consumer and generated by a travel agent shall be made available to others not involved in the transaction only with the consent of the consumer ».

protection" (Article 25 § 1). If this is not the case, the Commission may enter into negotiations with a view to enabling the transfer of data subject to certain guarantees (Article 25 § 5). At the end of these negotiations the Commission "may find (…) that a third country ensures an adequate level of protection (…) by reason of its domestic law or of the international commitments it has entered into, particularly upon conclusion of the negotiations referred to [in Article 25 § 5] for the protection of the private lives and basic freedoms and rights of individuals"[168]. The 16 December 2003 Communication from the Commission to the Council and the Parliament "Transfer of Air Passenger Name Record (PNR) Data: A Global EU Approach"[169] announces that the Commission will adopt a decision under Article 25(6) of Directive 95/46/EC, on the basis of the results of the negotiation with the US Bureau of Customs and Border Protection (CBP)[170]. The communication enumerates the undertakings obtained from the US authorities in the course of those negotiations : instead of having access to all data in the PNR, the US will receive limited data (a list of 34 items has been agreed upon, with no obligation to seek information from the passenger where certain items are blank) concerning only flights to, from or through the United States ; sensitive data, including data revealing racial or ethnic origin such a dietary preferences, will be filtered out and deleted ; the data will only be used for the prevention of terrorism or related crimes of international dimension, to the exclusion of other "domestic" crime ; the data will be retained for no more than three and a half years, which corresponds to the duration of the US-EC agreement ; the Chief Privacy Officer established within the Department of Homeland Security (DHS) will "receive and handle in an expedited manner representations from Data Protection Authorities in the EU on behalf of citizens who consider that their complaints have not been satisfactorily resolved by DHS"; an annual joint review (by the US Bureau of Customs and Border Protection and an EU Delegation led by the European Commission) of the US undertakings within the agreement will ensure that the actual practices of the US authorities are effectively monitored with regard to the agreement ; finally, the Commission has obtained that the CAPPS II (Computer Assisted Passenger Pre-Screening System) scheme would not be covered by the agreement : negotiations on this would only begin if and when the privacy concerns expressed by the US Congress concerning CAPPS II have been met.

The Commission has also prepared a document describing the information which the travel agents and airline companies should give to passengers flying to the US, informing them about the treatment of their personal data. It should be emphasized that this information cannot be interpreted as seeking to obtain the "consent" of the individual concerned, thus justifying a derogation from the principle that personal data should not be transferred to countries where no adequate protection exists (Article 26(1), a) of Directive 95/46/EC). In its abovementioned Opinion n° 6/2002 of 24 October 2002, the Working Party Article 29 has rightly emphasized that, in circumstances such as those involved here, the "consent" of the passenger (whose choice cannot in this case be considered "free" in the meaning of Article 2, h), of the Directive) could not justify transmitting the Passenger Name Record data. Rather, this information is to be seen as a minimal condition so that the passenger will be able to effectively exercise his rights under the agreement.

The announced clarification of the obligations of airline companies and the lawfulness of the transfer of data from the Passenger Name Record is obviously welcome, all the more so since the Member States have adopted sometimes divergent approaches to the interpretation of the requirements formulated in Chapter IV of the Directive concerning the transfer of personal data to third countries, which creates the risk of distortion of competition between companies depending on from which country they operate flights to the United States. Two arguments may be put forward in favour of the solution which the European Commission proposes to

[168] On the interpretation of the provisions of the Directive concerning the transmission of data to third countries, see the Working Document of the Article 29 Working Party on *Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU Data Protection Directive*, of 24 July 1998 (WP 12).
[169] COM(2003) 826 final, 16/12/2003.
[170] The date of March 2004 has been announced as the earliest possible date for adoption of such a decision.

adopt. The notion of "adequate protection" in Article 25 § 1 of Directive 95/46/EC is not synonymous to "equivalent protection". Provided that the objectives of Community legislation on data protection are achieved, it matters little if the means used by the country to which the personal data are transferred differ from those resorted to by Directive 95/46/EC for the European Union. Moreover, Article 13 of the Directive provides for the possibility of imposing restrictions on the principles relating to data quality, the provision of information to the individual concerned, right of access and rectification, and publicizing of processing operations, when such a restriction constitutes a necessary measure to safeguard "the prevention, investigation, detection and prosecution of criminal offences" (Article 13 § 1, d)). Any assessment of the adequate nature of the level of protection afforded in the third country to which personal data are transmitted from the European Union should also take account of this possibility of imposing restrictions on certain guarantees offered by the Directive.

Once it becomes effective, the agreement with the American authorities, whose undertakings might justify the adoption by the Commission of a decision taken by virtue of Article 25 § 6 of Directive 95/46/EC, should contain a set of guarantees regarding the nature and quantity of the data that may be transmitted to them, as well as the use that may be made of the data in the United States[171]. Nevertheless, under Community law as it stands *now*, the transmission of passenger data by airline companies which are bound to comply with Directive 95/46/EC and the domestic laws of the Member State where these data are processed continues to be an infringement of the Directive. Even the adoption of a Commission decision on the basis of Article 25 § 6 of Directive 95/46/EC will in itself not suffice to remedy this unlawfulness, since, if this decision is based on the international undertaking of the United States, the lawfulness of the transmission of passenger data will be dependent upon this agreement coming into effect[172]. On the other hand, it is doubtful whether the coming into effect of this agreement suffices to remove all difficulties. The provisions of the planned agreement do not offer sufficient guarantees with regard to the risk of abuse in the transmission of these data to other authorities or agencies in the United States[173], and the authorities responsible for data protection of the Union Member States are unable to monitor such transmissions. The data will not be kept longer than is necessary by the United States Customs and Border Protection Bureau or the United States Transport Security Administration, to which these data may be transmitted, and the undertakings of the American authorities of 22 May 2003[174] provide for the destruction of the data after a certain period. On the other hand, the powers of the Chief Privacy Officer du Department on Homeland Security in particular do not at present seem to be clearly defined in terms of their scope. The planned agreement with the United States creates a manifest risk of discrimination on the basis of "terrorist profiles" that may be defined on the basis of data, even non-sensitive data within the meaning of Article 8 of Directive 95/46/EC, which are transmitted to the American authorities[175]. This merits all the

[171] These guarantees offer to some extent a response to the difficulties identified by the European Parliament in its Resolution of 8 October 2003, Transmission of personal data by airlines in case of transatlantic flights (P5_TA-PROV(2003)0429).

[172] See Communication from the Commission of 16 December 2003, cited above, note 5.

[173] The Annex to the joint statement of 18 February 2003 lists the undertakings of the American authorities in the processing of PNR data. It provides that, in principle, "no other foreign, federal, state or local agency has access to PNR through Customs databases". However, it is specified that "other law enforcement entities may specifically request PNR information from Customs and Customs, in its discretion, may provide such information for national security or in furtherance of other legitimate law enforcement purposes". The authorities to which US Customs have transmitted such data cannot transmit them to third parties (Third Agency Rule): "for purposes of regulating the dissemination of PNR data which may be shared with other law enforcement entities, Customs is considered the "owner" of the data and such entities are obligated by the terms of disclosure to obtain Customs express authorization for any further dissemination".

[174] Undertakings of the United States Bureau of Customs and Border Protection and the United States Transportation Security Administration of 22 May 2003, available at: http://europa.eu.int/comm/internal_market/privacy/docs/wpdocs/2003/wp78-pnrf-annex_en.pdf

[175] The Annex to the joint statement of 18 February 2003 says in this respect, "PNR data is used by Customs strictly for enforcement purposes, *including use in threat analysis to identify and interdict potential terrorists and other threats to national and public security*, and to focus Customs resources on high risk concerns, thereby

more attention since the talks between the European Commission and the American authorities constitute a kind of laboratory with a view to a wider-ranging agreement, which the Communication from the Commission of 16 December 2003 proposes to conclude within the International Civil Aviation Organization[176]. The conditions for a generalization of the transmission of air passenger data, with the risk of discrimination that this will hold for certain categories of individuals, therefore seem to be fulfilled.

It is therefore essential that a regular evaluation can be organized of the implementation of the agreement that will be concluded with the American authorities, and that a safety clause be provided in case of abuse. Such a regular evaluation should comprise a mechanism of independent audits that will guarantee transparency in terms of the use made of the data transmitted by the airline companies to the United States Bureau of Customs and Border Protection. The Article 29 Working Party is of the opinion that the public reports resulting from these audits should contain "the number and volume of PNR requests from other US public bodies and the number, volume and the motivating reason for those requests for which authorization has been granted by the first recipients"[177]. At the expiry of the agreement, a global evaluation ought to be made which should take into account the evolution of the international situation and the permanence of the risk of terrorist attacks that originally justified the demands of the American authorities[178].

The communication by carriers, to the authorities of the State of destination, of data relating to the passengers

A question of principle that is raised by the negotiation of the agreement between the European Community and the United States regarding the transmission of PNR data is that of knowing whether data collected with a view to the booking of a flight may be used for other purposes[179]. The same kind of question is brought up by the proposal for a Directive establishing an obligation for air carriers to communicate certain data to the competent authorities of the country of destination for the purposes of immigration control as well as for the purpose of preventing certain criminal offences[180].
This proposal finds its legal basis in Articles 62, 2), a), and 63 § 3, b), EC, which empower the Council to establish standards and procedures to be followed by Member States in carrying out checks on persons at the external borders, as well as to take measures concerning illegal immigration and illegal residence. It plans to improve border checks and the fight against illegal immigration through the transmission in advance of passenger data by carriers to the competent national authorities, on pain, in the event that the carriers fail to fulfil these obligations, of dissuasive, effective and proportionate penalties, of which the Directive will fix the minimum levels. While the initial version of the proposal for a Directive was only aimed at air carriers, the latest version extends its scope to include all carriers[181]. One provision of the proposal (Article 3 § 1, b), of the version of 12 November 2003) also provides that the carriers should notify the competent national authorities within forty-eight

facilitating and safeguarding bona fide traveller (our emphasis)." This clearly illustrates the risk of discrimination attached to the definition of profiles of "potential" terrorists.
[176] See point 3.5. of the communication of 16 December 2003, cited above.
[177] Opinion 4/2003 of the Article 29 Working Party on the Level of Protection ensured in the United States for the Transfer of Passengers' Data, adopted on 13 June 2003 (WP 78), point 10.
[178] In this sense, see Opinion 4/2003 of the Article 29 Working Party on the Level of Protection ensured in the United States for the Transfer of Passengers' Data, cited above, point 3.
[179] Cf. Article 6, § 1, b), of Directive 95/46/EC, which provides that personal data may be "collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes". Article 13 of the Directive, as has already been pointed out, nevertheless provides for the possibility of restricting this right for one of the reasons that are listed.
[180] For the latest stage in the talks, see Council of the European Union, Initiative of the Kingdom of Spain with a view to adopting a Council Directive on the obligation of carriers to communicate passenger data, 14652/03, FRONT 155, COMIX 678, 12 November 2003.
[181] Although the Preamble still still refers exclusively to air carriers, which is undoubtedly a clerical error.

hours if a third country national has not used his return ticket to his country of origin or did not continue his journey to a third country[182]. Article 6 of the proposed Directive concerns the protection of personal data. It provides that data processed by carriers and transmitted to the competent authorities (authorities in charge of carrying out checks at the external borders or combating illegal immigration, where these data concern the interruption by a third country national of his journey or his failure to use his return ticket) may be used solely for the purpose of carrying out border checks. They should be destroyed once the individual concerned has entered the territory. The carrier will ensure that the data are destroyed 24 hours after arrival. A right of information, access and rectification of data is granted to the individual whose data have been processed in this way, in accordance with Directive 95/46/EC (Article 6 § 5 of the proposal).

The inclusion of biometric identifiers in the visa and the residence permit for third country nationals

The need to improve document security, which was presented as an urgent need in the aftermath of the September 11, 2001, events. This concern has already led to the modification of the uniform format for visas[183] as well as to the laying down a uniform format for residence permits for third country nationals[184]. Acting upon the request of the Member States, formulated first at the Veria informal meeting of the Justice and Home Affairs Ministers of 28-29 March 2003, and reiterated by the Thessaloniki European Council of 19-20 June 2003, the Commission adopted a Proposal for a Council Regulation amending Regulation (EC) 1683/95 laying down a uniform format for visas[185]. The proposal is, at a first stage, to include biometric identifiers (fingerprints and digital photograph to ensure facial recognition) on the travel documents of third country nationals[186]. This should be done in harmonized fashion across all the Member States implementing the Schengen Convention, to ensure interoperability – that the facial image or the fingerprint enrolled in State A will be readable by operators in State B with their own equipment. Article 62(2)b), iii), EC (according to which the Commission may present proposals on a uniform format for visas) and Article 63(3)a) EC (on the delivery of residence permit for third country nationals) provide the required legal basis to that effect. Later, documents of EU citizens will also be concerned by the measure. This will also facilitate compatibility with US legislation, which will require biometric elements in passports of citizens of countries granted a visa waiver as from 26 October 2004.

This further improvement of the security of travel documents of third country nationals must be related to the establishment of a common Visa Information System (VIS). The VIS should facilitate the practical application of the Dublin II regulation, limiting the risk of asylum-shopping by asylum seekers arriving in the Schengen area, as well as the implementation of a common return policy and the fight against illegal immigration and trafficking of human beings. The VIS should comprise a central system (C-VIS) and a national system in each

[182] This clause, however, does not have the support of several Member States, nor that of the Commission.

[183] Council Regulation (EC) n° 334/2002 of 18 February 2002 introducing the integration of a photograph according to high security standards and amending Regulation (EC) n° 1683/95 laying down a uniform format for visas, OJ L 53, 23/2/2002, p. 7.

[184] Regulation (EC) 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third country nationals, OJ L 157, 15/6/2002, p. 1.

[185] COM(2003)558 final.

[186] The potentially discriminatory impact of the proposal, taking into consideration the composition of the list of countries identified in Annex I of the Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81, 21/3/2001, p. 1 (and subsequent amendments), should not be underestimated, unfortunately. This has been emphasized, *inter alia*, by the organisation Statewatch at the hearing organized by the EU Network of Independent Experts on Fundamental Rights on 16 October 2003. See also the document « Statewatch submission to the EU Network of Independent Experts on Fundamental Rights », on the website of that organisation.

Member State (N-VIS). Essentially, the introduction of the digital photograph on the visa uniform format will make possible (provided of course that the digital photograph is of adequate quality and that the border crossing-points are equipped with the required technology) to relate the photograph not only to the holder (by the use of facial recognition systems), for means of authentification, but also to the data held in the VIS, for means of identification.

Of course, the requirements laid down in Directive 95/46/CE need to fully taken into account in the implementation of the proposal. To comply with these requirements, the proposal comprises an amended Article 4(2) to Regulation (EC) n° 1683/95, according to which

> No information in machine-readable form shall be included in the uniform format for visa, unless provided for in this Regulation, its Annex or unless it is mentioned in the relevant travel document.

Moreover, Article 4a is inserted in the same Regulation. With a view to ensuring that Article 17 of Directive 95/46/EC is complied with, it provides that

> The uniform format for visa shall contain a facial image, which shall function as interoperable biometric identifier and two fingerprint images of the holder. The fingerprint images shall be taken from flat fingers.
> The biometric information shall be kept on a storage medium which shall be highly secured and which shall have sufficient capacity.

Although they are useful, these provisions obviously cover only a small part of the requirements which can be derived from Directive 95/46/EC. Four aspects of the Directive, applied to biometrics, may be worth emphasizing, on the basis of the Working Document prepared on biometrics by the Data Protection Working Party instituted by Article 29 of Directive 95/46/EC[187]. First, a biometric element is at once universal (it is a characteristic to be found in each person), unique (the characteristic is distinctive to each person), and permanent (it refers to a property of the person which does not change in time). The permanent character especially is at once an advantage (in terms of reliability) and a risk factor (the risk of misuse of data after their storage in databanks is high).

Second, for the assessment of the proportionality of the processing of biometrics, it is essential to identify with precision the goal which is pursued by the processing. The Preambule of the Regulation proposed by the Commission states that the introduction of biometric elements in the uniform format for visas seeks to « establish a more reliable link between the holder and the visa format as an important contribution to ensuring that the uniform format for visas is protected against fraudulent use » (Recital 2) The establishment of a common Visa Information System (VIS) is note mentioned here. However, a crucial distinction is to be made between the use of biometrics for *authentification* purposes (is the document holder indeed the person to whom the document was delivered ?) and the use of biometrics for *identification* purposes (is the person already identified in a system storing the biometric information concerning a large set of persons ?). As remarked by the Working Party on Data Protection, « In principle, it is not necessary for the purposes of authentification/verification to store the reference data in a database ; it is sufficient to store the personal data in a decentralised way. Conversely, identification can only be achieved by storing the reference data in a centralised database, because the system, in order to ascertain the identity of the data subject, must compare his/her [data, transformed into templates or

[187] See the Working document on biometrics adopted on 1 August 2003 by the Data Protection Working Party instituted under Article 29 of Directive 95/46/EC (WP 80, 12168/02). It should be emphasized however that the Working Party still has to react to the proposal of the Commission ; the working document 80 of 1 August 2003 is drafted in general terms, on the use of biometrics in a number of different contexts.

images at the phase of enrolment] with the [similar data] of all persons whose data are already centrally stored ». Therefore, if the regulation seeks not only to ensure against fraudulent use of the visa (authentification), but also to complement the Dublin II Regulation and limit the risk of multiple asylum claims being introduced by a same person or serve the VIS, this should be explicitly mentioned.

Third, it is also important that the individual is fully informed of the enrolment of biometric elements relating to him/her, in accordance with Articles 10 and 11 of the Directive. Fourth, the Working Party on Data Protection emphasizes that biometric systems are not necessarily error-proof. In fact, the very requirements of proportionality (Art. 6 § 1, c) of Directive 95/46/EC) impose that only data which are strictly related to the legitimate objective pursued, and to the extent the processing of such data is necessary for the fulfilment of that purpose, may be processed : a strict adherence to the requirements of proportionality (implying, for instance, that only two fingerprints would be enrolled, rather than ten), only heightens the risk of errors occurring. But the illusion of scientific certainty created by the use of biometric identifiers means that « the data subject may find it difficult or even impossible to prove the contrary. For instance, a system may mistakenly identify a data subject as someone who should not be allowed to take a place or should not enter a specific country and who would have little means to resolve the problem when he is faced with such 'indisputable' evidence against him ». The Working Party therefore stresses that in such cases, Article 15 of Directive 95/46/EC requires that any decision legally affecting an individual should only be taken after reaffirming the outcome of the automated processing.

The evaluation of Directive 95/46/EC

During the period under scrutiny, the Court of Justice delivered an important judgment in which it confirmed that the provisions 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[188] should, on the one hand, be interpreted in the light of the protection of privacy afforded by Article 8 of the European Convention on Human Rights - a provision of which the European Court of Human Rights considered that it extended to protection with regard to the processing of personal data, irrespective of whether or not those data concerned an individual's "private life"[189] –, and on the other hand may be relied upon directly by the individual in order to avoid the application of rules of domestic law that are contrary to those provisions, insofar as these appear to be both unconditional and sufficiently specific. The Court ruled in this sense in a case where it was a matter of knowing whether the public communication, by the Austrian *Rechnungshof* (Court of Audit), of data on the salaries and pensions paid to employees and pensioners by various public bodies under its control when these salaries exceeded a certain level, along with the names of the recipients, was in compliance with the proportionality requirement enshrined in Article 8 § 2 of the European Convention on Human Rights as well as in Article 6 § 1, c), of Directive 95/46/EC (according to which the data must be "adequate, relevant and not excessive" in relation to the purposes), and in its Article 7, c) and e) (which include among the criteria for making data processing legitimate the necessity of compliance with a legal obligation to which the processing controller is subject, and the necessity of the "performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or the third party to whom the data are disclosed")[190].

This development is of course to be welcomed, as it could compensate in part for the incomplete or inadequate character of the implementation of directive 95/46/EC in the

[188] OJ L 281 of 23/11/1995, p. 31.
[189] Eur. Ct. H.R., *Rotaru v. Romania*, judgment of 4 May 2000, *ECR* 2000-V, § 43.
[190] ECJ (Plenary session), 20 May 2003, *Österreichischer Rundfunk et al.*, joined cases C-465/00, C-138/01 and C-139/01.

member States. However this should not lead to underestimate the difficulties which the implementation of the directive has faced in other important respects. In its first report on the implementation of Directive 95/46/EC, presented in May 2003[191], the Commission has identified three interrelated difficulties which may explain in certain cases, countries or sectors, a low level compliance with the requirements of data protection law, as listed in the national legislation implementing Directive 95/46/EC. First, it notes "under-resourced enforcement effort and supervisory authorities with a wide range of tasks, among which enforcement actions have a rather low priority » ; second, there is « patchy compliance by data controllers, no doubt reluctant to undertake changes in their existing practices to comply with what may seem complex and burdensome rules, when the risks of getting caught seem low » ; third, the Commission is confronted with an « apparently low level of knowledge of their rights among data subjects ».

These phenomena are of course mutually reinforcing. They should lead us to be most cautious about reliance on the consent of the data subject to legitimize the processing of personal data, when this is the only ground justifying such processing under the list of acceptable grounds in Article 7 of the Directive 95/46/EC. Indeed, this is especially problematic not only in employment relationships, where the imbalance of power is visible and should be taken into account in a further Community initiative in that field, but also in the relationships between consumer and business, where the dangers are seen as particularly high[192].

These findings also lead to recall that the EC Treaty (Art. 10 EC) imposes on the Member States an obligation to contribute faithfully to the implementation of EC Law. This must necessarily include, for instance, an obligation to ensure an adequate financing of the independent control authorities created according to Article 28 of Directive 95/46/EC, and required under Article 8(3) of the Charter of Fundamental Rights. These authorities should be given the means necessary for their effective functioning, in budgetary terms and by providing them with the needed personnel. This is indispensable not only for their independency, but also for the very possibility for these authorities to adequately perform the missions assigned to them, in particular by using their investigatory powers (which may comprise in situ inspections conducted without prior announcements) and their powers to engage in legal proceedings where they find privacy regulations to be violated. In fact, the financing of these authorities must not only be ensured and maintained, it must be improved, in line with the extension of the supervisory functions of these authorities, which is in proportion to the development of technologies processing personal data, for example biometrics as a means of identification[193].

The information and communication technologies that are increasingly being used in our information society can produce three kinds of impact on our privacy: they may be situated below the minimum thresholds of protection provided for by applicable Community law or by national transposition measures; they may comply with these standards, but nothing more; finally, they may have been designed in such a way as to minimize the impact on privacy and to facilitate the exercise of the rights of the individual concerned (right of information, access and rectification, objection and appeal) (Privacy Enhancing Technologies - PET). It would be useful to examine whether a privacy impact study might be carried out systematically as part

[191] COM(2003) 265 final, 15/5/2003. Article 33 of Directive 95/46/EC of 24 October 1995 provides that, at the latest by 24 October 2001 – three years after the expiry of date fixed for the implementation by the Member States of the directive –, the Commission reports to the European Parliament and to the Commission on its application, by making, if necessary, proposals for its revision. This report has thus finally been published in May 2003.

[192] For the suggestion that we may require « systems to protect individuals from their inclination to trade their own privacy for convenience », see the Report "Security and Privacy for the Citizen in the Post-September 11 Digital Age : A Prospective Overview", at p. 107.

[193] See the European Commission's Proposal for a Council Regulation amending Regulation (EC) 1683/95 laying down a uniform format for visas, COM(2003)558 final.

of the adoption of those technologies when harmonization measures are planned in the area of information technologies (Privacy Impact Assessments (PIAs)).

Data protection in the context of police cooperation

The Draft Council Resolution on security at European Council meetings and other comparable events[194] provides a striking illustration of the links between the development of a proactive approach to security and the risks that such an approach entails for the protection of privacy, and more particularly the protection of personal data. While the internal borders between the Member States of the Schengen area may be crossed freely, Article 2 § 2 of the Convention Applying the Schengen Agreement of 14 June 1985 on the gradual removal of checks at common borders, of 19 June 1990, provides, "Where public policy or national security so require, however, a Contracting Party may, (…) decide that for a limited period national border checks appropriate to the situation will be carried out at internal borders". Except where immediate action is required, any decision to reinstate checks at internal borders may only be taken after consultation with the other Contracting Parties. The above-mentioned Draft Resolution claims to make it easier for the States concerned to exercise this option by encouraging better cooperation between the competent national authorities. Indeed, according to the Preamble of the Draft Resolution, "application of Article 2(2) of the Schengen Convention may cause inconvenience at some border crossings in the host country, thereby detracting from people's freedom of movement across Europe, with the possibility of public order disturbances". The "effective application, with less nuisance value", of action taken under Article 2(2) of the Schengen Convention would be improved by better information and alerts "regarding named individuals from other Member States who may disrupt the holding of European Council meeings or other comparable international events", such information and alerts making "targeted checks" on those named individuals possible, "thereby facilitating free movement of people". The operative part of the Draft Resolution therefore states that

> In order to make it easier for the host country to carry out targeted close checks on travellers, Member States shall supply that country with any information of relevance in identifying individuals with a record of having caused disturbances in similar circumstances.

And such information may,

> where national legislation allows, include names of individuals convicted of offences involving disruption of public order at demonstrations or other events.

The Draft Resolution states that exchange of personal data as encouraged by its text would have to comply with relevant national and international legislation, and specifically to the Council of European Convention n°108 of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, however it says

> Personal data may be used and kept only until the end of the event for which they were supplied and only for the purposes laid down in this Resolution, save as specifically agreed with the country which supplied the data.

The information to be shared between the national law enforcement authorities therefore may comprise records of criminal convictions, but it is not limited to that sensitive information : relevant information may also consist in the identity of individuals "with a record of having

[194] Note from the Italian Presidency of the Council to the Working party on Police Cooperation, Draft Council Resolution on security at European Council meetings and other comparable events, doc. 10965/03, ENFOPOL 63, COMIX 417, 30/6/2003.

caused disturbances in similar circumstances"[195]. This may result in severely restricting the freedom of movement of protesters, wishing to voice their concerns at the international summits where they have the best chances of being heard. Such a restriction to the freedom of movement chills or impedes the exercise of a democratic right to peaceful assembly and demonstration, which is a component of freedom of expression. And the exchange of personal data, in the circumstances envisaged by the Draft Resolution, appears incompatible with the requirement that any interferences with the right to respect for private life should be circumscribed by legal rules of a sufficient quality.

This last proposal highlights the usefulness of an initiative for the adoption of an instrument seeking to reinforce the protection of the individual vis-à-vis the processing of personal data in the framework of activities led under Title VI of the Treaty of the European Union, which are excluded from the scope of applicability of Directive 95/46/EC (see Article 3(2)). In the course of 2004, particular attention should be paid to the guarantees of data protection in the implementation of the second generation Schengen Information System (SIS II). The Commission Staff Working Document published in February 2003[196] – which constitutes the progress report to be presented under Article 6 of the Regulation 2424/2001 of the Council of 6 December 2001[197] – is barely explicit on how an adequate level of data protection will be ensured in the setting up SIS II, which has become urgent in view of the rythm at which the enlargement of the Union to ten new Member States has proceeded. The specific role of the EU Network of Independent Experts in Fundamental Rights will be to evaluate whether the recommendations made by the data protection authorities – which the Commission has undertaken to consult[198] – have been effectively implemented in the final version of the System.

Article 9. Right to marry and right to found a family

The main question in connection with this provision which arose during the period under scrutiny concerned the notion of "family members" used by the amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which the Commission presented in April 2003 and which retains only part of the

[195] The Draft Resolution refers to the Security Handbook for the use of police authorities and services at international events such as meetings of the European Council (doc. 12637/3/02, ENFOPOL 123, 12.11.2002), which should serve as a set of guidelines for the member States in providing security at international events such as meetings of the European Council. Referring to Article 2(2) of the Schengen Convention, the Security Handbook states that the Member States « should utilise the available and appropriate legislative measures to prevent individuals or groups considered to be a threath to the maintenance of public order from travelling to the location of the event ». The Security Handbook includes an Annex A, « Risk analysis of potential demonstrators and other groupings », listing the information which the permanent national contact point designated in each State should transmit to the Member States organising the event as well as to the other affected countries, such as transit or neighbouring countries. This « risk analysis » should target « known potential demonstrators and other grouping expected to travel to the event and deemed to pose a potential threath to the maintenance of public law and order » in the organising State. Annex A to the Security Handbook suggests that information should be provided, inter alia, on the name of the group, the distinguishing marks (clothes, logos, flags), the possible violent nature of the group, the demonstration methods, the internal functioning of the group (means of communication e.g.), the links to other groups, the members involved previously in relevant incidents, the circumstances of these incidents and whether the led to convictions, the behaviour (towards the police and the population, wearing masks, alcohol or drug consumption, « pattern of behaviour at different types of events », or « other relevant information ». The permanent national contact point should indicate the sources of his information and the accuracy and reliability of the provided information. However, this enumeration of items already gives an indication as to the risks of discrimination and of chilling the exercise of democratic rights to protest such exchange of information may entail. It would be clearly unacceptable if the exercice of freedom of expression or of peaceful assembly led to the prohibition to travel to other countries of the Schengen zone where European Summits are held.

[196] SEC(2003) 206, 18/2/2003.

[197] OJ L 328 of 13/12/2001

[198] See point 3.5. of the Working Document SEC(2003)206.

amendments proposed by the European Parliament. This instrument is examined under Article 45 of the Charter. The debate centres more particularly on the recognition by the other Member States of marriages between individuals of the same sex as provided for by Belgian and Dutch law.

Article 10. Freedom of thought, conscience and religion

Regarding the protection afforded by Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[199] to persons expressing their adherence to a particular religion, see the commentary on Article 21 of the Charter. The evaluation of the activities of the European Union during the period under scrutiny does not elicit any other commentaries on Article 10 of the Charter.

Article 11. Freedom of expression and of information

In a judgment of 12 June 2003, the European Court of Justice was led to balance the fundamental rights, as recognized inter alia in the European Convention on Human Rights, with the fundamental freedoms of movement of the EC Treaty[200]. An enterprise of international transport alleged before an Austrian jurisdiction that the autorisation given to an association for the defense of the environment to manifest its views by occupying the Brenner highway, leading this highway to be blocked for almost 30 hours, was incompatible with the principle of freedom of movement of goods. Requested to interpret EC Law in that context, the Court rules that Article 28 EC « does not prohibit only measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State » (Recital 57) [201]. Therefore the abstention of the Austrian authorities to prohibit the manifestation is normally to be considered a measure equivalent to a quantitative restriction incompatible with Articles 28 and 29 EC, unless it can be objectively justified. The Court notes in that respect that « the national authorities relied on the need to respect fundamental rights guaranteed by both the ECHR and the Constitution of the Member State concerned in deciding to allow a restriction to be imposed on one of the fundamental freedoms enshrined in the Treaty » (Recital 76), and that therefore « The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter » (Recital 77). As to how to operate this conciliation, the Court say that « the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests » (Recital 81); it adds : « The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights » (Recital 82).

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[199] OJ L 303 of 2/12/2000, p. 16.
[200] ECJ, 12 June 2003, *Schmidberger*, C-112/00, nyr.
[201] See also ECJ, 9 December 1997, *Commission v. France*, C-265/95, *ECR* I-6959, Recitals 29 and 30. The European Court of justice, however, emphasizes the differences between the two situations : in Commission v. France, in particular, the manifestants intended to obstruct the free flow of goods, and more precisely the free circulation of products from Member States other than France ; they did not seek to manifest to give publicity to their views on a question of general interest. Comp. with the Opinion of AG F.G. Jacobs of 11 July 2002 in *Schmidberger*, point 54 ; see also, however, point 79 of the Opinion.

The judgment therefore confirms that a Member State may justify imposing certain restrictions on the fundamental market freedoms of the EC Treaty by the need to respect the fundamental rights recognized in the legal order of the Union, as these are codified, in particular, by the Charter of Fundamental Rights[202]. With respect to obstacles to the free movement of goods, the solution is confirmed by Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States[203]. Indeed, this regulation covers obstacles to the free movement of goods which are attributable to a Member State, whether through action or inaction on its part, which may constitute a violation of Article 28 and ff. EC where such obstacles lead to serious disruption of the free movement of goods by physically or otherwise preventing, delaying or diverting their import into, export from or transport across a Member State, causing serious loss to the individuals affected, and requiring immediate action in order to prevent any continuation, increase or intensification of the disruption or loss in question. In conformity with the judgment of 9 December 1997 in *Commission v. France*, "inaction" of Member States' authorities refers to cases when the competent national authorities, in the presence of an obstacle caused by actions taken by private individuals, fail to take all necessary and proportionate measures within their powers with a view to removing the obstacle and ensuring the free movement of goods in their territory. The Regulation states that it "may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike" (Article 2). This is the solution which is confirmed in the *Schmidberger* case-law.

An examination of the proportionality of the restrictions imposed on the fundamental freedom of movement under the Treaty, where such restrictions are justified by the concern to protect fundamental rights, must not take the form of a strict examination of necessity. Although such a restriction may not be "necessary" for the protection of a recognized fundamental right, in the sense that this right would not be infringed even if the measure does not need to be adopted, it may nevertheless be justified by the concern that a State might have to realize a fundamental right beyond what is strictly required for the observance of that right. In several cases where the Netherlands and Austria claimed to justify certain restrictions on the free provision of services or the free movement of goods in the name of the necessity of pluralism, this justification could have been allowed, even though in the European Convention on Human Rights the freedom of expression does not call for the organization of such pluralism[204]. This position of the Court of Justice merits approval. Fundamental rights do not merely have to be "respected". They possess a dynamic content, which is progressively clarified by measures that ensure their implementation. It is important that, in the implementation of those rights, the States are not too strictly bound by the respect due to the economic freedoms of the Treaty, provided that the measures that are adopted are not discriminatory and are reasonably linked to the necessity of developing the fundamental rights that are recognized. Verification of necessity will have to be all the less strict since what is involved is the non-intervention by the national authorities in the face of the exercise by individuals of their fundamental freedoms.

Furthermore, the fundamental rights that are likely to justify certain restrictions on the fundamental freedoms of movement should not be limited solely to the rights featured in the

[202] While recalling that one could not exclude a situation where, under the pretext of respecting the fundamental rights guaranteed in his own national legal order, a State would in fact be pursuing objectives incompatible with the EC Treaty – disguising protectionist measures under the concern for fundamental rights (points 97 and 98) –, AG Jacobs considered in his Opinon that « where a Member State seeks to protect fundamental rights recognised in Community law the Member State necessarily pursues a legitimate objective. Community law cannot prohibit Member States from pursuing objectives which the Community itself is bound to pursue » (point 102).

[203] OJ 1998 L 337, p. 8.

[204] See ECJ, 25 July 1991, *Commission v. Netherlands*, 353/89, *ECR,* p. 4089 (Recital 30); ECJ, 25 July 1991, *Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media*, 288/89, *ECR* p. 4007 (Recital 23); ECJ, 3 February 1993, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, 148/91, *ECR*, p. 513 (Recitals 9 and 10); ECJ, 26 June 1997, *Familiapress*, C-368/95, *ECR*, p. I-3689 (Recital 24).

Charter of Fundamental Rights of the European Union. The Charter does not seek to impede the development of the fundamental rights that feature among the general principles of Union law as enforced by the Court[205]. When the European Convention proposed a Treaty establishing a Constitution for Europe, its authors rightly chose to include among the fundamental rights, besides the rights enshrined in the Charter, the fundamental rights that form part of Union law as general principles[206].

Pluralism of the media

In accordance with Article 11 § 2 of the Charter of Fundamental Rights of the European Union, "the freedom and pluralism of the media shall be respected". This provision seems to be a consequence of the freedom of expression guaranteed by Article 11 § 1 of the Charter. Although the European Convention on Human Rights did not establish a "right to pluralism in the media" or to pluralist information, several decisions of the European Court of Human Rights acknowledged that the concern to safeguard the pluralism of the media may justify the imposition by the State of certain restrictions on the freedom of expression guaranteed by Article 10 § 1 of the European Convention on Human Rights[207]. In the judgment in the case of *Demuth v. Switzerland* of 5 November 2002, for example, the European Court of Human Rights referred to "the legitimate need for the quality and balance of programs in general" which may counterbalance the freedom of expression; it assessed the lawfulness of the refusal to grant a concession with a view to the broadcasting of a thematic channel devoted to automobile issues, taking into account that "audio-visual media are often broadcast very widely (...). In view of their strong impact on the public, domestic authorities may aim at preventing a one-sided range of commercial television programs on offer" (§ 43).

The Court of Justice of the European Communities has given similar rulings. In two judgments of 25 July 1991 concerning the requirement imposed by the Dutch *Mediawet* of a balanced representation in the media of the different social, cultural, religious or philosophical components of Dutch society, the Court of Justice acknowledged the compatibility with Community law of the restriction imposed by that law on the free provision of audio-visual services, by considering that the maintenance of the pluralism which that policy in question seeks to safeguard "is connected with freedom of expression, as protected by Article 10 of European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order"[208]. It followed the same line of reasoning in the context of the free movement of goods. The case concerned the distribution in Austria of periodicals published by German publishers but which, on account of the prize competitions which those periodicals contained, constituted a threat to the diversity of the Austrian press. The Court considered that maintenance of press diversity may constitute an overriding requirement in the public interest justifying a restriction on the free movement of goods, provided that such restriction remains proportionate to the objective pursued and does not constitute a disproportionate restriction on the freedom of expression of the German distributors[209].

The above case law recognizes that the State is free to take measures to ensure that a certain diversity of opinion is maintained, either internally (through the representation of different opinions in the same media), or externally (by preserving a diversity of media). The

[205] See Article 53 of the Charcter (level of protection).
[206] See Article 7, §§ 1 and 3 of the Draft Treaty establishing a Constitution for Europe.
[207] Eur. Ct. H.R., *Informationsverein Lentia et al. v. Austria*, judgment of 24 November 1993, § 38; *VgT Verein gegen Tierfabriken v. Switzerland*, judgment of 28 June 2001, § 73.
[208] ECJ, 25 July 1991, *Commission v. Netherlands*, 353/89, *ECR,* p. 4089 (pt. 30); ECJ, 25 July 1991, *Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media*, 288/89, *ECR,* p. 4007 (pt. 23); also ECJ, 3 February 1993, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, 148/91, *ECR*, p. 513 (Recitals 9 and 10).
[209] ECJ, 26 June 1997, *Familiapress*, C-368/95, *ECR,* p. I-3689 (Recitals 18 and 24).

legitimacy of this objective has been recognized on account of the fact that the concern for pluralism is seen as being linked to the freedom of expression. It is true that neither the European Court of Human Rights nor the Court of Justice of the European Communities has so far imposed an obligation on the State to take positive measures with a view to establishing sufficient pluralism in the media for the right of the public to sufficiently diversified and pluralist information to be respected. However, in general terms, the respect for freedom of expression may in principle require the State to adopt positive measures: "Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals"[210]. More specifically, in the case of *De Geïllustreerde Pers v. Netherlands*, the European Commission of Human Rights made reference to a similar obligation for the State to combat excessive concentration in the media[211]. And while Article 10 § 1 of the European Convention on Human Rights allows a State party to this instrument to set up a licensing system for radio and television, this authority may only be exercised in compliance with the requirements of pluralism that characterizes a democratic society[212].

Pluralism of the media may therefore be considered as an aspect of freedom of expression (see in this sense Recommendation (99) 1 of the Committee of Ministers of the Council of Europe and, more recently, Recommendation 1506(2001) "Freedom of expression and information in the media in Europe", adopted on 4 April 2001 by the Parliamentary Assembly of the Council of Europe: "A pluralist and independent media system is also essential for democratic development and a fair electoral process. It is thus essential to eliminate oligopolism in the media, and to ensure that the media are not used to gain political power, especially in countries where a mixed public-private system would enable political movements, supported by the private sector, to control all information after elections, especially through radio and television" (par. 12)).

On several occasions, the EU Network of Independent Experts on Fundamental Rights has been asked to look into the compatibility with the requirements of the Charter of Fundamental Rights of the situation that has come about in Italy with the media concentration in the television sector, the combination of the control of the state television channel (RAI) by the leader of the parliamentary majority party - the Board of Governors of the RAI is appointed by Parliament - and the risk of a conflict of interests between the role of Mr Berlusconi as Chairman of the Board and his role as private entrepreneur in the media industry at the head of the Mediaset group. On 28 January 2003, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1589 (2003) "Freedom of expression in the media in Europe", in which it notes, "In Italy, the potential conflict of interest between the holding of political office by Mr Berlusconi and his private economic and media interests is a threat to media pluralism unless clear safeguards are in place, and sets a poor example for young democracies" (par. 12).

The present Report is not concerned with the situation of fundamental rights in Italy, but solely with the activities of the European Union examined in the light of the Charter of Fundamental Rights. It will therefore restrict its observations to the latter issue[213]. In the assumption that the situation created in Italy proves incompatible with the pluralism of the media which the institutions of the Union and the Member States acting within the scope of European Union law must "respect" (Article 11 § 2 of the Charter), do the Union institutions

[210] Eur. Ct. H.R., *Ozgur Gundem v. Turkey*, judgment of 16 March 2000, § 43.
[211] Report of 6 July 1976 (drawn up in accordance with former Article 31 of the European Convention on Human Rights), *DR* 8, p. 5.
[212] See e.g. application n° 10764/84, *DR* 49, p. 131.
[213] The reader is referred to the report drawn up for the attention of the Network by the competent Member for Italy of the EU Network of Independent Experts (ref. CFR-CDF.rappIT2003.doc), as well as the summary Report of the Network, containing its conclusions and recommendations (ref. CFR-CDF.ConclusionsENG2003.doc or CFR-CDF.ConclusionsFR2003.doc).

have the means to take action? And, if the answer to the first question is yes, may we infer that such an obligation rests on them?

First of all, it should be noted that the responsibility for guaranteeing pluralism in the media currently lies with the Member States. The Community legislator intervened in this area with the adoption of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities[214], subsequently amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997[215]. This Directive is based more particularly on the consideration that "it is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole". The body of the Directive, however, does not contain any provision aimed precisely at requiring that the Member States, who are targeted by the Directive, take certain measures to guarantee the maintenance of pluralism in television broadcasting, whereas the Directive does contain, for example, detailed provisions on the protection of minors (Article 22) or on the right of reply (Article 23).

As amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, Article 3 § 1 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities provides, "Member States shall remain free to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive". The Preamble of Directive 97/36/EC specifies that the Member States may exercise this right with a view to adopting rules concerning "the need to safeguard pluralism in the information industry and the media, and the protection of competition with a view to avoiding the abuse of dominant positions and/or the establishment or strengthening of dominant positions by mergers, agreements, acquisitions or similar initiatives; whereas such rules must be compatible with Community law" (44th recital).

Where appropriate, it is up to the Community legislator to intervene by amending Directive 89/552/EEC in order to oblige Member States to establish a more restrictive framework aimed at maintaining pluralism in the media. Article 26 of the Directive puts in place a system of periodical evaluation of the application of the Directive through reports drawn up by the Commission. It is up to the Commission, when drawing up its next report, to decide whether it wishes to propose such a revision. Article 11 § 2 of the Charter of Fundamental Rights does not prevent the Commission from carrying out such a revision. Although it is true that Article 11 § 2 of the Charter cannot establish any new power or task for the Union (Article 51 § 1 of the Charter), it could prevent the institutions of the Union from using the powers that have been assigned to them to contribute, within the limits of these powers, to the preservation of pluralism.

So long as no such revision has taken place, the responsibility for guaranteeing media pluralism lies with the Member States. We need to examine whether we could not infer from Article 11 § 2 of the Charter of Fundamental Rights an *obligation* for the Member States, in their regulation of the audio-visual sector on their territory, to take measures that offer sufficient guarantees for pluralism, that is to say, to exercise in this sense the *power* that is given to them by Article 3 § 1 of Council Directive 89/552/EEC of 3 October 1989. Insofar as

[214] OJ L 298 of 17/10/1989, p. 23.

[215] Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 202 of 30/7/1997, p. 60.

they transpose Directives 89/552/EEC and 97/36/EC, the Member States must respect the provisions of the Charter, as well as the general principles of Union law of which the Court ensures the observance. If we consider that positive obligations may be imposed on the Member States in order to ensure respect of the fundamental rights recognized in European Union law, the answer might have to be yes. "The freedom and pluralism of the media shall be respected" (Article 11 § 2 of the Charter) not only by the institutions of the Union, but also by the Member States which implement Union law, more particularly in the national measures to transpose Community directives. On this account they would have an obligation to guarantee pluralism and to operate in this sense the margin of appreciation that is allowed them by Directive 89/552/EEC. It is therefore up to the Commission as well as to the other Member States, in accordance with Articles 226 and 227 EC, to ensure that this obligation is observed by instituting infringement proceedings before the Court of Justice.

A similar line of reasoning could be followed in the area of concentrations. Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings[216], provides in Article 21 § 3 for an exception to the principle of the exclusive authority of the European Commission to adopt decisions relating to the compatibility of Community-wide concentrations with the Common Market rules. This provision states, "Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law", and it provides that shall in any case be regarded as legitimate interests "public security, plurality of the media and prudential rules".

Member States may therefore prohibit, more particularly in the name of media pluralism, any concentration between undertakings, even where this has been authorized in advance by the Commission. In making use of this right offered by Article 21 § 3 of the Regulation on concentrations, Member States are obliged to respect the fundamental rights that form part of the general principles of Union law or which are now incorporated in the Charter of Fundamental Rights[217]. We may therefore ask ourselves whether, since freedom and pluralism of the media figures among these fundamental rights, the Member States could be obliged to control concentrations from the viewpoint of this requirement of pluralism. In the light of the prohibition imposed on Member States of infringing the fundamental rights when they take action within the scope of Community law - or, as the Charter states, when they implement it -, failure to act (to prohibit such concentration in the area of information or the media, even where this has been authorized by the European Commission) might be considered as action (imposing on a concentration certain additional conditions in accordance with Community law). The obligation to "respect" media pluralism requires that the authorities take positive measures in order to guarantee this, without being able to content themselves with adopting a purely passive attitude.

Focused on the question of economic concentration, the latter option does not, however, address the problem associated with a conflict of interests that arises when a person simultaneously holds positions that are mutually incompatible because they prevent him from exercising them in perfect objectivity.
Therefore,

- the institutions of the Union, and in particular the Commission, if they consider it desirable, have the required powers to formulate rules imposing on the Member States to take measures ensuring that pluralism in the media is respected; amending directive 89/552/EEC would constitute the most economical way to do so;

[216] OJ L 257 of 21/09/1990, p. 13 (amended version)
[217] ECJ, 28 October 1975, *Rutili*, 36/75, *ECR*, p. 1219 (Recital 32); ECJ, 25 July 1991, *Commission v. Netherlands*, 353/89, *ECR*, p. 1089 (Recital 30); ECJ, 18 June 1991, *ERT*, C-260/89, *ECR*, p. I-2925 (Recital 43).

• the Member States are obliged to respect the pluralism of the media when the implement Community law, in accordance with Article 11(2) of the Charter; the compatibility of the implementation of directive 89/552/EEC should be evaluated also in consideration of this obligation; so should the attitudes adopted by the Member States with respect to the concentration of undertakings in the domain of the media, including in situations where such concentrations have been authorized by the Commission.

Article 12. Freedom of assembly and of association

The significant developments of the period under scrutiny are dealt with under Article 11 of the Charter (Freedom of expression and of information) with regard to the balance to be struck between the right to demonstrate and the free movement of goods, and under Article 8 of the Charter (Protection of personal data) with regard to the threats against the right to respect for the privacy of members of groups that are suspected of wanting to disrupt public order during international summits.

Article 13. Freedom of the arts and sciences

Decision 1513/2002/EC of the European Parliament and of the Council of 27 June 2002 concerning the sixth framework programme of the European Community for research, technological development and demonstration activities, contributing to the creation of the European Research Area and to innovation (2002 to 2006), states in its Preamble that the research activities carried out within the sixth framework programme "should respect fundamental ethical principles, including those which are reflected in Article 6 of the Treaty on European Union and in the Charter of fundamental rights of the European Union"[218]. What this implied, however, was not made explicit in that decision[219]. Reference was made to a number of instruments regulating scientific research, particularly in the area of biomedecine. The Annex of the Decision says that "During the implementation of this programme and in the research activities arising from it, fundamental ethical principles including animal welfare requirements, are to be respected. These include, inter alia, principles reflected in the Charter of fundamental rights of the European Union, protection of human dignity and human life, protection of personal data and privacy as well as the environment in accordance with Community law and, where relevant, international conventions, such as the Declaration of Helsinki, the Council of Europe Convention on Human Rights and Biomedicine signed in Oviedo on 4 April 1997 and the Additional Protocol on the Prohibition of Cloning Human Beings signed in Paris on 12 January 1998, the UN Convention on the Rights of the Child, the Universal Declaration on the Human Genome and Human Rights adopted by UNESCO, and the relevant World Health Organisation (WHO) resolutions, the Amsterdam Protocol on Animal Protection and Welfare; and current legislation, regulations and ethical guidelines in countries where the research will be carried out." These principles are relevant particularly to the first thematic priority of the programme, comprising life sciences, genomics and biotechnology for health.

Article 18 of the Convention of the Council of Europe on Human Rights and biomedecine does not take position on the question whether research on in vitro embryos is admissible or not. It leaves a choice to the States parties. It does state that where such research is authorized by law, an adequate protection of the embryo must be ensured[220]. It also states that the

[218] OJ L 232 of 29.8.2002, p. 1.
[219] Article 3 simply states that : "All the research activities carried out under the sixth framework programme must be carried out in compliance with fundamental ethical principles".
[220] Article 2 of the Convention on Human Rights and biomedecine should also be taken into account, according to which the interests of the human being should be recognized the primacy above the interests of society or science.

constitution of human embryos for the purpose of scientific research is prohibited. Thus, it is not in violation of the Convention to authorize research on human embryos which have originally been constituted *in vitro* with a view to procreation but for which there is no parental project remaining (supernumerary embryos), and which therefore would be destroyed.

According to the understanding of this rapporteur, after some Member States objected to the European Community funding research on human embryonic stem cells – a form of research which is prohibited in certain Member States –, the funding of this research was suspended until an agreement could be reached on the conditions under which such research could be funded by the Community : it was agreed, at the Council meeting of 30 September 2002, that the moratorium would last until 31 December 2003. On 9 July 2003, the Commission therefore proposed to impose strict conditions on the funding of human embryonic stem cell research[221]. Clearly, research will not be supported by Community funds where it is prohibited by the country where it takes place. Even where such research is admitted, however, strict conditions are imposed to the funding of the research involving human embryonic stem cells. The conditions proposed by the Commission are closely inspired by the Opinion n°15 given on that issue by the European Group on Ethics in Science and New Technologies on 14 November 2000. These conditions are summarized in the following paragraph which the Commission proposed to insert after the 17th paragraph of annex I to Decision 2002/834/EC :

> In order to be funded by the Community, research projects involving the procurement of stem cells from human embryos must also meet the following conditions:
> (a) prior to the start of research activities, participants must obtain ethical advice at local or national level in the countries where the research will be carried out;
> (b) the human embryos used for the procurement of stem cells must have been created before 27 June 2002 [the date of the adoption of the Sixth Framework Programme] as a result of medically-assisted in vitro fertilisation designed to induce pregnancy, and were no longer to be used for that purpose [therefore only the "supernumerary embryos are concerned, for which there is no parental project anymore and which therefore would be destroyed in any event][222];
> (c) the project must serve particularly important research aims to advance scientific knowledge in basic research or to increase medical knowledge for the development of diagnostic, preventive or therapeutic methods to be applied to humans;
> (d) all other alternative methods (including existing or adult stem cell lines) must have been examined and demonstrated not to be sufficient for the purposes of the research in question;
> (e) the free, express, written and informed consent of the donor(s) should be provided in accordance with national legislation prior to the start of the research activities;
> (f) no monetary compensation or other benefit in kind must be granted or promised for the donation;
> (g) the protection of personal data, including the genetic data, of the donor(s) must be ensured;

Therefore, even research which is not in principle unacceptable under the Convention, may have to be strictly regulated to take into account the supremacy of the interests of the human being.

[221] Proposal for a Council Decision amending decision 2002/834/EC on the specific programme for research, technological development and demonstration: "Integrating and strengthening the European research area" (2002-2006), COM(2003)390 final of 9.7.2003.

[222] As the Commission explained further in its Amended proposal presented on 26 November 2003 : "In order to allay fears that Community funding might indirectly encourage the production of embryos by in vitro fertilisation (IVF) over and above the number required, and to send out a political signal, the Commission is proposing that only supernumerary embryos created before 27 June 2002 (date of adoption of the 6th Framework Programme) can be used".

> (h) where appropriate, the participants in research projects must follow quality and safety standards on donation, procurement and storage in accordance to the state of the art, in order to ensure in particular the traceability of these stem cells.
> The scientific evaluation and the ethical review organised by the Commission of the research proposals shall include verification of these conditions. The conditions set out in point (c) and (d) shall be assessed during the scientific evaluation.
> The opinions of the European Group on Ethics in Science and New Technologies, and in particular those relating to research involving the use of human embryonic stem cells will be taken into account.
> The participants in research projects should use their best efforts to make the newly derived human embryonic stem cell lines available to the scientific community on a non-profit making basis for research purposes.
> A list of research projects involving the use of all types of human embryonic stem cells funded under the sixth framework programme will be published yearly by the Commission.

In the light of the opinion of the European Parliament, which it delivered on 19 November 2003 and which included 18 amendments[223], the Commission amended slightly its initial proposal[224]. In particular, the amended proposal contained the requirement that the donor must have given his/her consent in accordance with national legislation prior to the procurement of the cells and not simply prior to the start of the research; and the Commission confirmed that in order to contribute to optimising the use of human embryonic stem cell lines, it will support the initiative to set-up of a European registry – for which, in fact, a call for proposals had been launched already months ago.

It would not be advisable for the EU Network of Independent Experts on Fundamental Rights to take a position on the issues concerning fundamental rights which are raised by this debate, which because of its complexity requires a much more thorough examination than the one which can be offered here. The initial proposal of the Commission, and its amended proposal, do appear to conform to the minimal standards imposed by the international law of human rights concerning research performed on human embryonic stem cells, which has the effect of destroying the embryo. It may be advisable however for the Commission to further detail what procedural guarantees are implied by the notion of express, free and informed consent, given by the donors of the embryos in written form, to such use of supernumerary embryos. Inspiration should be sought from the consequences which the Steering Committee on Bioethics of the Council of Europe (CDBI) has drawn in this context from Article 5 of the Convention on Human Rights and Biomedecine. In particular, it would be important to further detail the nature of the information which should be communicated to the donors (including information of legal nature, relating to the consequences of the consent which is sought, but also information relating to the ends of the research which can be performed on human embryonic stem cells), the mode of communication of this information (in a language simple and understandable, and in a non-directing fashion), and perhaps, the time frame between the communication of the information and the expression of consent[225].

An important question which the Steering Committee on Bioethics rightly emphasizes[226] concerns the relation between the debate on the conditions of research carried out on stem cells of supernumerary human embryos and the fundamental freedoms of movement and provision of services. In countries that impose an absolute ban on that kind of research, can

[223] Rapp. P. Liese, A5-0369/2003.
[224] Amended proposal for a Council Decision amending decision 2002/834/EC on the specific programme for research, technological development and demonstration: "Integrating and strengthening the European research area" (2002-2006), COM(2003)749 final of 26.11.2003.
[225] CBDI, Report of the the Working Party on the Protection of the Human Embryo and Fetus (CDBI-CO-GT3), 19 June 2003, esp. III.D.
[226] Above-mentioned report, pp. 27-28.

the import of embryonic stem cells be prohibited as well[227]? Should access to certain material produced from such research conducted in countries where this is permitted be restricted to countries where it is prohibited, or should restrictions be imposed on the use of techniques derived from this research? What are the consequences, for the choice by laboratories of their country of establishment, of the differing approaches of Member States? These questions naturally go beyond the question of the conditions that may be imposed on Community funding for research on embryonic stem cells, yet they lead us to examine the limits that every country encounters in the choices it makes in a context of free movement.

Article 14. Right to education

We refer to the commentary on Article 26 of the Charter (Integration of persons with disabilities) as regards the right to education of children with disabilities, as guaranteed by Article 15 § 1 of the revised European Social Charter. The issue of the access of Romany children to education is discussed under Article 21 of the Charter (Non-discrimination).

Article 15. Freedom to choose an occupation and right to engage in work

Right of access to employment without discrimination for nationals of Member States

In a judgment of 6 November 2003[228], the European Court of Justice confirmed its broad reading of the concept of « worker » under Article 39 EC : there exists an employment relationship where a person performs services for and under the direction of another person in return for which he receives remuneration, and the fact that employment is of short duration – it has lasted for two months and a half in the case which led to the referral by an Austrian court – does not *per se* exclude the application of this provision of the Treaty. According to the Court, all that is required for a person to be treated as a worker under EC law is that he/she pursues an activity which is « effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and accessory » (Recital 26). The Court insists on an objective analysis of this condition by the national authorities, so that circumstances which could lead to raise suspicions about the true intent of the « worker » and a possible abuse of his/her right under EC law to be treated accordingly are irrelevant.

Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community[229] provides that workers from another Member State have the right to the same social advantages as national workers. According to the case-law of the Court, assistance for university education is included in the notion of « social advantage », therefore a national of a Member State other than the host Member State who has engaged in occupational activity in that host State should be recognized such assistance as would nationals in the same situation, « provided that there is continuity between the previous occupational activity and the studies pursued » (Recital 35). The Court recalls however that « this condition cannot be imposed on a migrant worker who has involuntarily become unemployed and is obliged by conditions on the labour market to undertake occupational retraining » (Recital 35), and it considers, with respect to the facts of the case, that « the mere fact that a contract of employment is from the outset concluded as a fixed-term contract cannot necessarily lead to the conclusion that, once that contract expires,

[227] See the German Act of 28 June 2002: *Gesetz zur Sicherstellung des Embryonenschutzes im Zusammenhand mit Einfuhr und Verwendung menschlicher embryonaler Stammzellen (Stammzellgesetz)*, commented on in the *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002*, pp. 42-43.
[228] ECJ, 6 November 2003, *Franca Ninni-Orasche*, C-413/01, nyr.
[229] OJ, English Special Edition 1968 (II), p. 475, amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1).

the employee concerned is automatically to be regarded as voluntarily unemployed » (Recital 42).

It is notable that, when considering the alleged abuse of right committed by the applicant in the proceedings before the national court, the Court answers « account should also be taken of the fact that the appellant in the main proceedings appears to have entered the host Member State not with the sole aim of benefiting from the system of student assistance in that State but in order to live there with her husband, who is a national of that State, and of the fact that she is lawfully resident there » (Recital 47). Although it is not cited by the Court, the latter statement seems to refer to the *Martinez Sala* judgment of 1998, in which the Court had considered that the national of a Member State, falling under the scope of application *ratione materiae* of the EC Treaty, should not be discriminated on the grounds of his/her nationality, even with respect to the « social advantages » in the sense of Article 7(2) of Regulation 1612/68[230].

Under Article 39(4) EC, employment in the public service is excepted from the principle of non-discrimination on the grounds of nationality between citizens of the Union in the field of employment. In a judgment of 30 September 2003, the European Court of Justice has made a restrictive reading of the exception, considering that the exception could not be invoked where the employment only very occasionally leads to participate, directly or indirectly, in the exercise of powers conferred by public law or to exercise duties designed to safeguard the general interests of the State or of other public authorities, according to the definition of the exception in the case-law of the Court[231]. Indeed, the Court considers that « the posts of master and chief mate in the Spanish merchant navy are posts in which exercise of the duty of representing the flag State is, in practice, only occasional »[232], to reject the argument of Spain according to which the posts could be reserved for perons having the Spanish nationality insofar as « the floating town which is the ship requires the presence on board of a representative of the public power (…), who is the captain »[233]. The judgment is based instead on the reasoning that

> recourse to the derogation from the freedom of movement for workers provided for by Article 39(4) EC cannot be justified solely on the ground that rights under powers conferred by public law are granted by national law to holders of the posts in question. It is still necessary that such rights are in fact exercised on a regular basis by those holders and do not represent a very minor part of their activities. Indeed, (…), the scope of that derogation must be limited to what is strictly necessary for safeguarding the general interests of the Member State concerned, which cannot be imperilled if rights under powers conferred by public law are exercised only sporadically, even exceptionally, by nationals of other Member States (Recital 44).

The judgment remains in line with the functional conception of the notion of « public administration » found in Article 39(4) EC – the outcome is not based on the fact that the employment positions were with a private legal person, i.e. the owner of the ship (see Recital 43) –, however it gives a priority to the principle of non-discrimination on the basis of nationality. A broader reading of Article 39(4) EC, which dates from the original Treaty of Rome and thus also predates the notion of a European citizenship, would seem difficult to reconcile with the nature of the rights afforded to the European citizen, who is recognized in

[230] See now, codifying this case-law, Article 21(1) of the Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2003)199 final (commented hereafter, under Article 45 of the Charter).
[231] ECJ, 3 July 1986, *Lawrie Blum*, C-66/85, ECR 2121.
[232] ECJ, 30 September 2003, *Colegio de Oficiales de la Marina Mercante Española*, C-405/01, nyr.
[233] Opinion of Advocate General C. Stix-Hackl, 30 June 2003 (unofficial translation, by the author of this report).

particular to right to vote and to be elected in local or municipal elections, whatever his/her nationality, in his/her State of residence.

Status of third-country nationals

Article 15 § 3 of the Charter of Fundamental Rights provides, "Nationals of third countries who are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union". Following the political agreement secured by the Council on 5 June 2003[234] on the Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents[235], third-country nationals should be able to acquire the status of long-term residents after five years of residence. The principal acquis of the text is the fact that long-term residents shall enjoy equal treatment with nationals as regards: access to employment and self-employed activity, provided such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration; education and vocational training, including study grants in accordance with national law; recognition of diplomas, certificates and other professional qualifications in accordance with relevant national procedures; social security, social assistance and social protection as defined by national law; tax benefits; access to goods and services and the supply of goods and services made available to the public, including access to procedures for the allocation of housing.

Member States have been allowed a wide margin of appreciation. A Member State may restrict such equal treatment with its nationals in the area of access to employment or self-employment if, in accordance with its national law or Community law in force, such employment or self-employment is reserved for its nationals or for EU or EEA citizens. The clause that provides for this exception strongly limits the right of ordinary foreigners, and particularly so when they wish to exercise their right to free movement within the Union. In this case, the second State of residence may examine the situation of its labour market and apply its national procedures concerning the requirements for admission to employment or the exercise of self-employed activity. It may also, "for reasons connected with employment market policy", give preference to Union citizens, third-country nationals where this is provided for by Community law, as well as to third-country nationals residing legally and receiving unemployment benefit in the Member State concerned. Finally, it may restrict the total number of persons qualifying for a residence permit, on condition that the admission of third-country nationals is already subject to such restrictions in accordance with the law in force at the moment of adoption of the Directive.

Article 16. Freedom to conduct a business

No significant new developments were identified under this provision of the Charter during the period under scrutiny.

Article 17. Right to property

In a judgment of 10 July 2003[236], the European Court of Justice considered that the choice made by the United Kingdom authorities, in the implementation of Council Directive 91/67/EEC of 28 January 1991 concerning the animal health conditions governing the placing

[234] The text was formally adopted by the Council on 25 November 2003.
[235] COM(2001)127 final, OJ n° C 240 E of 28/8/2001, p. 79.
[236] ECJ, 10 July 2003, *Booker Aquaculture Ltd.*, Joined Cases C-20/00 and C-64/00, nyr.

on the market of aquaculture animals and products[237], as amended by Council Directive 93/54/EEC of 24 June 1993 introducing minimum Community measures for the control of certain fish diseases[238], to order the immediate destruction and slaughter of infected fish without provided for any form of compensation of the owner, does not constitute a disproportionate and intolerable interference impairing the very substance of the right to property,in violation of the fundamental rights protected in the legal order of the European Community. The Court emphasized in this respect that « the measures referred to do not deprive farm owners of the use of their fish farms, but enable them to continue to carry on their activities there » (Recital 80), and that the business of a fish farm carries commercial risks which the exploitant must be aware of (Recital 83).

Article 18. Right to asylum

The Dublin Convention of 15 June 1990 determining the Member State responsible for examining applications for asylum lodged in one of the Member States of the European Communities was aimed at establishing the responsibility of one single Member State for processing an application for asylum. This Convention has been transcribed into a Regulation[239], following the transfer to the European Community of powers in the area of asylum and immigration by the Amsterdam Treaty, which came into effect on 1 May 1999. The evaluation by the Commission of the mechanism put in place by the Dublin Convention has, however, highlighted its limitations, while concerns over the responsibility placed on the States forming the external borders of the Union remain. Moreover, the European Court of Human Rights has emphasized that the fact that one Member State has been made responsible for processing applications for asylum lodged in the European Union does not exempt the Member State within whose jurisdiction the asylum-seeker is residing from ensuring that, when sending this person back to the State responsible for processing his application, it does not indirectly subject him to the risk of ill-treatment[240]. As the Court considers,

> The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, 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. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution (see e.g. Waite and Kennedy v. Germany judgment of 18 February 1999, *Reports* 1999, § 67). The Court notes the comments of the UNHCR that, while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered.

[237] OJ 1991 L 46, p. 1.
[238] OJ L 175, p. 23.
[239] Council Regulation No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L50 of 25/2/2003, p. 1 and Commission Regulation No 1560/2003 laying down detailed rules for the application of Regulation No 343/2003, OJ L222, p. 3.
[240] Eur. Ct. H.R. (3rd section), *T.I. v. United Kingdom* (application no 43844/98), decision of 7 March 2000 (Sri Lankan asylum seeker whose application for asylum has been rejected by the German authorities, subsequently lodged an application for asylum in the United Kingdom where he arrived clandestinely).

Minimum standards for the reception of asylum seekers in the Member States

The *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002* has already commented on Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States[241]. We will therefore be brief on this text. The Directive operates a minimum harmonization of the laws of the Member States. The objective of limiting "secondary" movements of asylum seekers through an approximation of national laws is not likely to be achieved, taking into account the great flexibility of the obligations undertaken by the Member States. The text does not apply to temporary protection but merely to conventional asylum seekers and their family members, even if the Member States are free to extend it to subsidiary protection (Article 3). Asylum seekers should be informed of the benefits to which they are entitled and of the obligations with which they must comply within 15 days after they have lodged their application for asylum, and should be provided with information on organizations that provide specific legal assistance or health care, in writing and in a language that the applicants can understand.

In principle, Member States can authorize asylum seekers to move freely within their territory or within an area assigned to them by that State. Nevertheless, for reasons of public interest or public order, Member States may decide on the residence of the asylum seeker and may even confine him to a particular place or within an assigned area, without affecting the "unalienable sphere of his private life" (Article 7 § 1). They may even make provision of the material reception conditions subject to actual residence of the applicants in a specific place and grant applicants temporary permission to leave this place (Article 7, §§ 4 and 5). Any decision to refuse material reception conditions or a decision to restrict the free movement of asylum seekers may be the subject of an appeal.

Certain guarantees are given to asylum seekers, in the form of material reception conditions enabling them to subsist in reasonable living conditions, in kind or in the form of financial allowances or vouchers. The allowances must be sufficient to enable the applicants to subsist. The material reception conditions will be guaranteed in particular to persons with specific needs (unaccompanied minors, pregnant women, disabled people, etc), including applicants being held in detention. The same applies for the provisions aimed at preserving family unity, medical examinations and health care, access to education and vocational training, whether or not the applicants have a right to employment. The Directive does indeed provide that Member States may deny asylum seekers access to the labour market during a particular period of time. Such a decision may be reviewed after one year if no decision has been taken concerning the application for asylum. Member States are obliged to provide asylum seekers with housing (premises, accommodation centres, hotels, private houses) in order to protect their family and private life. In any case, the possibility of communicating with legal advisers, non-governmental organizations, the United Nations High Commissioner for Refugees must be guaranteed to them.

From the point of view of the requirements of international law on human rights, it is the situation of minors that appears to be the most problematical. Several provisions of Directive 2003/9/EC are devoted to the situation of minors, whose specific situation has been taken into account[242]. However, the possibility of detaining asylum-seeking minors at other than specialized centres subsists, which, from the point of view of Article 3 § 1 of the United Nations Convention on the Rights of the Child, remains problematical[243].

[241] OJ L 31 of 6/2/2003, p. 18. Unlike Denmark and Ireland, the United Kingdom marked its intention to participate in this instrument.
[242] See Articles 10 (schooling and education of minors), 18 (minors) and 19 (unaccompanied minors).
[243] See the *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002*, pp. 75-76.

Determination of the status of refugees or of persons qualifying for subsidiary protection

The proposal for a Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection has not yet been brought to a successful conclusion[244], even though a political agreement was reached by the Council on 28 November 2002. One of the main obstacles is the refusal by several Member States to align the status of persons qualifying for subsidiary protection with that of conventional refugees. Access to employment and social protection, as well as the right to family reunification are the main aspects at issue. Another problem concerns the clauses on cessation of protection. On the one hand, with regard to the cessation of refugee status, these clauses are determined exhaustively by the Geneva Convention of 28 July 1951. On the other hand, the protection offered by a Member State by virtue of Article 3 of the European Convention on Human Rights is an absolute protection, prohibiting expulsion to the borders of a country where the person in question risks an attempt on his life or treatment contrary to Article 3 of the Convention.

Definition of minimum standards on procedures for granting and withdrawing refugee status

The definition of minimum standards on procedures in Member States for granting and withdrawing refugee status is also the subject of a proposal for a Directive, called Directive on "asylum procedures"[245]. One of the issues raised by this proposal is that of the so-called "safe" countries, whether the country of origin of the asylum seeker or a country which he passed in transit and where he could have applied for asylum. Pending the adoption of this proposal, Austria lodged an initiative with a view to the adoption of a Council Regulation establishing the criteria for determining the States which qualify as safe third States for the purpose of taking the responsibility for examining an application for asylum lodged in a Member State by a third country national and drawing up a list of European safe third States[246]. The scope would of course be confined to European States only[247], yet the proposed Regulation would nevertheless introduce the principle of identifying "safe countries" in the Community order. This initiative, however, was rejected by the European Parliament in plenary session on 24 September 2003.

The compromise that is sought on this same question by the proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status has so far left Member States with ample freedom of action in this matter. The freedom of States to designate a country as "safe" is, however, limited by criteria enumerated in the Annexes which detail the elements of this "safety"[248]. Moreover, the text contains two clauses which for the "safe third country" (Article 28 - Application of the safe third country concept)

[244] COM(2001)510 of 12 September 2001.
[245] COM(2000)578 of 20/9/2000 and COM(2002)326 final of 18/6/2002.
[246] OJ C17 of 24/1/2003, p. 6. The text will be repealed when the Directive is adopted.
[247] The list of third countries in Europe that are considered safe includes the twelve countries that are candidates for accession to the Union, as well as Norway, Iceland and Switzerland. Only Switzerland would continue to figure on this list. Since the signature of the accession treaties on 16 April 2003 in Athens by the ten candidate countries, the so-called "Dublin II" Regulation and the Schengen acquis will apply in those countries. Romania and Bulgaria will not be covered by the regulation until the Council has adopted a decision "at a later date" (Article 6 § 2). As regards Norway and Iceland, under the Dublin II Regulation and the Schengen acquis, the Regulation will also apply to them as soon as those countries have notified that they accept the contents thereof and they will ensure its transposition into their national law.
[248] Annex I concerns the identification of safe third countries. It is stipulated, "Observance of the standards for the purpose of designating a country as a safe third country also includes provision by that country of effective remedies that guarantee these foreign nationals or stateless persons from being removed in breach of Article 3 of the European Convention or Article 7 of the International Covenant and Article 3 of the Convention against Torture." It is important to emphasize that, in such a context, "effective remedies" must suspend the decision to remove a person from the national territory, in other words, that a removal order cannot be carried out until an independent - in principle judicial - authority has had the opportunity to rule on the absence of risk associated with the removal.

and for the "safe country of origin" (Article 31 – Application of the safe country of origin concept) respectively are aimed at guaranteeing that the identification of countries that are considered safe shall never constitute an absolute presumption with regard to the situation of each individual asylum seeker. The Justice and Home Affairs Council of 2 and 3 October 2003 endorsed the principle of a list of safe third countries without being unanimous yet on the conditions and criteria to be adopted for the establishment of such a list. For the rest, the observations formulated on the text in preparation by the EU Network of Independent Experts on Fundamental Rights in the *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002* are still relevant today[249].

Processing of asylum seekers outside the borders of the Union

On 10 March 2003, the United Kingdom, through its Prime Minister, proposed to externalize the processing of asylum applications. The proposal was meant to develop a "new approach" to asylum issues by reducing the number of incoming asylum seekers on European Union territory by keeping them outside the Union. It therefore aims to establish "regional protection areas"[250] close to the country of origin of the asylum seekers and to set up transit processing centres situated near the external borders of the Union[251]. These two instruments would thus make it possible to externalize the processing of asylum applications. These protection areas in third States would receive the asylum seekers, who would be transferred there upon their arrival in a Member State. Their applications would be processed at these centres, which are run by the International Organization for Migration under the supervision of the United Nations High Commissioner for Refugees. Persons who have been granted refugee status will be assigned to a Member State according to a fair quota and distribution system yet to be defined. The others would be returned to their country of origin or would qualify for temporary protection until the situation in their country of origin has improved.

The United Nations High Commissioner for Refugees reacted to this proposal at the informal Council at Veria on 28 and 29 March 2003[252]. The UNHCR found that there was a need to update the Geneva instrument and expressed the wish for a relaunch of the protection mechanisms called "Convention Plus"[253], aimed at guaranteeing a better functioning of the Geneva Convention and developing modernized policies despite the diversion of the procedures. This relaunch would be embodied in the conclusion of special agreements complementing the Geneva Convention. In this perspective, the UNHCR was not opposed to the setting up of "closed centres" allowing faster processing and simplified procedures. On the other hand, he considered that the reception centres should be situated within the European Union and that they should be reserved solely for economic migrants coming from safe third countries.

[249] See the *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002*, pp. 153-155.
[250] For example in Turkey, Iran, Morocco or Northern Somalia.
[251] For example in Romania, Ukraine or Albania.
[252] UNHCR, New approaches on Asylum-Migrations issues, Statement of High Commissionner R. Lubbers, Veria, Greece, March 2003.
[253] The latter may be summarized as follows: firstly, the conclusion of special agreements with a view to developing plans of action in order to respond more effectively and foreseeably to massive influxes; targeting of development aid in order to ensure a fairer distribution of the burden and to promote the independence of refugees and returnees, whether in the host countries or communities by facilitating local integration or in the countries of origin in the context of reintegration; the conclusion of multilateral undertakings in the area of resettlement; better definition of the roles and responsibilities of the countries of origin, transit and destination in the area of secondary or irregular movements (multilateral readmission arrangements, strengthening of capacities, extraterritorial protection arrangements). Simultaneously, cooperation from the UNHCR needs to be developed in order to help States speed up asylum procedures and improve the quality of examination of asylum applications by identifying safe countries of origin or safe third countries, information on countries of origin, and monitoring of the case law developed in the Member States. See UNHCR, Convention Plus: Questions and answers, 20 January 2003.

Any attempt to transfer the responsibilities incumbent upon the Member States and on the Union to third States is contrary to their international obligations from the viewpoint of the Geneva Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms[254]. Furthermore, any updating of the Geneva Convention can only take place complementary to this Convention and must not replace the current instrument. We may also ponder over the conditions envisaged by the main players for the transfer of asylum seekers to such reception structures as well as over the kind of rules that will apply on this occasion, in particular with regard to the detention of applicants and their access to remedies. The definition and application of the concept of "safe third countries" that will thus be established in the Union also merits special attention, with a view to guaranteeing the "effective protection"[255] required from the viewpoint of fundamental rights and fitting into the legislative instrument that is currently being finalized. In any case, the effective protection of asylum seekers presupposes that minimum conditions are satisfied, which can be identified as follows: physical safety, protection against refoulment, access to asylum procedures of the UNHCR or to national procedures with sufficient guarantees where this is essential for access to effective protection or to long-term solutions, and social and economic well-being entailing, at least, access to primary health care, primary education and the labour market or to sufficient means of subsistence to guarantee a dignified living standard.

On 20 June 2003, the European Council of Thessaloniki[256] confined itself to calling upon the Commission to explore the "parameters" of a better access of asylum seekers to the territory of the European Union, following a Communication from the Commission advocating "more accessible, equitable and managed asylum systems"[257].

Article 19. Protection in the event of removal, expulsion or extradition

The binding effect of the provisional measures adopted by the European Court of Human Rights

A chamber constituted in the first section of the European Court of Human Rights gave a judgment on 6 February 2003[258], in which it considered for the first time that the indication of provisional measures by virtue of Article 39 of the Rules of Court is binding on the State to which it is addressed. The case of *Mamatkulov and Abdurasulovic v. Turkey* concerns the extradition of the two applicants by the Turkish authorities to Uzbekistan on 27 March 1999 in pursuance of a bilateral agreement between Turkey and the Republic of Uzbekistan. The Court considered, "It follows from Article 34 that, firstly, applicants are entitled to exercise their right to individual application effectively, within the meaning of Article 34 *in fine* – that is to say, Contracting States must not prevent the Court from carrying out an effective examination of the application – and, secondly, applicants who allege a violation of Article 3 are entitled to an effective examination of the issue whether a proposed extradition or expulsion will entail a violation of Article 3. Indications given by the Court, as in the present case, under Rule 39 of the Rules of Court, permit it to carry out an effective examination of the application and to ensure that the protection afforded by the Convention is effective; such indications also subsequently allow the Committee of Ministers to supervise execution of the

[254] Amnesty International, "Strengthening Fortress Europe in Times of War. Commentary on British proposals for external processing and responsibility sharing arrangements with third countries", 27 March 2003; ECRE, Statement of the European Council on Refugees and Exiles on the European Council meeting, 21 and 22 March 2003, 17 March 2003.

[255] See the conclusions of the Seminar of experts convened by the UNHCR, Conclusions on the concept of "Effective Protection" in the context of secondary movements of refugees and asylum-seekers, Lisbon, 10 December 2002

[256] Point 26 of the conclusions.

[257] COM(2003)315 of 3 June 2003.

[258] The judgment is not final. An application has been filed to transfer the proceedings before the Grand Chamber of the European Court of Human Rights, which has accepted.

final judgment. Such measures thus enable the State concerned to discharge its obligation to comply with the final judgment of the Court, which is legally binding by virtue of Article 46 of the Convention"[259]. The Court concluded on this point, "Any State Party to the Convention to which interim measures have been indicated in order to avoid irreparable harm being caused to the victim of an alleged violation must comply with those measures and refrain from any act or omission that will undermine the authority and effectiveness of the final judgment"[260].

The Community return policy of persons staying illegally in the Member States

The question that has in particular held out attention during the period under scrutiny follows upon several initiatives aimed at facilitating the organization of joint flights and transit in the Member States. The Council recommended that common standards be adopted in this area when on 28 November 2002 it adopted its Return Action Programme. This also follows upon the Communication from the Commission of 14 October 2002 on a community return policy on illegal residents[261], and is also discussed in the Communication from the Commission on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents[262].

Following upon an initiative of the Federal Republic of Germany[263], the Council adopted Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air[264]. The Directive is adopted on the basis of Article 63(3)b) EC. It seeks to organize the mutual assistance between the States participating in the Schengen convention[265] where the removal of third country nationals by air is not possible by direct flights, and where, therefore, flights transiting through airports of other Member States may be required. The Directive applies to removals by air both with and without escorts, however it seeks to scrupulously preserve the sovereign prerogatives of the transit State where the exercise of public authority is concerned[266]. Article 7(1) of the Directive reflects the compromise between the need to make the transit of an escort from the requesting State possible, while strictly limiting the exercise of powers by that escort, during the transit : « When carrying out the transit operation, the powers of the escorts shall be limited to self-defence. In addition, in the absence of law-enforcement officers from the transit Member State or for the purpose of supporting the law-enforcement officers, the escorts may use reasonable and proportionate action in response to an immediate and serious risk to prevent the third-country national from escaping, causing injury to himself/herself or to a third party, or damage to property. Under all circumstances escorts must comply with the legislation of the requested Member State. » The costs relating to the transit are fully incurred by the requesting State (Article 5(6)), and the requesting State also undertakes to readmit the third-country national where either the autorisation to transit by air is refused or revoked, where the third-country national entered the requested Member State without authorisation during the transit, or where the transit to another State has been unsuccessful or is impossible (Article 6).

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[259] § 107.
[260] § 110.
[261] COM(2002)564.
[262] Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents (COM(2003)323 final, 3/6/2003).
[263] OJ C 4, 9/1/2003, p. 4. Initially (April 2003), this met a skeptical response from the European Parliament : see doc. A5-0104/03.
[264] OJ L 321, 6/12/2003, p. 26.
[265] All EU Member States, with the exception of Denmark, the UK and Ireland (Denmark may decide to implement the directive before 25 April 2004, in accordance with Art. 5 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community) ; and Iceland and Norway.
[266] See Preamble, Recital 4 : « The sovereignty of the Member States, particularly with regard to the use of direct force against third-country nationals resisting removal should remain unaffected ».

Recital 7 of the Preamble and Article 8 of the Directive explicitly state that the implementation of the Directive should comply fully with the Geneva Convention relating to the status of refugees of 28 July 1951 and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Regrettably, only the Preamble states that « In accordance with the applicable international obligations, transit by air should be neither requested nor granted if in the third country of destination or of transit the third-country national faces the threat of inhumane or humiliating treatment, torture or the death penalty, or if his life or liberty would be at risk by reason of his/her race, religion, nationality, membership of a particular social group or political conviction. » Article 3(3) of the Directive, which lists the reasons for which the Member State whose assistance is requested may refuse transit by air, does not reiterate this, although it is formulated « without prejudice to the obligations of Article 8 » of the Directive, which refers to the international obligations of the States under the Geneva Convention and the ECHR. Of course, where a risk of ill-treatment of persecution in the country of return exists, the State requested to offer its assistance to the removal by air not only should be able to deny the request : it is under an obligation to refuse. It would be unacceptable for the requested State to seek to escape its international obligations by invoking the fact that it was merely facilitating the implementation of a removal decision made, independently, by the authorities of the requesting State.

Article 6(1)(d) of Directive 2003/110/EC, relating to the obligation to readmit the third country national who could not be removed, should also be read as including the situation where it appears to the transit State that the removal would put the person subject to deportation at risk, even in situations where the appreciation of the authorities of the transit State differs from the appreciation of the authorities of the requesting State. Such a situation will not occur, normally, where the transit has been agreed upon by the requested State in a particular case, as the final country of destination will identified in the initial request. However, it could occur where States have entered bilateral or multilateral agreements under which transit authorisations are presumed, making it possible to organise removals by air transiting by another State party to such an agreement without seeking specific autorisation to that effect, provided it is notified beforehand (Article 4(2), 3d indent). Here, indeed, no individualized examination of each removal is done beforehand. It is however essential that such an examination is performed by the requested State at least after receiving the notification, and that if it appears to the requested State that the removal would be in violation of its international obligations, the autorisation is revoked and the person readmitted in the requesting State. Indeed, Article 3(5) of the Directive provides for the possibility that certain facts are brought to the attention of the requested State, leading that State to revoke the autorisation initially given : here again, Article 6(1)(a) should apply, imposing on the requesting State to accept the readmission of the deported person and the related costs (Article 5(6)), even where this information concerns the situation of human rights in the country of destination and the risks which, in the view of the transit State, the removed person may be facing. Any other reading would mean that a State would be tempted not to comply with its international obligations, as imposed by the instruments mentioned in Article 8 of the Directive, out of fear of the costs relating to the readmission of the third-country national in the State which took the initial decision on the removal.

More recently, Italy has taken two initiatives since the start of its presidency of the Council. It proposed a Directive to complement this instrument with respect to removals by land. The aim of this Directive would be to define measures for assistance between the competent authorities of the Member States in case of transit, with escort, across the territory of one or several Member States, of third-country nationals against whom removal orders have been issued by a Member State[267]. Italy also proposed a Council Decision[268] aimed specifically at

[267] Initiative of the Italian Republic with a view to adopting a Council Directive on assistance in cases of transit through the territory of one or more Member States in the context of removal orders taken by Member States against third-country nationals, 9 September 2003, doc. 12026/03

organizing joint flights for the collective repatriation of aliens who are illegally present in the territory of Member States. It relies for its legal basis on Article 63, paragraph 3, point b), EC and extends the Comprehensive Plan to combat illegal immigration and trafficking of human beings, adopted on 28 February 2002[269]. This plan states that readmission and return policy is an integral and vital component of the fight against illegal immigration, and emphasizes that a Community return policy calls for common principles and common measures. This intention is reaffirmed by the Member States in the Return Action Programme, approved on 28 and 29 November 2002, which recommends that the return of third-country nationals illegally resident in a Member State should be made as efficient as possible by "sharing existing capacities of Member States" for such removal. The text proposes a rationalization of procedures, the designation of a contact national authority and the compilation of a common manual. The aim of the proposed decision is to group the persons being expelled from several Member States on one flight in order to reduce the costs of expulsion. Each Member State will designate an authority responsible for organizing the flights. This authority will inform the other Member States if a joint flight is being scheduled, so that the other States can reserve seats on board the plane for the persons they intend to expel. The authority will establish the organizational details (number of escorts, medical personnel and interpreters to be provided on board). In order to decide the number of escorts to be provided, the authorities need to take into account the criminal record of those passengers and their behaviour, violent or not, during their detention. The authorities will choose the air carrier and determine how the costs will be shared. The proposed decision obliges the selected air carrier to submit the relevant flight plan and to obtain all the necessary flight authorizations.

The joint organization by several Member States of removal operations by air involves the adoption of certain minimum common security standards. The Commission convened two meetings of experts in January and March 2003 in order to arrive at a text containing "Common guidelines on security provisions for joint removals by air", submitted to the Member States for approval. The Commission has announced its intention to propose a Council Directive on minimum standards for return procedures and mutual recognition of return decisions[270], given the lack of effectiveness of the existing Directive on mutual recognition of expulsion decisions, which has not established a binding framework for the mutual recognition of all return decisions.

Neither Article 4 of Additional Protocol n° 4 to the European Convention on Human Rights, nor general international human rights law stands in the way of the joint removal of a group of illegally residing aliens[271]. In the single case in which the European Court of Human found a violation of Article 4 Protocol n° 4 ECHR, the Court reiterated that collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group"[272]. The Court admits however, that in certain circumstances doubts may arise about the individualized character of the examination of each situation : where one or more States announce their intention to return a group of persons to a certain destination, they may be tempted to only summarily check each individual situation, or even to proceed on the basis of characteristics such as nationality, ethnic origin or religion, either in the determination of the asylum claims, or in the adoption of orders to leave the territory as such. This would

[268] Initiative of the Italian Republic with a view to adopting a Council Decision on the organization of joint flights for removals of third-country nationals illegally present in the territory of two or more Member States, 9 September 2003, 12025/03

[269] OJ C 142 of 14/6/2002, p. 23.

[270] Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents (COM(2003)323 final, 3.6.2003), para. 2.3.

[271] Eur. Ct. HR (1st sect.), *Majic v. Sweden*, dec. of 23 February 1999 (Appl. n° 45918/99).

[272] Eur. Ct. HR (3rd section), *Conka v. Belgium* judgment of 5 February 2002, Appl. N° 51564/99, § 59.

constitute a collective expulsion of aliens, in the meaning of Article 4 of Protocol n°4 ECHR. This was precisely the situation in the case of *Conka v. Belgium*, where the Court concluded that there was a collective expulsion with a specially chartered flight to organize the removal to Slovakia of 74 Slovakians of Roma origin, who had been ordered to leave Belgian territory after they had answered a notice to present themselves at the police station[273]. The recourse to removal operations using special flights actually increases the risk of a collective administrative processing of removal orders.

For the rest, it should be insisted that Community policy on the return of illegal residents should take into account standards established in this area by the bodies of the Council of Europe. The text below lists the most recent standards that have been elaborated by the Parliamentary Assembly of the Council of Europe and by the European Committee for the Prevention of Torture. These standards, which have been derived from the European Convention on Human Rights and from the case law of the European Court of Human Rights, should serve as a guide in the interpretation of a series of provisions of the Charter of Fundamental Rights of the European Union that are relevant to the development of minimum standards on return procedures for illegal aliens, in particular Article 4 (Prohibition of torture and inhuman or degrading treatment or punishment), Article 6 (Right to liberty and security), Article 18 (Right to asylum) and Article 19 (Protection in the event of removal, expulsion or extradition).

> ***Recommendation 1547 (2002) from the Parliamentary Assembly on Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity,*** adopted on 22 January 2002 by the Parliamentary Assembly (rapp. Ms Vermot Mangold) (extracts)
>
> 13. Finally, the Assembly recommends that the Committee of Ministers urge member states:
>
> i. to establish independent monitoring systems for expulsion procedures, for example by appointing observers, mediators or ombudsmen, and to conduct impartial and in-depth enquiries at all levels into allegations of ill-treatment;
>
> ii. to ensure that all foreigners awaiting expulsion receive, under the aegis of a referee, supervision which is:
>
> *a.* individual, through the assessment of the individual situation of each foreigner concerned, covering not only his or her administrative and legal status, but also his or her anxieties concerning the expulsion and his or her state of health;
>
> *b.* comprehensive, through the involvement of a multidisciplinary group including, with respect for their ethical principles, doctors, psychologists, social workers, legal advisors, organisations offering legal or humanitarian assistance, particularly non-governmental organisations;
>
> *c.* monitored at all stages of the expulsion procedure, that is, during preparation for departure, in particular in detention areas and centres, during the journey and on repatriation;

[273] Consider also the friendly settlements reached in the cases of *Sulejmanovic and others* and *Sejdovic and Sulejmanovic v. Italy* (Appl. N° 57574/00 and n° 57575/00) (judgments of 8 November 2002 (Eur. Ct. HR (1st sect.)).

iii. to ensure that every accompanied minor concerned by an expulsion procedure is not taken away by the competent officers unless in the presence of his parents and accompanied by them;

iv. to develop systematic policies for voluntary or forced repatriation in partnership with the International Organization for Migration (IOM) or any other relevant body, in particular through the allocation of financial aid;

v. to adapt without delay their legislation and practices regarding holding prior to expulsion, in order to:

a. limit the length of detention in waiting or transit zones to a maximum of fifteen days;

b. limit the length of detention in police stations to the amount of time strictly necessary for any arrest and to separate foreigners awaiting expulsion from people being questioned for common law crimes;

c. limit prison detention to those who represent a recognised danger to public order or safety and to separate foreigners awaiting expulsion from those detained for common law crimes;

d. avoid detaining foreigners awaiting expulsion in a prison environment, and in particular to:
– put an end to detention in cells;
– allow access to fresh air and to private areas and to areas where foreigners can communicate with the outside world;
– not hinder contacts with the family and non-governmental organisations;
– guarantee access to means of communication with the outside world, such as telephones and postal services;
– ensure that during detention foreigners can work, in dignity and with proper remuneration, and take part in sporting and cultural activities;
– guarantee free access to consultation and independent legal representation;

e. guarantee, under regular supervision by the judge, the strict necessity and the proportionality of the use and continuation of detention for the enforcement of the deportation order, and to set the length of detention at a maximum of one month;

f. favour alternatives to detention which place less restrictions on freedom, such as compulsory residence orders or other forms of supervision and monitoring, such as the obligation to register; and to set up open reception centres;

g. ensure that detention centres are supervised by persons who are specially selected and trained in psycho-social support and to ensure the permanent, or at least regular, presence of "inter-cultural mediators", interpreters, doctors and psychologists as well as legal protection by legal counsellors;

h. take into account, in any decision to limit personal freedom, the needs of vulnerable groups, and in particular:
– the principle of the unity of the family must be respected in all circumstances;
– unaccompanied minors must be treated in accordance with their age, and must immediately be taken charge of by a judge for minors and have access to independent legal consultation and representation;
– single women must be able to use separate facilities ;
– the elderly must have access to the medical care necessary for their age;

vi. ensure that expulsion orders are enforced by specially trained, plain-clothed state representatives and not by private agents, and avoid any traumatising treatment, especially towards vulnerable persons;

vii. inform the destination state of the measures taken, to ensure the expelled persons are not considered criminals;

viii. set up a monitoring system in the destination country, managed by embassy personnel, with a view to ensuring that the expelled person is not subjected to human rights violations, considered as a criminal or threatened with blackmail or arbitrary detention;

ix. adapt immediately their legislation and practices concerning the transportation of expelled foreigners in order to:

a. inform the deportee at least thirty-six hours in advance of the details of the journey: times, destination, means of transport and, if applicable, whether they will be escorted;

b. limit the use of escorts to cases of known resistance, to take careful account of all refusals to be escorted and to organise a prior meeting with members of the escort, if absolutely necessary;

c. ensure that members of escorts are adequately trained, particularly in mediation and stress management, and have linguistic and cultural knowledge;

d. favour in all cases scheduled air transport and to ensure that the carrier and captain have been fully informed and, if they do not allow the presence on board of independent observers or video recordings, to at least give their formal agreement;

e. allow also the presence of independent observers or to make video recordings of the moments leading up to departure, due to the possibility of threats or attacks intended to persuade the person to leave; the independent observers must be present on departure and arrival;

f. systematically draw up certificates on the physical and mental health of the deportee, on departure and arrival;

g. introduce into national law specific regulations which strictly forbid the following practices:
– partial or total obstruction of the respiratory tract;
– gagging with adhesive tape;
– the use of poison gas or stun gas;
– the administration of tranquillisers against the wishes of the person concerned or of medicines without medical direction;
– any form of restraint other than handcuffs on the wrists;
– immobilisation by handcuffs during the journey;
– the wearing of masks or hoods by members of the escort;
– the arbitrary or disproportionate use of force;

h. ensure proportionality and respect for safety and human dignity in any other measures taken during the expulsion procedure, by taking account of the particular needs of vulnerable persons such as children, unaccompanied minors, single women and the elderly;

i. ensure that deportees receive food and drink during the journey and that they can carry and reclaim their personal belongings;

x. introduce into law the legal guarantees necessary for persons whose rights are violated during an expulsion procedure to be able to effectively exercise their right to appeal, namely:

a. the possibility for the victim, or any other person appointed by him or her to this effect, to appeal to the legal authorities, including, if appropriate, the diplomatic representations of the state from which he has been expelled;

b. the provision of complete information to all persons awaiting expulsion regarding the possibility of making an appeal and ways of doing so, information on the possible consequences of a refusal to co-operate and the means of restraint stipulated in national law;

c. the presence of the victim in the state which decided to expel him or her throughout the duration of the proceedings brought about by the appeal, if necessary by means of:
– the suspension of an expulsion procedure against a person still present in the state from which he or she is to be expelled; or
– the return of an expelled person to the state which expelled him or her.

Deportation of foreign nationals by air - Extract from the 13th General Report of the European Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT) [CPT/Inf (2003) 35]

31. The CPT recognizes that it will often be a difficult and stressful task to enforce a deportation order in respect of a foreign national who is determined to stay on a State's territory. It is also clear, in the light of all the CPT's observations in various countries – and particularly from an examination of a number of deportation files containing allegations of ill-treatment – that deportation operations by air entail a manifest risk of inhuman and degrading treatment. This risk exists both during preparations for deportation and during the actual flight; it is inherent in the use of a number of individual means/methods of restraint, and is even greater when such means/methods are used in combination.

32. At the outset it should be recalled that **it is entirely unacceptable for persons subject to a deportation order to be physically assaulted as a form of persuasion to board a means of transport or as a punishment for not having done so.** The CPT welcomes the fact that this rule is reflected in many of the relevant instructions in the countries visited. For instance, some instructions which the CPT examined prohibit the use of means of restraint designed to punish the foreigner for resisting or which cause unnecessary pain.

33. Clearly, one of the key issues arising when a deportation operation is carried out is the use of force and means of restraint by escort staff. The CPT acknowledges that such staff are, on occasion, obliged to use force and means of restraint in order to effectively carry out the deportation; however, **the force and the means of restraint used should be no more than is reasonably necessary.** The CPT welcomes the fact that in some countries the use of force and means of restraint during deportation procedures is reviewed in detail, in the light of the principles of lawfulness, proportionality and appropriateness.

34. The question of the use of force and means of restraint arises from the moment the detainee concerned is taken out of the cell in which he/she is being held pending deportation (whether that cell is located on airport premises, in a holding facility, in a prison or a police station). The techniques used by escort personnel to immobilise the person to whom means of physical restraint – such as steel handcuffs or plastic strips – are to be applied deserve special attention. In most cases, the detainee will be in full possession of his/her physical faculties and able to resist handcuffing violently. In cases where resistance is encountered, escort staff usually immobilise the detainee completely on the ground, face down, in order to put on the handcuffs. Keeping a detainee in such a position, in particular with escort staff putting their weight on various parts of the body (pressure on the ribcage, knees on the back, immobilisation of the neck) when the person concerned puts up a struggle, entails a risk of positional asphyxia[274].

There is a similar risk when a deportee, having been placed on a seat in the aircraft, struggles and the escort staff, by applying force, oblige him/her to bend forward, head between the knees, thus strongly compressing the ribcage. In some countries, the use of force to make the person concerned bend double in this way in the passenger seat is, as a rule, prohibited, this method of immobilisation being permitted only if it is absolutely indispensable in order to carry out a specific, brief, authorised operation, such as putting on, checking or taking off handcuffs, and only for the duration strictly necessary for this purpose.

The CPT has made it clear that **the use of force and/or means of restraint capable of causing positional asphyxia should be avoided whenever possible and that any such use in exceptional circumstances must be the subject of guidelines designed to reduce to a minimum the risks to the health of the person concerned.**

35. The CPT has noted with interest the directives in force in certain countries, according to which means of restraint must be removed during the flight (as soon as take-off has been completed). If, exceptionally, the means of restraint had to be left in place, because the deportee continued to act aggressively, the escort staff were instructed to cover the foreigner's limbs with a blanket (such as that normally issued to passengers), so as to conceal the means of restraint from other passengers.

On the other hand, instructions such as those followed until recently in one of the countries visited in connection with the most problematic deportation operations, whereby the persons concerned were made to wear nappies and prevented from using the toilet throughout the flight on account of their presumed dangerousness, can only lead to a degrading situation.

36. In addition to the avoidance of the risks of positional asphyxia referred to above, the CPT has systematically recommended **an absolute ban on the use of means likely to obstruct the airways (nose and/or mouth) partially or wholly.** Serious incidents that have occurred in various countries over the last ten years in the course of deportations have highlighted the considerable risk to the lives of the persons concerned of using these methods (gagging the mouth and/or nose with adhesive tape, putting a cushion or padded glove on the face, pushing the face against the back of the seat in front, etc.). The CPT drew the attention of States Parties to the Convention to the dangers of methods of this kind as far back as 1997, in its 7th General Report. It notes that this practice is now expressly prohibited in many States Parties and **invites States which**

[274] See, in particular, "Positional Asphyxia – Sudden Death", US Department of Justice, June 1995, and the proceedings of the "Safer Restraint" Conference held in London in April 2002 under the aegis of the UK Police Complaints Authority (cf. www.pca.gov.uk).

have not already done so to introduce binding provisions in this respect without further delay.

37. It is essential that, in the event of a flight emergency while the plane is airborne, the rescue of the person being deported is not impeded. Consequently, **it must be possible to remove immediately any means restricting the freedom of movement of the deportee, upon an order from the crew**.

Account should also be taken of the health risks connected with the so-called "economy-class syndrome" in the case of persons who are confined to their seats for long periods (See, in particular, "Frequency and prevention of symptomless deep-vein thrombosis in long-haul flights: a randomised trial", John Scurr et al, *The Lancet*, Vol. 357, 12 May 2001).

38. Two particular points were of concern to the CPT after visits to certain countries: the wearing of masks by deportation escorts and the use, by the latter, of incapacitating or irritant gases to remove immigration detainees from their cells in order to transfer them to the aircraft.

In the CPT's opinion, **security considerations can never serve to justify escort staff wearing masks during deportation operations.** This practice is highly undesirable, since it could make it very difficult to ascertain who is responsible in the event of allegations of ill-treatment.

The CPT also has very serious reservations about the use of incapacitating or irritant gases to bring recalcitrant detainees under control in order to remove them from their cells and transfer them to the aircraft. The use of such gases in very confined spaces, such as cells, entails manifest risks to the health of both the detainee and the staff concerned. Staff should be trained in other control techniques (for instance, manual control techniques or the use of shields) to immobilise a recalcitrant detainee.

39. Certain incidents that have occurred during deportation operations have highlighted **the importance of allowing immigration detainees to undergo a medical examination before the decision to deport them is implemented**. This precaution is particularly necessary when the use of force and/or special measures is envisaged.

Similarly, **all persons who have been the subject of an abortive deportation operation must undergo a medical examination as soon as they are returned to detention** (whether in a police station, a prison or a holding facility specially designed for foreigners). In this way it will be possible to verify the state of health of the person concerned and, if necessary, establish a certificate attesting to any injuries. Such a measure could also protect escort staff against unfounded allegations.

40. During many visits, the CPT has heard allegations that immigration detainees had been injected with medication having a tranquillising or sedative effect, in order to ensure that their deportation proceeded without difficulty. On the other hand, it also noted in certain countries that instructions prohibited the administration, against the will of the person concerned, of tranquillisers or other medication designed to bring him or her under control. **The CPT considers that the administration of medication to persons subject to a deportation order must always be carried out on the basis of a medical decision taken in respect of each particular case. Save for clearly and strictly defined exceptional circumstances, medication should only be administered with the informed consent of the person concerned.**

41. **Operations involving the deportation of immigration detainees must be preceded by measures to help the persons concerned organise their return, particularly on the family, work and psychological fronts.** It is essential that immigration detainees be informed sufficiently far in advance of their prospective deportation, so that they can begin to come to terms with the situation psychologically and are able to inform the people they need to let know and to retrieve their personal belongings. The CPT has observed that a constant threat of forcible deportation hanging over detainees who have received no prior information about the date of their deportation can bring about a condition of anxiety that comes to a head during deportation and may often turn into a violent agitated state. In this connection, the CPT has noted that, in some of the countries visited, there was a psycho-social service attached to the units responsible for deportation operations, staffed by psychologists and social workers who were responsible, in particular, for preparing immigration detainees for their deportation (through ongoing dialogue, contacts with the family in the country of destination, etc.). Needless to say, **the CPT welcomes these initiatives and invites those States which have not already done so to set up such services**.

42. The proper conduct of deportation operations depends to a large extent on the quality of the staff assigned to escort duties. Clearly, **escort staff must be selected with the utmost care and receive appropriate, specific training designed to reduce the risk of ill-treatment to a minimum.** This was often far from being the case in the States Parties visited. In some countries, however, special training had been organised (methods and means of restraint, stress and conflict management, etc.). Moreover, certain management strategies had had a beneficial effect: the assignment of escort duties to staff who volunteered, combined with compulsory rotation (in order to avoid professional exhaustion syndrome and the risks related to routine, and ensure that the staff concerned maintained a certain emotional distance from the operational activities in which they were involved) as well as provision, on request, of specialised psychological support for staff.

43. **The importance of establishing internal and external monitoring systems in an area as sensitive as deportation operations by air cannot be overemphasised.** The CPT observed that in many countries, specific monitoring systems had, unfortunately, been introduced only after particularly serious incidents, such as the death of deportees.

44. **Deportation operations must be carefully documented.** The establishment of a comprehensive file and a deportation record, to be kept for all operations carried out by the units concerned, is a basic requirement. Information on abortive deportation attempts should receive special attention and, in particular, the reasons for abandoning a deportation operation (a decision taken by the escort team on managerial orders, a refusal on the part of the captain of the aircraft, violent resistance on the part of the deportee, a request for asylum, etc.) should be systematically recorded. The information recorded should cover every incident and every use of means of restraint (handcuffs; ankle cuffs; knee cuffs; use of self-defence techniques; carrying the deportee on board; etc.).

Other means, for instance audiovisual, may also be envisaged, and are used in some of the countries visited, in particular for deportations expected to be problematic. In addition, surveillance cameras could be installed in various areas (corridors providing access to cells, route taken by the escort and the deportee to the vehicle used for transfer to the aircraft, etc.).

45. **It is also beneficial if each deportation operation where difficulties are foreseeable is monitored by a manager from the competent unit, able to interrupt the operation at any time.** In some of the countries visited, the CPT found that there

were spot checks, both during preparations for deportation and during boarding, by members of internal police supervisory bodies. What is more, in an admittedly limited number of cases, members of the supervisory bodies boarded aircraft incognito and thus monitored the deportee and the escort until arrival at the destination. The CPT can only welcome these initiatives, which are all too rare at present in Europe.

Further, **the CPT wishes to stress the role to be played by external supervisory (including judicial) authorities, whether national or international, in the prevention of ill-treatment during deportation operations**. These authorities should keep a close watch on all developments in this respect, with particular regard to the use of force and means of restraint and the protection of the fundamental rights of persons deported by air.

CHAPTER III : EQUALITY

Article 20. Equality before the law

It is referred to the commentary under Article 21 of the Charter.

Article 21. Non-discrimination[275]

Directives based on Article 13 EC

By 19 July 2003 and 2 December 2003 respectively, the transposition should have been completed of Directives 2000/43/EC and 2000/78/EC adopted in 2000 on the basis of Article 13 EC[276]. This transposition process is not complete yet, however. It is therefore too early to formulate a comprehensive appraisal[277]. On the other hand, the following remarks may be made on questions of interpretation that have been raised by certain provisions of the Directives, which a review might be able to clarify. These remarks have been formulated in the perspective of the reports which the Commission is due to submit at the end of 2005, beginning of 2006, on their application[278]. At this stage they are purely provisional and need to be completed in the light of the experience subsequently gained in 2004-2005.

Protection against victimization

Article 9 of Directive 2000/43/EC and Article 11 of Directive 2000/78/EC concern protection against victimization. Although they are formulated in slightly different terms, neither is really explicit on the extent of the protection, ratione personae, which Member States should guarantee. Can this protection be limited to the author of the complaint, who allegedly

[275] For the purposes of the commentary on this provision, we were unable to take account of the Annual Report (Part 2) drawn up by the European Monitoring Centre on Racism and Xenophobia (EUMC): see *Racism and Xenophobia in the EU Member States: Trends, Developments and Good Practices in 2002*, December 2003, 96 pages. Nevertheless, it is advisable to consult this document, in particular for its presentation of the need to collect statistical data to allow a better monitoring of the effectiveness of the fight against discrimination in diverse areas.
[276] 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; 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.
[277] The object of the present report, which exclusively evaluates the activity of the Union institutions, is not to offer an assessment of the transposition of this Directive by the Member States. For a first appraisal of the new Member States and the candidate States, see the report *Equality, Diversity and Enlargement. Report on measures to combat discrimination in acceding and candidate countries*, DG Employment & Social Affairs (Unit Fundamental Rights and Anti-Discrimination), September 2003.
[278] In accordance with Article 17 of Directive 2000/43/EC and Article 19 of Directive 2000/78/EC.

suffered discrimination, or should it be extended to witnesses or colleagues at work who support the complainant? It would be essential for the Commission to make it clear that in its view it is the latter interpretation that should prevail. This would be in line with Recommendation CRI(2003)8 adopted on 13 December 2002[279]. This will avoid a divergence between the interpretation of the Directives and that of the Directive in preparation implementing the principle of equal treatment between women and men in the access to and supply of goods and services[280], of which the Preamble accompanying the Commission proposal clearly states, in connection with a clause (Article 9) formulated in identical terms, "Victims and witnesses could be deterred from exercising their rights due to the risk of reprisals in certain circumstances" (p. 17).

Scope of the concept of reasonable accommodation

In Directive 2000/78/EC, the concept of reasonable accommodation is provided only for the benefit of persons with disabilities (Article 2 § 2, ii), and Article 5). This element of non-discrimination, however, should also be able to be relied upon by persons of a particular religion or ethnic origin: in the former case, reasonable accommodation would concern, for example, working hours or work schedules (so that they are compatible with hours of prayer or religious festivals), dietary arrangements at company cafeterias or the nature of the duties to be carried out (menus should be made up and tasks distributed in accordance with religious prohibitions); in the latter case, it may guarantee greater respect for ethnic identity, for example as regards the wearing of religious insignia or, in the particular case of Roma, the residence imposed by the employer. It should be underlined, first, that the notion of reasonable accommodation should not necessarily be confined to the elimination of obstacles in the physical environment : even with respect to disability, an effective accommodation may for instance consist in sign language interpretation, or a form of individualized assistance to facilitate the integration in the undertaking[281]. Second, the obligation to provide reasonable accommodation is not merely an element in the prohibition of direct/indirect discrimination, but constitutes an *additional* guarantee to those that ensue from the prohibition of those two traditional forms of discrimination. Indeed, the refusal to provide reasonable accommodation consists in the choice of *imposing on everybody, without exception, a common standard*. Such a refusal will not generally be considered as constituting direct discrimination. And it could in certain cases be objectively justified as pursuing a legitimate aim, by means both appropriate and necessary. In this way, such a refusal could escape the prohibition of discrimination, unless the obligation to introduce an exception to the common standard may be imposed, when the common standard itself seems justified and therefore non-discriminatory[282].

Link between reasonable accommodation and indirect discrimination

The concept of reasonable accommodation is presented in an ambiguous way in Article 2 § 2, b) of Directive 2000/78/EC. This provision, as it stands now, gives the impression that, faced with the situation where an employer relies on a provision, practice or criterion that is apparently neutral yet would put persons with disabilities at a particular disadvantage, and cannot justify this provision, practice or criterion, may *either* modify this measure, *or* provide reasonable accommodation to allow the disabled person to have access to a job, to keep this

[279] ECRI General Policy Recommendation n°7 on national legislation to combat racism and racial discrimination.
[280] COM(2003)657 final, of 5/11/2003.
[281] See, e.g., amendement n°25 proposed in the Report on the proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation (rapp. T. Mann) (doc. A5 – 0264/2000, 21 September 2000), and the explanations contained in that proposal.
[282] See for example Cass. fr. (soc.), 24 March 1998, *Azad v. Chamsidine, Dr. Soc.*, June 1998, p. 615 (employee at a butcher's who claimed that his Muslim religion prohibits him from all contact with pork: although the fact that employees working at a butcher's are required to handle pork may be considered justified, even though it may put Muslims at a particular disadvantage, it will not necessarily be easy to justify that no exception can be made to the general rule, considering that the Muslim religion of the employees invokes entitlement to such an exception).

job or to gain promotion. There should be no *alternative* here, but a *subsidiarity* between the two concepts. It is only when the apparently neutral measure does not need to be modified because it may be objectively and reasonably justified that we need to examine the possibility of a reasonable accommodation of the situation of the disabled person, taking into account his specific needs. Any other interpretation perpetuates environments that discourage the professional integration of disabled persons, unless arrangements are made on a case-by-case basis that would allow such an integration to take place on an individual basis.

Marriage-related benefits and the prohibition of discrimination based on sexual orientation

Recital 22 of Directive 2000/78/EC states that the prohibition of any form of discrimination, direct or indirect, on the ground of sexual orientation, is "without prejudice to national laws on marital status and the benefits dependent thereon". This means that, even there where marriage is only open to couples of men and women, the fact of attaching certain advantages to marriage cannot be considered as bringing about discrimination on the ground of homosexual orientation. This is only acceptable insofar as the European Court of Human Rights has not yet recognized the right to marry for same-sex couples without one of the partners having undergone a sex change as it has recognized for couples of which one of the partners is a transsexual[283]. It should be emphasized, however, that, on the one hand, granting certain rights to couples of men and women (e.g. cohabiting in a stable relationship) whereas same-sex couples are excluded from those same advantages constitutes direct discrimination on the basis of sexual orientation, within the meaning of the Directive[284]; on the other hand, bearing in mind the fact that the prohibition of all discrimination is one of the general principles of Community law, observance of which is ensured by the Court of Justice of the European Communities[285], only the fact of reserving certain advantages for married couples whereas excluding unmarried couples from those advantages yet granting them identical or similar recognition (as is the case with various forms of registered partnership or solidarity pact), may be classed as discrimination on the ground of sexual orientation, either directly (where advantages are reserved for the institution open to heterosexuals only whereas the institution reserved for homosexuals is excluded from those advantages) or indirectly (where no objective and reasonable justification can be given for reserving certain advantages for married couples only, whereas national law has established an institution, parallel to marriage, that is essentially similar thereto, while continuing to reserve marriage for heterosexual couples only). It would be useful if the Commission would issue a Communication interpreting Directives 2000/43/EC and 2000/78/EC, covering, among other things, the two latter points.

Relationship between Non-Discrimination and Personal Data Protection.

This is developed under the next paragraph.

Diversity in Business and the use of sensitive data in diversity policies

The European Commission (Directorate-General for Employment, Industrial Relations and Social Affairs) has commissioned a report on the business case for diversity policies within

[283] See Eur. Ct. H.R., *Christine Goodwin v. United Kingdom* and *I. v. United Kingdom*, judgment of 11 July 2002; and the interpretation of this judgment by the Court of Justice of the European Communities in its judgment of 7 January 2004, *K. B. and National Health Service Pensions Agency*, C-117/01.

[284] The gap observed by the Court of Justice of the European Communities in the judgment of 17 February 1998 in the *Grant* case (C-249/96, *ECR* p.I-621) has been filled by the adoption of Article 13 EC and Directive 2000/78/EC.

[285] ECJ, 30 April 1996, *P. v. S.*, C-13/94, *ECR* p.I-2143.

the undertaking. The report was completed in October 2003[286]. It is based on a survey of 200 companies in 4 EU countries, on literature reviews, on 8 case studies in 6 Member States, and on a number of interviews with a range of actors. The report puts forward a number of benefits from diversity policies, among which especially the strengthened cultural values within the organisation, the enhanced reputation of the undertaking and a capacity to retain the most talented people. Costs, too, are associated with diversity policies. Some are opportunity costs, linked to the transition towards an internal culture within the enterprise more open to diversity, and therefore should be seen as an investment. Other costs are recurring expenses : such costs include, inter alia, the hiring and training of specialist staff, record-keeping, monitoring and reporting processes. The report however also highlights the need for a more complete dissemination of information on workforce diversity policies, to contribute to a better awareness by companies of the potential significance and benefits of diversity policies. It also insists on the need for case-studies on diversity policies which have worked well, and more generally, for more systematic comparisons of the performances of a wide range of companies in achieving diversity. The purpose of such a comparison could be to better identify the obstacles which diversity policies face in the different sectors or countries, the ways such obstacles have been overcome in other settings, and the costs and benefits of diversity policies.

One specific obstacle to the adoption and implementation of workforce diversity policies are the restrictions on the processing of sensitive data in the EU, which may make it impossible to measure the evolution of the workforce, according to sexual orientation, race or ethnic origin, or religion. The processing of data on racial origin, religious or other beliefs, health (disability) or sex life is subject to particularly strict conditions on account of the risk of discrimination involved in the use of such data. 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[287] provides, "Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life" (Article 8 § 1)[288]. However, if a victim of discrimination can adduce in support of his action certain statistical data that will make it possible to presume discrimination - obliging the respondent to prove that he has not committed the alleged discrimination -, the processing of such personal data is necessary. Before we can argue that such a measure, provision or criterion produces a disproportionate impact on the persons who define themselves by their membership of a 'racial' or ethnic group, their religion or beliefs, their age, disability or sexual orientation, we must be able to classify those persons according to those criteria[289]. Moreover, an employer who wants to implement a policy of diversity within his workforce must necessarily monitor the composition of the workforce on the basis of such data.

[286] The Costs and Benefits of Diversity. A Study on Methods and Indicators to Measure the Cost-Effectiveness of Diversity Policies in Enterprises, report drawn up by the Centre for Strategy and Evaluation Service (CSES) on behalf of the European Commission. See http://europa.eu.int/comm/employment_social/fundamental_rights/prog/studies_en.htm

[287] OJ L 281 of 23/1/1995, p. 31.

[288] See also Article 6 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, opened for signature within the Council of Europe on 28 January 1981 (CETS n° 108) (which says that sensitive data "may not be processed automatically unless domestic law provides appropriate safeguards").

[289] The Member States can provide that indirect discrimination, prohibited under the Directives adopted on the basis of Article 13 EC, may be established "by any means, including on the basis of statistical evidence" (Preamble of 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 (Recital 15); Preamble of 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 (Recital 15)). This is merely an option offered to Member States, since the Directives only impose minimum standards.

Directive 95/46/EC only allows the processing of sensitive data in five situations, among which: "(a) the data subject has given his explicit consent to the processing of those data, except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his consent; or (b) processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorized by national law providing for adequate safeguards (…); or (e) the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims." The processing of sensitive data by an employer may therefore be allowed for the purpose of complying with the obligations imposed on him by labour law, insofar as such law provides adequate safeguards (Article 8 § 2, b) of Directive 95/46/EC). In order to shield himself against legal action for alleged discrimination on the basis of certain statistical data on the composition of the workforce or the disproportionate impact of any system that he has put in place, an employer will have to continuously monitor the consequences of the decisions he takes in terms of their repercussions on the different categories of workers or prospective workers. To this end, he will have to process "sensitive" data such as membership of a 'racial' or ethnic group, religion, or health (disability). Article 8 § 2 of Directive 95/46/EC stipulates that national law offers specific safeguards, in other words, that it strictly regulates the method used by an employer and the use he makes of those data, in particular the way in which those data are collected (only self-identification of the worker with certain categories makes this classification acceptable), protection of the data (persons having access to those data and conditions of access), and exercise by the person concerned of rights of access and rectification.

In this context, two situations merit special attention:

- It would be appropriate to examine in which Member States of the European Union a person who claims to have been discriminated against may demand from an employer that he justifies his reliance on certain provisions, criteria or practices on the basis of statistical evidence submitted to the competent authority, although the employer is unable, under the applicable law on the protection of personal data, to process sensitive data of his employees, even with their consent.

- It would also be a good idea to examine, more broadly, according to the substance of the national measures to transpose the above-mentioned Directive 95/46/EC, the obstacles that an employer finds on his way when he wants to implement a policy of diversity in his workforce. Where appropriate, the introduction of exceptions to the prohibition of processing sensitive data, within the limits authorized by the Directive, may be contemplated in order to encourage the implementation of a diversity policy. Bearing in mind the considerable differences in national sensitivities hat exist in this area, it may not be desirable to impose a uniform solution. However, a regular examination of the current situation, in particular by the social partners at the national level, may be recommended. It should be stressed that the differences in approach between Member States on this issue precisely pose a threat to the prime objective of Directive 95/46/EC when it was adopted, which was to guarantee the free movement of data between Member States, particularly in order to facilitate cross-border economic activity[290]. The realization of this objective would be threatened if differences in approach between national laws have the effect of impeding the implementation of a staff policy encouraging diversity in companies that operate in several States[291]. The

[290] The criticisms levelled at Article 4 of Directive 95/46/EC during the evaluation procedure of this Directive highlight this problem very well. This provision relates to the law applying to data protection. It obliges the economic operator who has activities in several Member States to comply with each of the national laws applicable to his activities in the countries where they are located.

[291] See Communication of the Commission on the implementation of Directive 95/46/CE, COM(2003) 265 final, 15.5.2003.

> Commission has taken the view that Internal Market legislation should « provide a level playing field for economic operators in different Member States; help to simplify the regulatory environment in the interests of both good governance and competitiveness; and tend to encourage rather than hinder cross-border activity within the EU »[292].

A proposal for a Directive on the processing of personal data and the protection of privacy in an occupational context is expected in early 2004. We will need to examine, in the light of this proposal, which answers may be formulated to those two questions.

Prohibition of discrimination on the ground of membership of a national minority

By prohibiting all discrimination on the ground of membership of a national minority, Article 21 § 1 of the Charter obliges the institutions of the Union as well as the Member States, when implementing Union law, to bear in mind the impact that their initiatives may have on members of national minorities. However, the Charter does not define the concept of national minority. Nor is this concept defined in the Framework Convention for the Protection of National Minorities, opened for signature within the Council of Europe[293]. It should, however, be considered that the prohibition of discrimination on the ground of membership of a national minority offers protection against discrimination to groups of persons who reside on the territory of a State and are citizens thereof; display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state; and are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language[294].

The implementation of equal treatment in favour of persons belonging to national minorities may impose certain positive obligations: obligation to adopt adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality (Article 4 § 2 of the Framework Convention); obligation to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage (Article 5 § 1); obligation to encourage a spirit of tolerance and to promote mutual respect, understanding and co-operation among all persons living on their territory (Article 6 § 1); obligation to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity (Article 6 § 2); obligation to adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities (Article 9 § 4); obligation to promote equal opportunities for access to education at all levels for persons belonging to national minorities (Article 12 § 3). Account should also be taken of the fact that, in accordance with the interpretation of the Framework Convention for the Protection of National Minorities as given by the advisory committee set up by virtue of Article 26 thereof, the obligations listed under Article 6 of the Framework Convention also apply with regard to asylum-seekers and persons belonging to other groups that have not traditionally lived in the country in question[295].

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[292] Commission of the European Communities, *First report on the implementation of the Data Protection Directive (95/46/EC*), cited above.

[293] CETS n° 157. This convention was opened for signature on 1 February 1995 and came into force on 1 February 1998. It was ratified by all Member States of the Union, except Belgium, France, Greece, Luxembourg, the Netherlands and Latvia.

[294] Recommendation 1201(1993) adopted by the Parliamentary Assembly of the Council of Europe, proposing the adoption of an additional protocol on the rights of national minorities to the European Convention on Human Rights.

[295] See for example the Advisory Committee of the Framework Convention for the Protection of National Minorities, Opinion on Austria (ACFC/INF/OP/I(2002)009), 16 May 2002, par. 32

Therefore, two series of recommendations may be issued. Firstly, the concern for the protection of national minorities by the institutions of the Union should necessitate a more systematic evaluation of the actions they take with regard to the capacity for national minorities to maintain and develop their culture and to preserve their religion, languages, traditions and cultural heritage. Such an evaluation is totally lacking today. However, it should be considered an integral part of a verification of the conformity of the actions of European Union institutions with the requirements of the Charter of Fundamental Rights. For the time being, such an evaluation of the impact on national minorities of certain proposals may consist of a strictly legal compatibility review. For instance, such an evaluation may lead to the inclusion in the Green Paper from the Commission, "Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union"[296], of a reference to Article 10 § 3 of the Framework Convention - guaranteeing members of national minorities free assistance of an interpreter -, which would have further strengthened the argument developed in point 5 of the Green Paper[297]. Moreover, this same Green Paper could have recalled that one of the fundamental rights to be granted to suspects or defendants in criminal proceedings is not to be classified in an ethnic group against their will, notably in the records drawn up by the police[298].

In the medium term, the assessment of the impact of European Union initiatives on the rights of national minorities involves more than a purely legal analysis. It involves, first of all, the collection and updating of statistical data on the ethnic breakdown of the population in question in order to make it easier to measure the impact[299]. It also involves a requirement of consultation, even participation, of representatives of the groups concerned. Article 15 of the Framework Convention for the Protection of National Minorities imposes the guarantee of "the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them". This is an essential guarantee. A true assessment of the impact of policies on minorities can only be carried out effectively with the participation of representatives of those minorities[300].

The examples that have been given of the positive obligations incumbent on the public authorities under the Framework Convention for the Protection of National Minorities were chosen because they indicate the use that the European Community/Union could make of its powers in order to contribute to this protection:

- Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities[301], subsequently amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June

[296] COM(2003) 75 final of 19/2/2003. The *Green Paper* is discussed in more detail below under Article 48 of the Charter.

[297] See for example the Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on the Czech Republic, ACFC/INF/OP/I(2002)002, 6 April 2001, par. 57: "The State Report also states that the Government's Council for National Minorities intends to propose an amendment to the Criminal Code so that defendants in criminal proceedings can receive all documents in their own language. In addition, it notes the difficulties that arise in this area because of a shortage of interpreters of the Roma language. The Advisory Committee encourages the Czech authorities to take any measures likely to improve this situation".

[298] Article 3 § 1 of the Framework Convention reads, "Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice". See Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Germany, 1 March 2002, ACFC/INF/OP/I(2002)008), par. 19-21.

[299] See the Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Sweden (ACFC/INF/OP/I(2003)006), 20 February 2003, par. 71.

[300] For this reason, the Advisory Committee on the Framework Convention on the Protection of National Minorities "considers that national minorities should be consulted more systematically on decisions which affect them" (Opinion on Lithuania, ACFC/INF/OP/I(2003)008, 21 February 2003, par. 104).

[301] OJ L 298 of 17/10/1989, p. 23.

1997[302], could, when it is next amended, take into account the obligation which the Advisory Committee on the Framework Convention derived from Article 9 § 4 of the Framework Convention for the Protection of National Minorities to reserve sufficient time in public service broadcasting for minority languages and for programmes reserved for national minorities[303].

• In accordance with the authority that is indisputably given to them by Articles 29 and 31, e), EU, the Member States, acting within the framework of the Union, may adopt a framework decision to combat racism and xenophobia. The present report has already addressed this question. On several occasions, the Advisory Committee on the Framework Convention for the Protection of National Minorities has urged for an effective protection, in particular in criminal law, for the victims of crimes inspired by racial or national hatred[304].

• The concept of universal service, which the *Green Paper on services of general interest*[305] cites among the obligations that are traditionally associated with the concept of services of general economic interest, should in particular take account of the special situation of communities living in conditions of segregation, isolated from the rest of the community, especially when low income forms an obstacle to the use of paid transport. The case of the Roma present itself in those terms in several States[306]. With regard to Italy, the Advisory Committee on the Framework Convention for the Protection of National Minorities thus considered in its Opinion of 14 September 2001, "For years the Roma have been isolated from the rest of the population by being assembled in camps where living conditions and standards of hygiene are very harsh. Numerous concurring reports suggest that problems of overcrowding persist: in several camps some huts have neither running water nor electricity and proper drainage is often lacking. While some Italian Roma do undeniably continue to lead an itinerant or semi-itinerant life, the fact remains that many of them aspire to live under housing conditions fully comparable to those enjoyed by the rest of the population"[307]. With regard to the problem of school absenteeism of Roma children in that country, the Committee notes, "The transportation problems facing Roma pupils who live in camps remote from schools, and the precarious financial circumstances of many parents, are also factors of

[302] Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 202 of 30/7/1997, p. 60.
[303] Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Sweden (ACFC/INF/OP/I(2003)006), 20 February 2003, par. 81; Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Lithuania, ACFC/INF/OP/I(2003)008, 21 February 2003, par. 97; Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Hungary, ACFC/INF/OP/I(2001)004, par. 29; Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Slovakia, ACFC/INF/OP/I(2001)001, 22 September 2000, par. 32; Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on the Czech Republic, ACFC/INF/OP/I(2002)002, 6 April 2001, par. 45.
[304] Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Slovakia, ACFC/INF/OP/I(2001)001, 22 September 2000, par. 29; Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on the Czech Republic, ACFC/INF/OP/I(2002)002, 6 April 2001, par. 40.
[305] COM(2003)270 final of 21 May 2003.
[306] See for example the report *Breaking the Barriers – Romani Women and Access to Public Health Care*, Strasbourg, 11 September 2003 (independent report prepared under the supervision of representatives of the Council of Europe, the OSCE High Commissioner on National Minorities, the Office for Democratic Institutions and Human Rights (ODIHR), the European Monitoring Centre on Racism and Xenophonia of the European Union, and the Regional Office for Europe of the World Health Organization (WHO)), particularly Part II of the report, which describes types of direct and indirect discrimination by healthcare workers and institutions that Roma may confront in accessing health care.
[307] Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Italy (ACFC/INF/OP/I(2002)007), 14 September 2001, par. 25.

absenteeism which should be addressed"[308]. A concern for the protection of national minorities would have made it possible to take better account of these data when defining the requirement of universal service. This cannot be conceived as an obligation to supply services to all people, without discrimination, on the same "affordable" terms: it should take into account the special situation of certain groups with specific needs.

The most important contribution which the European Community could make to the protection of minorities, within the framework of its existing powers, would be the **adoption of a Directive specifically aimed at encouraging the integration of Roma**. The Opinions of the Advisory Committee on the Framework Convention for the Protection of National Minorities leave no doubt as to the inadequacy of Directive 2000/43/EC of 29 June 2000, even though it protects the Roma against all discrimination on the ground of membership of an ethnic group. The urgent need to adopt a specific Directive based on Article 13 EC in order to encourage the integration of the Roma minority not only stems from the grave concerns that have been expressed in the evaluation reports on the situation of this minority in several Member States of the European Union, and not just in the acceding States where the question of integration of the Roma arises with particular acuteness. This urgency also stems from the inappropriateness in several respects of Directive 2000/43/EC, which was not specifically aimed at achieving the *integration* of groups that are traditionally excluded, such as the Roma. On the one hand, as has already been pointed out, the Directive does not give the Roma the guarantee of having access to reasonable accommodation matching their specific needs. However, the Roma should, for example, be able to have access to employment or obtain services without being prevented from doing so by the fact of them wearing traditional clothing[309], *even* there where a justification may be given to support the prohibition of such clothing. What should be justified, however, is the refusal to make an exception to a general prohibition measure, whereas this measure prevents the Roma from preserving an essential element of their identity. The Roma should be able to choose to lead an itinerant or semi-itinerant lifestyle, *even* there where there are good justifications for country planning legislation which in principle denies them the availability of stopping places for their caravans. Considering that the itinerant lifestyle is part of the Roma identity, non-discrimination in access to housing as in principle imposed by Directive 2000/43/EC (Article 3 § 1, h)) should be understood as obliging the authorities to provide sufficient stopping places for caravans[310]. The obligation to provide effective accommodation where it is reasonable should be imposed, too, in the sphere of education. The Committee of Ministers of the Council of Europe, for instance, has recommended to the Member States of the Organisation that « Educational policies for Roma/Gypsy children should be accompanied by adequate resources and the flexible structures necessary to meet the diversity of the Roma/Gypsy population in Europe and which take into account the existence of Roma/Gypsy groups which lead an itinerant or semi-itinerant lifestyle. In this respect, it might be envisaged having recourse to distance education, based on new communication technologies."[311]

[308] Ibid., par. 55.

[309] Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Finland (ACFC/INF/OP/I(2001)002), par. 25; Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Sweden (ACFC/INF/OP/I(2003)006), par. 24.

[310] Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on the United Kingdom (ACFC/INF/OP/I(2002)006), 30 November 2001, par. 40-42. The Advisory Committee considers that the lack of available sites throughout the United Kingdom is problematic from the point of view of Article 5 of the Framework Convention, which recognizes for members of national minorities the right to preserve the essential elements of their identity, namely their traditions: "This combined with a range of legislative and administrative measures have the effect of inhibiting nomadism and effectively denying travellers the right to maintain and preserve or develop one of the important elements of their culture and identity, namely travelling. The Advisory Committee therefore considers that the Government and the devolved Executives should take further steps to ensure the availability of additional adequate stopping places for Roma / Gypsies and Irish Travellers".

[311] Recommendation No R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe (adopted by the Committee of Ministers on 3 February 2000 at the 696th meeting

Similarly, Part IV of the report *Breaking the Barriers – Romani Women and Access to Public Health Care*, published by the Council of Europe in September 2003 – but which was the outcome of a collaboration between this organization and the OSCE High Commissioner on National Minorities, the Office for Democratic Institutions and Human Rights (ODIHR), and the European Monitoring Centre on Racism and Xenophobia of the European Union –, clearly highlights the mechanisms that would make it possible to take better account of the specific situation of the Roma, and particularly that of Romani women, in the access to health care services. The policy of "openness" advocated by this report implies that health care workers become more familiar with Roma practices relating to health care and thus are able to make the necessary accommodations for those practices in order to ensure a non-discriminatory access to health care for the Roma.

On the other hand, with regard to the necessity of achieving the integration of the Roma, the mere prohibition of direct or indirect discrimination does not suffice. Equal treatment in this case involves taking into account a) the need to achieve *desegregation* of Roma in the area of housing and in particular of education, whether the situations of segregation that are encountered are the result of deliberate choices made by the public authorities[312] or of personal preferences[313]; b) the need to *compensate for past discrimination* which resulted in a particularly unfavourable situation for the Roma in social and economic life as a whole, by adopting a policy of *affirmative action* to integrate the Roma in the community[314]; c) the need to encourage the integration of the Roma minority while respecting the attachment to an itinerant life which some of its members may still have. This calls for a policy that effectively promotes the free choice of members of that minority to either pursue an itinerant or semi-itinerant lifestyle or to adopt a sedentary lifestyle which should be allowed to develop in

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of the Ministers' Deputies). The passage cited is the first of the Guiding principles of an education policy for Roma/Gypsy children in Europe appended to the recommendation.

[312] On the tendency to establish special classes for Roma children, *de facto* excluding them from normal classes, see Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Sweden (ACFC/INF/OP/I(2003)006), 20 February 2003, par. 87; Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Hungary, ACFC/INF/OP/I(2001)004, par. 22 and especially par. 40-43: Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Slovakia, ACFC/INF/OP/I(2001)001, 22 September 2000, par. 39; Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on the Czech Republic, ACFC/INF/OP/I(2002)002, 6 April 2001, par. 60-62. In principle, the Advisory Committee on the Framework Convention for the Protection of National Minorities considers that placing Roma children in such special schools should take place only when it is absolutely necessary and always on the basis of consistent, objective and comprehensive tests, avoiding culturally biased questions. On the other hand, the Advisory Committee approves of the establishment of so-called zero-classes, allowing the preparation of Roma children for basic school education, inter alia by improving their educational language skills. Furthermore the Advisory Committee considers the creation of posts of Roma pedagogical advisors in schools to be a most positive step (Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on the Czech Republic, ACFC/INF/OP/I(2002)002, 6 April 2001, par. 63). These measures should be regarded as forms of reasonable accommodation for the benefit of the members of this minority. They may be seen as implementing the abovementioned Guiding principles of an education policy for Roma/Gypsy children in Europe appended to Recommendation No R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe, which state in part that « Appropriate support structures should be set up in order to enable Roma/Gypsy children to benefit, in particular through positive action, from equal opportunities at school" (Guiding Principles, 6); and that "The member states are invited to provide the necessary means to implement the above-mentioned policies and arrangements in order to close the gap between Roma/Gypsy pupils and majority pupils" (Guiding Principles, 7).

[313] The Advisory Committee on the Framework Convention for the Protection of National Minorities has found, with regard to Hungary, that there appears to be a "*de facto* increasing separation of schools, (…) where parents withdraw their children from schools where Roma children go. Furthermore, the reluctance of Roma parents to send their children to kindergarten appears to express a lack of confidence in the educational system. Whereas the Hungarian authorities obviously should pay due respect to the principle of parental choice, they must at the same time not remain passive before these undesirable developments and take measures to counteract them" (Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Hungary, ACFC/INF/OP/I(2001)004, par. 43).

[314] See for example the report *Breaking the Barriers – Romani Women and Access to Public Health Care*.

reasonable conditions[315]. Directive 2000/43/EC of 29 June 2000 does not address the issue of segregation as such, that is to say, there where the separation of groups does not lead to one group being treated less favourably than another. It allows Member States to introduce measures of positive action (Article 5), yet without imposing this, that is to say, without making it an essential element of effective equal treatment. Furthermore, it does not answer the question of knowing how to allow members of a traditionally disadvantaged group to become integrated, without this resulting in a forced assimilation of the members of that group, to the detriment of their right to preserve the constituent elements of their identity. Finally, the scope *ratione materiae* of Directive 2000/43/EC is too limited for the needs of the Roma. Their exclusion from a number of public services and essential social goods is the result of their precarious administrative situation, their statelessness and, worst of all, the total lack of administrative documents attesting their legal status[316]. These documents are often expensive to obtain for a highly impoverished people. A specific obstacle to their obtaining these documents is also the requirement to furnish proof of a fixed address to which social benefits can be paid, which *de facto* has the effect of excluding Roma who lead an itinerant or semi-itinerant life. Among the key findings from the important report mentioned above, *Breaking the Barriers – Romani Women and Access to Public Health Care*, is this (p. 12):

> Many Roma lack identity cards, birth certificates and other official documentation of their legal status. Such documents are often required to access public services. Statelessness, and the lack of status within the State of residence, as well as problems with documentation impede access to a range of rights including access to health care. These situations are created by a variety of factors, including information and financial barriers, eligibility criteria that have a disproportionate impact on Roma, and discrimination by local authorities. There is need for greater awareness among authorities of the situation of Roma, and greater flexibility in application of legal status requirements for Roma (as for other discriminated groups) in order that they may enjoy equal access to public services.

Directive 2000/43/EC does not prohibit discrimination in the issuing of administrative documents. Such documents, however, are often required to access certain social benefits which constitute, particularly for marginalized peoples, an essential aid to integration. This is another reason why a Directive specifically aimed at Roma is indispensable. Article 13 EC forms the appropriate legal basis for such a Directive.

Age-based discrimination in motor vehicles civil liability insurance

During the period under scrutiny, the attention of the EU Network of Independent Experts in Fundamental Rights has been brought to bear on the diversity of the practices of insurance companies in setting rates for motor vehicles civil liability insurance, and on the risks entailed by the principle of the freedom to set rates in the non-life insurance sector, combined with the use of the actuarial method by insurers. This question relates to fundamental rights, firstly because of the importance for the individual to be able to move freely – especially if he/she resides in rural areas or areas not well served by the public transportation system -, and secondly because of the risk of discrimination. When it proposed to the Council the adoption of a directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services[317], the Commission noted that, especially in the sectors of life insurance, health insurance and motor vehicle insurance, sex was often used – as a useful proxy – in the place of other, more reliable indicators such as life habits and modes of consumption. The Commission considered that it ought to react to such a form of

[315] Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Italy, ACFC/INF/OP/I(2002)007, par. 25.
[316] This was also underlined in the contribution which the European Roma Rights Center presented at the hearing organized by the EU Network of Independent Experts on Fundamental Rights on 16 October 2003.
[317] COM(2003)657 final. See hereafter, under Article 23 of the Charter.

discrimination, because « equal treatment for women and men is a fundamental right and (…) the freedom to set tariffs must be subject to that right »[318]. It also took into account the fact that it would be difficult for either individual insurers or individual Member States to move towards the elimination of sex discrimination : « it is difficult for individual insurance companies to move to sex-neutral pricing in the face of competition from other companies, as the members of the sex which benefits from the change will tend to move disproportionately to that company, while those who are disadvantaged will tend to leave it, thus leaving the company with a portfolio of risks which it is not able to cover without a general increase in premiums » ; and in the context of the single market in insurance, a move by a single Member State to require unisex tariffs « could expose its insurers to undercutting in part of its market by businesses in other Member States ». The Commission concluded that it should act to eliminate sex discrimination in insurance. The same reasoning would appear to apply with respect to motor vehicle third-party liability insurance.

The Community legislator is invited to act with a view of prohibiting any discrimination based on age in the motor vehicle third-party liability insurance[319]. Such an intervention could be all the more desirable as there currently remains a doubt as to the possibility for the Member States to impose such a prohibition. In an exchange of correspondance with a consumers' organisation, the Commission would have taken the position that the principle of the freedom to set rates in the non-life insurance sector would be an obstacle for the national legislator to exclude the insurers from setting tariffs on the basis of age[320]. It is true that in a judgment of 25 February 2003[321], the European Court of Justice has taken the view that « the Community legislature clearly meant to secure the principle of freedom to set rates in the non-life insurance sector, including the area of compulsory insurance such as insurance covering third-party liability arising from the use of motor vehicles » (Recital 29), to conclude that this principle was breached by the introduction and maintenance in force by the Italian Republic of « rate-freezing rules applicable to all contracts of insurance in respect of third-party liability arising from the use of motor vehicles in relation to risks situated within Italian territory, without distinguishing between insurance companies having their head office in Italy and those conducting their business in Italy through branch offices or under the freedom to provide services ». This Report needs not comment on the reading of this case-law by the European Commission, nor of course does it have to analyse the formulation which is given to the « principle of freedom to set rates in the non-life insurance sector » in the judgment of 25 February 2003[322]. It will suffice to note here that, if the Commission considers, whether

[318] Explanatory Memorandum, at p. 8.

[319] With respect to race or ethnic origin, the obligation of the national legislator to prohibit discrimination based on such criteria in the insurance is provided by Directive 2000/43/EC.

[320] Answer of 5 June 2003 to the letter of Test-Achats, of 18 April 2003, p. 4. The EU Network of Independent Experts in Fundamental Rights was not provided with a copy of the position of the Commission as expressed in this answer, however.

[321] ECJ, 25 February 2003, *Commission v. Italy*, C-59/01, nyr

[322] The principle of « freedom to set rates in the non-life insurance sector » is deduced by the Court from Articles 6, 29 and 39 of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) (OJ L 228, p. 1). The first provision cited replaces Article 8(3) of Directive 73/239/EEC by the followig text : « Nothing in this Directive shall prevent Member States from maintaining in force or introducing laws, regulations or administrative provisions requiring approval of the memorandum and articles of association and communication of any other documents necessary for the normal exercise of supervision. Member States shall not, however, adopt provisions requiring the prior approval or systematic notification of general and special policy conditions, scales of premiums and forms and other printed documents which an undertaking intends to use in its dealings with policyholders. Member States may not retain or introduce prior notification or approval of proposed increases in premium rates except as part of general price-control systems ». The second provision cited by the Court says : « Member States shall not adopt provisions requiring the prior approval or systematic notification of general and special policy conditions, scales of premiums, or forms and other printed documents which an insurance undertaking intends to use in its dealings with policy-holders. They may only require non-systematic notification of those policy conditions and other documents for the purpose of verifying compliance with national provisions concerning insurance contracts, and that requirement may not constitute a prior condition for an undertaking's carrying on its business. Member States may

rightly or wrongly, that the national legislator may not without violating this principle protect younger or older drivers from age-based discrimination in the setting of the rates applicable to the compulsory third-party liability insurance, it must consider with great care whether a Community initiative based on Article 13 EC should not compensate for the incapacity of the Member States to act against this form of discrimination.

Non-discrimination on grounds of nationality between nationals of Member States in the scope of application of the Treaties

According to the first paragraph of Article 12 EC, « Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited ». Article 17 EC provides that « 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship. 2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby »[323]. In a judgment of 2 October 2003 in the Garcia Alvello case, the European Court of Justice considers that constitutes a discrimination based on nationalité, prohibited under Articles 12 and 17 EC, the refusal by the Belgian authorities to authorize the children of Mr Garcia Alvello to adopt as family name a combination of the name of their father and of their mother, as according to the rules on the determination of the family name in Spain. According to the Court, « Articles 12 EC and 17 EC must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State » (Recital 45). According to the Court, by exercising his rights to circulate freely as a Citizen of the Union, Mr Garcia Alvello has situated himself in the scope of application ratione materiae of EC law, thus justifying the application of Article 12 EC. The Court recalls that « The situations falling within the scope *ratione materiae* of Community law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 18 EC » (Recital 24)[324].

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not retain or introduce prior notification or approval of proposed increases in premium rates except as part of general price-control systems » (Article 29 of Directive 92/49/CEE). The third provision, Article 39 of Directive 92/49/CEE, states in para. (2) and (3) that « (2) The Member State of the branch or of the provision of services shall not adopt provisions requiring the prior approval or systematic notification of general and special policy conditions, scales of premiums, or forms and other printed documents which an undertaking intends to use in its dealings with policyholders. It may only require an undertaking that proposes to carry on insurance business within its territory, under the right of establishment or the freedom to provide services, to effect non-systematic notification of those policy conditions and other documents for the purpose of verifying compliance with its national provisions concerning insurance contracts, and that requirement may not constitute a prior condition for an undertaking's carrying on its business. (3) The Member State of the branch or of the provision of services may not retain or introduce prior notification or approval of proposed increases in premium rates except as part of general price-control systems. » The Court considers that these provisions « meant to secure the principle of freedom to set rates in the non-life insurance sector, including the area of compulsory insurance such as insurance covering third-party liability arising from the use of motor vehicles » (Recital 29). It considers that Article 28 of Directive 92/49/CEE (« The Member State in which a risk is situated shall not prevent a policyholder from concluding a contract with an insurance undertaking authorised under the conditions of Article 6 of Directive 73/239/EEC, as long as that does not conflict with legal provisions protecting the general good in the Member State in which the risk is situated ») « cannot in any circumstances be so interpreted as to negate the effectiveness of the provisions mentioned in paragraph 28 above, which expressly set out the grounds justifying derogation from the principle that undertakings should be free to set rates » (Recital 31).

[323] C.J.C.E., 5 juin 1997, *Uecker et Jacquet*, aff. jtes C-64/96 et C-65/96, *Rec.* p. I-3171, point 23.

[324] See ECJ, 24 November 1998, *Bickel and Franz*, C-274/96, ECR p. I-7637, Recitals 15 and 16.

Article 22. Cultural, religious and linguistic diversity

The question of the protection of national minorities through the requirement of non-discrimination on the ground of membership of a national minority is discussed under Article 21 of the Charter.

Article 23. Equality between men and women

Extension of the requirement of equal treatment between women and men in the access to, and the provision of, goods and services

The main development in connection with this provision of the Charter of Fundamental Rights is the Commission proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to, and the provision of, goods and services, for which Article 13 EC would constitute the legal basis[325]. However important and welcome this initiative may be, there is little to remark on it at this stage. The Directive is indeed closely inspired by Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[326], to such an extent that the concepts to which the proposal claims to refer are already familiar.

It is, however, regrettable that the proposed Preamble justifies an exemption from the application of the principle of equal treatment between women and men for the content of media or advertising by invoking respect for the freedom and pluralism of the media (11th recital of the proposal). There is no cause to justify by a reference to fundamental rights what is the result, fortunate or not, of a political arbitration between conflicting interests. On the one hand, such a reference testifies to a poor understanding of the freedoms that are invoked. The UN Human Rights Committee clearly pointed out in its General Comment n° 28, "Equality of Rights between Men and Women", adopted at its 1834th meeting (sixty-eighth session) on 29 March 2000, "As the publication and dissemination of obscene and pornographic material which portrays women and girls as objects of violence or degrading or inhuman treatment is likely to promote these kinds of treatment of women and girls, States parties should provide information about legal measures to restrict the publication or dissemination of such material" (§ 22). If the European Court of Human Rights has not yet had the opportunity to rule on the scope of the freedom of expression guaranteed under Article 10 of the European Convention on Human Rights in this context, it is probably because it would consider that this does not prevent justified legislative action in the name of protecting the equal dignity of women[327]. On the other hand, care should be taken that reference in this context to the freedom and pluralism of the media does not serve as a precedent when it comes to justifying action in order to combat incitement to racial hatred or discrimination, for instance. The fact that Article 22b of Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities[328], amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997[329], provides, "Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality", suffices to show the fragility of reliance upon freedom of expression in the context in which it appears in the

[325] COM(2003)657 final, of 5/11/2003.
[326] OJ L 180 of 19/7/2000, p. 22.
[327] See, *mutatis mutandis*, Eur. Ct. H.R. (GC), *Refah Partisi (Welfare Party) et al. v. Turkey*, judgment of 13 February 2003, application nos. 41340/98, 41342/98, 41343/98 and 41344/98, here §§ 122-124.
[328] OJ L 298 of 17/10/1989, p. 23.
[329] Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 202 of 30/7/1997, p. 60.

Preamble of the Directive implementing the principle of equal treatment between women and men in the access to, and the provision of, goods and services, the adoption of which is proposed to the Council. It is therefore advisable to omit the reference made in this Preamble to the freedom of expression and pluralism of the media.

It is also regrettable that recourse to the submission of statistical evidence in order to give rise to a presumption of discrimination does not have to be explicitly defined as a means of proof which the Member States must allow. Allocation of the burden of proof is allowed in civil cases (Article 8 §§ 1 and 3). However, a wide margin of appreciation is left to the Member States as regards the nature of the "facts" of which the presentation by the victim would permit the presumption of direct or indirect discrimination. The necessity that the victim's submission satisfies the requirements of effectiveness must define the limits, in this respect, of the procedural autonomy of the Member States. It is worth recalling in this connection that, in the *Enderby* case, it is by taking into account the fact that the plaintiff had submitted statistical evidence making it possible to establish a prima facie case of discrimination that the Court considered, "Where there is a prima facie case of discrimination, it is for the employer to show that there are objective reasons for the difference in pay. Workers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory"[330]. The Community legislator should take this case law into consideration when drafting Article 8 of the Directive and the 17th recital of the Preamble.

Developments within the case-law

This new development will build on an *acquis* of European Community Law in the field of equal treatment between women and men, which is already important. However, secondary EC Law adopted at first on the basis of Articles 119 and 235 of the EEC Treaty, and now under Article 141 EC, is simply a partial implementation of the fundamental right to equal treatment, which figures among the general principles of Community law which the European Court of Justice ensures the respect of, in conformity with Article 220 EC[331]. It follows that « a provision of a directive adopted by the Council in disregard of the principle of equal treatment for men and women is vitiated by illegality »[332].

In the judgment of 9 September 2003 where it recalls this principles, the Court of Justice concludes that a provision of a Directive stipulating that training in general medical practice[333], although it may be organized on a part-time basis, must at least comprise a period during which it is full-time, does not constitute a violation of the principle of equal treatment between men and women. The Court does recognize that such a requirement places women at a particular disadvantage as compared with men, as « the percentage of women working part-time is much higher than that of men working on a part-time basis. That fact, which can be explained in particular by the unequal division of domestic tasks between women and men, shows that a much higher percentage of women than men wishing to train in general medicine have difficulties in working full-time during part of their training » (Recital 35). The Court however considers that adequate preparation for the effective exercise of general medical practice may require a certain number of periods of full-time training, as it « enables doctors to acquire the experience necessary, by following patients' pathological conditions as they may evolve over time, and to obtain sufficient experience in the various situations likely to

[330] ECJ, 27 October 1993, *Enderby*, C-127/92, *ECR*, p. I-5535, Recital 18.
[331] ECJ, 15 June 1978, *Defrenne* (« n°3 »), 149/77, *ECR* p. 1365, Recitals 26 and 27, and ECJ, 30 April 1996, *P. v. S.*, C-13/94, *ECR* p. I-2143, Recital 19.
[332] ECJ, 9 September 2003, *Rinke*, C-25/02, Recital 27.
[333] Article 5 of Council Directive 86/457/EEC of 15 September 1986 on specific training in general medical practice (OJ 1986 L 267, p. 26), since incorporated as Article 34 of Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ 1993 L 165, p. 1).

arise more particularly in general medical practice » (Recital 40). Therefore the Court concludes that the the requirement whose validity was questioned must be regarded as justified by objective factors independent of any discrimination on grounds of sex, and does not constitute an indirect sex discrimination.

It should be emphasized that the judgment does not exclude that may commit such a discrimination the national legislator who would impose a period of full-time training disproportionately longer than what would be justified under the stated objectives. Considering the risk that, under the pretext of implementing Article 5 of Directive 86/457, the national legislator commits such a discrimination, it would be strongly advisable to fix the maximum limit which may not be exceeded, in accordance with what may be justified by the need to fulfil the objective of the Community legislation.

A second case may be considered as significant during the period under scrutiny. The Court of Justice considers that the decision of the employer taking an employee's pregnancy into consideration constitutes a direct discrimination based on sex, prohibited by Article 5 of Directive 76/207/EEC[334]. Ms Busch has chosen, in full agreement with her employer, a private clinic, to put an end prematurely to her parental leave, to take up her employment with the clinic again. She then had announced that she was pregnant, which meant that she would receive a maternity allowance higher than the parental leave allowance, as well as the supplementary allowance paid by the employer. Her employer alleged that she has breached the duty of employee loyalty inherent in any contract of employment, as she had not informed the employer before returning to work that she was pregnant. The Court however considered that she did not have such an obligation to inform the employer : « Since the employer may not take the employee's pregnancy into consideration for the purpose of applying her working conditions, she is not obliged to inform the employer that she is pregnant. » (Recital 40). The absolute character of the protection of the employee from discrimination on the basis of pregnancy – which constitutes a direct discrimination based on sex, according to the constant case-law of the Court[335] – is thus reinforced by this judgment.

In the case of *Dory*[336], the Court was requested to interpret Article 2 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[337], in a context where a man was complaining that the limitation of compulsory military service in Germany to men constituted a direct discrimination on the ground of sex. Mr Dory asserted that compulsory military service has the effect of prohibiting the exercise of an occupation during the period of that service and of delaying access to employment. The Court rejected the argument. In accordance with its previous case-law[338], it stated that « decisions of the Member States concerning the organisation of their armed forces cannot be completely excluded from the application of Community law, particularly where observance of the principle of equal treatment of men and women in connection with employment, including access to military posts, is concerned. But it does not follow that Community law governs the Member States' choices of military organisation for the defence of their territory or of their essential interests. » (Recital 35) Indeed, the Court considers that « It is for the Member States, which have to adopt appropriate measures to ensure their internal and external security, to take decisions on the organisation of their armed forces » (Recital 36). The judgment appears to reflect the idea embodies in Article 6(3) EU – although this provision, cited by the Commission in its submissions to the Court, is not cited by the

[334] ECJ, 27 February 2003, *Busch*, C-320/01, nyr.
[335] ECJ, 8 November 1990, Dekker, C-177/88, *ECR* I-3941.
[336] ECJ, 11 March 2003, *Dory*, C-186/01, nyr.
[337] OJ 1976 L 39, p. 40. This Directive has since been modified by Directive 2002/73/EC of 23 September 2002, OJ L 269 of 5.10.2002, p. 15.
[338] ECJ, 11 January 2000, *Kreil*, C-285/98, ECR I-69 (constitutes a violation of the principle of equal treatment irrespective of sex the exclusion of women from all the positions in the German army).

Court itself – that the Union must respect the national identity of the Member States, especially where the essential interests of the States are at stake.

In the case of *Kutz-Bauer*[339], the Court was requested to answer whether Articles 2(1) and 5(1) of Directive 76/207 preclude a provision of a collective agreement applicable to the public service organizing a the scheme of part-time work for older employees but which, although it allows male and female employees to take advantage of the scheme, reserves the right to participate in the scheme of part-time work to servants which have not become eligible for a retirement pension at the full rate under the statutory old-age insurance scheme. Indeed, as the class of persons eligible for such a pension at the age of 60 consisted almost exclusively of women whereas the class of persons entitled to receive such a pension only from the age of 65 consisted almost exclusively of men, the definition of the circle of beneficiaries of the scheme could be considered to constitute an indirect discrimination against women. The Court summarizes thus : « while both female and male workers may benefit from the scheme of part-time working from the age of 55 with the employer's consent, the great majority of workers entitled to benefit from the scheme for a period of five years from the age of 60 are male » (Recital 49). It is for the national court to decide whether the measure may nevertheless be justified by objective factors unrelated to any discrimination based on sex. However, the European Court of Justice recalls that « although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against one of the sexes » (Recital 59) : therefore, may not be considered an objective justification for the measure in question the mere desire to avoid the additional burden associated with allowing female workers to take advantage of the scheme at issue.

Article 24. The rights of the child

There is no new significant development to be reported for the period under scrutiny, under this provision of the Charter.

Article 25. The rights of the elderly

There are no significant new developments to report under this provision of the Charter for the period under scrutiny. However, it will be noted that the Member States should have implemented Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation by 2 December 2003. Acting under its powers recognized by Article 211 EC, the Commission has rightly insisted upon this deadline being complied with, and closely monitored the initiatives adopted by the Member States to conform themselves to the Directive.

Article 26. Integration of persons with disabilities

The institutions of the Union have taken an impressive number of initiatives recently to encourage the social and professional integration of persons with disabilities. The most important of these initiatives are the following :

[339] ECJ, 20 March 2003, *Kutz-Bauer*, C-187/00, nyr. See also, equally delivered during the period under scrutiny but which restates the applicable principles to such situations, the judgment of 11 September 2003, *Steinicke*, C-77/02, nyr (advantageous scheme for older public servants in the German federal administration, but which was then reserved to public servants having worked during at least three years on a full-time basis during the previous five years). At last, see ECJ, 23 October 2002, *Schönheit and Becker*, C-4/02 and C-5/02, nyr.

• In adopting Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment[340], the Commission has determined that certain categories of State aid schemes which seek to favor employment, and especially employment of target groups, including workers with disabilities[341], may be considered compatible with the common market within the meaning of Article 87(3) EC and be exempted from the notification requirement of Article 88(3) EC. Insofar as it exempts State aids benefiting the professional integration of disadvantaged workers or workers with disabilities, the Regulation is based on the finding, stated in its Preamble, that "Certain categories of worker experience particular difficulty in finding work, because employers consider them to be less productive. This perceived lower productivity may be due either to lack of recent experience of employment (for example, young workers, long-term unemployed) or to permanent handicap. Employment aid intended to encourage firms to recruit such individuals is justified by the fact that the lower productivity of these workers reduces the financial advantage accruing to the firm and by the fact that the workers also benefit from the measure and are likely to be excluded from the labour market unless employers are offered such incentives. It is therefore appropriate to allow schemes providing such aid, whatever the size or location of the beneficiary » (Preamble, Recital 23).

To avoid the risk that enterprises benefiting from aid encouraging the employment of workers with disabilities whose productivity is perceived as lower will put them at a competitive advantage, the Commision considers however that « Schemes providing aid for [enabling them to remain in the labour market and possibly including participation in sheltered employment] should be exempted from notification provided that the aid can be shown to be no more than necessary to compensate for the lower productivity of the workers concerned, the ancillary costs of employing them or the costs of establishing or maintaining sheltered employment. » (Recital 25). Article 6 of the Regulation may play an especially important role in the future, as it exempts the dditional costs of employment of disabled workers, insofar as it does not exceed « the level needed to compensate for any reduced productivity resulting from the disabilities of the worker or workers, and for any of the following costs: (a) costs of adapting premises; (b) costs of employing staff for time spent solely on the assistance of the disabled worker or workers; (c) costs of adapting or acquiring equipment for their use, which are additional to those which the beneficiary would have incurred if employing workers who are not disabled, over any period for which the disabled worker or workers are actually employed ». This constitutes an encouragement to the Member States to facilitate the employer's obligation to provide the form of accommodation required by the employee with disabilities for his/her effective functioning, and thus – if States loyally contribute to the objective of the professional integration of workers with disabilities – , could maximize the potential of Directive 2000/78/EC with respect to this catagory of workers.

• On 15 July 2003, the Council adopted a Resolution on promoting the employment and social integration of people with disabilities[342] in which, referring *inter alia* to Articles 21 and 26 of the Charter of Fundamental Rights, it calls upon the Member States to « promote the full integration and participation of people with disabilities in all aspects of society, recognising that they have equal rights with other citizens »[343]; to « remove barriers to the integration and participation of people with disabilities in the labour market, by enforcing equal treatment measures and improving integration and

[340] OJ L 337 of 13.12.2002, p. 3.
[341] Article 2, g) of the Regulation defines the "disabled worker" as « any person either: (i) recognised as disabled under national law; or (ii) having a recognised, serious, physical, mental or psychological impairment ».
[342] OJ C 175 of 24.7.2003, p. 1.
[343] See also, Council Resolution of 6 May 2003 on accessibility of cultural infrastructure and cultural activities for people with disabilities, OJ C 134 of 7.6.2003, p. 7.

participation at all levels of the educational and training system »; to « pursue efforts to make lifelong learning more accessible to people with disabilities and, within this context, give particular attention to the barrier-free use of new information and communication technologies and the Internet to improve the quality of learning, vocational training and access to employment »[344]; to « remove barriers impeding the participation of people with disabilities in social life and, in particular, in working life, and prevent the setting up of new barriers through the promotion of design for all ». The presentation of national action plans by the Member States in the context of the European Employment Strategy could prove a particularly useful tool for the improvement of the employment level and social inclusion of persons with disabilities and for the exchange of best practices in this regard : the Resolution encourages Member States to « consider the possibility of taking measures at national and European level, consistent with the objectives of the European Employment Strategy, to promote the employment of people with disabilities », and to « mainstream disability issues when drafting future national action plans relating to social exclusion and poverty ». A systematic assessment of the impact of policies on the situation of persons with disabilities would undoubtedly serve the aims of professional and social integration of these persons. Therefore, it is welcome that the Resolution calls for reinforcing « the mainstreaming of the disability perspective into all relevant policies at the stages of policy formulation, implementation, monitoring and evaluation », and also insists on the need for statistical information for such monitoring and evaluation as well as for the need of cooperation with bodies and civil society organisations concerned with people with disabilities.

• On 22 July 2003, acting in the framework of the European Employment Strategy, the Council adopted the latest guidelines for the employment policies of the Member States[345]. The approach to the professional integration of persons with disabilities is hardly innovative. The Council recalls that « effective integration into the labour market of people at a disadvantage will deliver increased social inclusion, employment rates, and improve the sustainability of social protection systems. Policy responses need to tackle discrimination, provide a personalised approach to individual needs, and create adequate job opportunities by providing recruitment incentives for employers. (…) Access to the labour market is a major priority with respect to people with disabilities who are estimated to represent some 37 million people in the European Union, many of whom have the ability and desire to work » (Recital 17). However, the 7th guideline to the Member States is formulated in very non-committing terms ; and the formulation chosen moreover clearly lays the accent on the need for adaptation of the person with a disability, who should be encouraged to be more « employable », rather than on the need for undertakings to adapt to a diverse workforce, as the employers simply should be imposed an obligation of non-discrimination. Indeed, the guideline says that « Member States will foster the integration of people facing particular difficulties on the labour market, such as (…) people with disabilities, (…) by developing their employability, increasing job opportunities and preventing all forms of discrimination against them. In particular, policies will aim to achieve by 2010: (…) a significant reduction in each Member State in the unemployment gaps for people at a disadvantage, according to any national targets and definitions ».

• On 30 October 2003, the European Commission published an important Communication which seeks to identify how it will build upon the momentum created

[344] On this question, reference is made to another resolution adopted by the Council during the period under scrutiny in this Report : Council Resolution of 6 February 2003 « e-accessibility - improving the access of people with disabilities to the Knowledge Based Society », 14680/02, OJ C 39, 18.2.2003, p. 5.
[345] Council Decision of 22 July 2003 on guidelines for the employment policies of the Member States, OJ L 197 of 5.8.2003, p. 13.

by the European Year of Persons with Disabilities[346]. The Communication is based on the idea that "shaping society in a fully inclusive way » is an objective of the Union, and that « in this respect, the fight against discrimination and the promotion of the participation of people with disabilities into economy and society play a fundamental role ». The Communication sees the elimination of environmental barriers to the full participation of persons with disabilities in the economy and in society as central. The communication identifies three strategic objectives for the future : achieving full application of the Equal Treatment in Employment and Occupation by closely monitoring its implementation by the Member States, and pursuing the anti-discrimination strategy of the European Community ; mainstreaming disability issues in relevant Community policies and existing processes ; improving accessibility to goods, services and the built environment, by relying on the principle of universal design (« design for all »). This strategy will be informed by a biennal report examining the overall situation of people with disabilities.

• On 2 December 2003, the conciliation committee joining representatives from the Council and from the European Parliament found an agreement on the content of two directives to be adopted in the field of public procurement[347]. According to the agreement, these directives will provide that the contracting authority should, whenever possible, lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users.

These achievements and plans for the future must be examined against the requirements of Article 26 of the Charter of Fundamental Rights. For the interpretation of these requirements, it is important to take into account Article 15 of the revised European Social Charter. In 2003, the European Committee on Social Rights delivered its first interpretations of Article 15 of the Revised European Social Charter (1996), which, says the Committee, "advances the change in disability policy that has occurred over the last decade away from welfare and segregation and towards inclusion and choice". It considers accordingly that Article 15 of the Revised ESC embodies a requirement of non-discrimination – a view which anyway could be seen as flowing from the combination of Article 15 and Article E (Non-discrimination) of the Charter. After examining the reports submitted by those States, the European Social Rights Committee adopted negative conclusions concerning the compliance by Italy and Slovenia with all three paragraphs of Article 15 revESC[348]. What matters in the context of this report, however, rather than the individual performances of the Member States, is the interpretation made of Article 15 of the revised European Social Charter by the European Committee on Social Rights, insofar as this interpretation may facilitate evaluating whether the institutions of the Union comply with the corresponding provision of the Charter of Fundamental Rights.

The European Committee on Social Rights considers under Article 15 par. 1 of the revised European Social Charter that[349] :

[346] COM(2003)650 final, 30.10.2003.

[347] At the time of writing, the results of the votes which were to take place in the European Parliament and in the Council under Article 251(5) EC were still unknown.

[348] The Committee also examined the law and practice of France and Sweden under these provisions. France is requested to provide the Committee with further information before conclusions can be adopted on compliance with each paragraph of Art. 15 of the revised Charter. Further information is also required from Sweden on Article 15 para. 1 and 3. No reference is made here to States which are non-EU member States.

[349] Concl. 2003-1, p. 159 (France – Article 15 para. 1) ; Concl. 2003-1, p. 292 (Italy – Article 15 para. 1) ; Concl. 2003-2, p. 498 (Slovenia – Article 15 para. 1) ; Concl. 2003-2, p. 608 (Sweden – Article 15 para. 1). The Committee defers its conclusion concerning the compliance of France with Article 15 para. 1 of the Revised Charter, as it excepts France to comment on the fact that the number of children with disabilities is special schools is significantly larger than the number of children educated in mainstream educational institutions. The conclusion is also deferred with respect to Sweden. As to Italy and Slovenia, the Committee concludes that these States are not in conformity with Article 15 para. 1 of the Revised Charter as there is no anti-discrimination legislation in relation to disability in the field of education.

> In so far as Article 15 par. 1 of the Revised Charter explicitly mentions 'education', (…) the existence of non-discrimination legislation [is necessary] as an important tool for the advancement of the inclusion of children with disabilities into general or mainstream educational schemes. Such legislation should, as a minimum, require a compelling justification for special or segregated educational systems and confer an effective remedy on those who are found to have been unlawfully excluded or segregated or otherwise denied an effective right to education.

The European Community has the competence to adopt measures prohibiting discrimination in education, under Article 13 EC. Article 26 of the Charter of Fundamental Rights, read in conformity with the requirements of Article 15 par. 1 of the Revised European Social Charter, may require the Community institutions to exercise this competence, if this adds value to the initiatives which Member States may take at the national level to comply with this requirement[350]. Their failure of the Community to do so, in the absence of any convincing justification, would not seem to be in conformity with this objective of the Charter of Fundamental Rights. The Commission should therefore be encouraged to propose such a legislation, in the form of a disability-specific directive[351]. The EU Network of Indepenent Experts on Fundamental Rights has invited the Commission to act in this regard, in the Report on the situation of fundamental rights in the EU and its Member States in 2002. It is regrettable that the European Year of Persons with Disabilities 2003 has not been used as an opportunity to make progress towards such an instrument. When the Community will propose such legislation, it will have to be inquired into the conditions under which such legislation requires non-discrimination in the field of education, including, but by no means limited to, the prohibition of segregated education unless justified by compelling reasons[352]. In that respect, the decision of the European Committee of Social Rights in the collective complaint lodged by Austime-Europe should also bring a useful clarification of the relationship between the right to education (Article 17.1.ESC) and the protection from discrimination (Article E)[353].

The Community has sought to improve the professional integration of persons with disabilities, especially by the adoption of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation[354]. By adopting this Directive and ensuring that its implementation by the Member States is effectively monitored, the European Community has complied with its obligations under Article 26 of the Charter of Fundamental Rights, insofar as this provision should be read as referring to Article 15 par. 2 of the Revised European Social Charter.

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[350] The principles of subsidiarity and proportionality do not constitute an obstacle to the adoption of such legislation, as demonstrated by the adoption, on 29 June 2000, of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000, p. 22. See also the reasoning of the Commission, as presented in the Proposal for a Council Directive implementing the principle of equal treatment between women and men in access to goods and services and provision of goods and services, COM(2003) 657 final, of 5.11.2003, pp. 10.12.

[351] The European Disability Forum has been campaigning for such a directive since early 2003. This question has also been insisted upon by the representative of EDF at the hearing organised on 16 October 2003 by the EU Network of Independent Experts on Fundamental Right at the European Parliament.

[352] Indeed, including children with disabilities in mainstream education, however, is not enough, as an equal right to education requires more than imposing similar standards to all, even those with different needs. The Committee requires that the normal curriculum is adjusted to take account of disability; that individualized educational plans are crafted for students with disabilities; that resources follow the child, by provision of support staff and other technical assistance; that testing or examining modalities are adjusted to take into account the disability, and it taken under non-standard conditions, that this is not revealed to third parties; that the qualifications recognized are the same for all children and rated the same after the child leaves the educational system. Moreover, where special education is provided where this cannot be avoided, the Committee seeks to ensure that it leads to qualifications which are recognized and may give access to vocational training or employment on the open labour market.

[353] Collective complaint n° 13/2002 (the conclusions are expected to be available in the Spring of 2004).

[354] OJ L 303 of 2.12.2000, p. 16.

Article 15 par. 3 of the Revised European Social Charter concerns the integration and participation of persons with disabilities in the life of the community. According to the European Committee on Social Rights, this provision requires the adoption of positive measures to achieve integration in housing, transport, telecommunications, cultural and leisure facilities. As Article 15 par. 3 of the Revised Charter refers to participation of persons with disabilities, the European Committee on Social Rights also requires that "persons with disabilities and their representative organisations should be consulted in the design, and ongoing review of such positive action measures and that an appropriate forum should exist to enable this to happen"[355]. Moreover, Article 15 par. 3 of the Revised European Social Charter "requires the existence of anti-discrimination (or similar) legislation covering both the public and the private sphere in the fields such as housing, transport, telecommunications, cultural and leisure activities, as well as effective remedies for those who have been unlawfully treated"[356]. For reasons identical, *mutatis mutandis*, to those put forward with respect to the right of children with disabilities to be protected from discrimination in education, a continued failure of the European Community to adopt an anti-discrimination legislation in the fields named above[357], could constitute a violation of Article 26 of the Charter of Fundamental Rights. Clearly, the answer will be affirmative where, in the absence of a Community initiative to ensure that the principle of equal treatment is complied with in those fields, the Member States will be hesitant to move forward, for instance out of fear of the short-term budgetary consequences or of imposing on enterprises operating on their territory costs their competitors in other Member States do not have to meet. The announcement at the highest level that the Commission will propose an initiative to remedy this is therefore, again, to be welcomed.

In sum, the important initiatives which have been taken by the institutions of the Union to improve the social and professional integration of persons with disabilities, while they cannot be underestimated, should not obfuscate the fact that, if the shift from the medical model to the social, or "rights-based", model is to be taken seriously, more needs to be done. For instance, reliance on the social responsibility of corporate actors, and correlative insistence on the business case for integrating persons with disabilities and on the voluntary initiatives enterprises could take accordingly, should not be seen as a substitute for imposing legal obligations on those actors not to discriminate on the ground of disability, and not to deny effective accommodation where this does not impose a disproportionate burden ; calling upon the Member States, in the Employment Guidelines, to subsidize the provision of such accommodation, should not distract from the fact that such subsidisation also can be described as deriving from the general obligation to loyally co-operate in the fulfilment of the objectives sought by EC law (Article 10 EC) : indeed, although Directive 2000/78/EC does not as such impose on Member States to provide such support – instead, the States are free to choose whether or not to act in this respect –, it shall be noted that a complete refusal to provide for a significant support to employers adjusting the working environment to suit the needs of persons with disabilities runs counter to the objective pursued by the directive.

[355] Concl. 2003-1, p. 168 (France – Article 15 para. 3) ; Concl. 2003-1, p. 507 (Slovenia – Article 15 para. 3).

[356] Concl. 2003-1, p. 170 (France – Article 15 para. 3) ; Concl. 2003-1, p. 298 (Italy – Article 15 para. 3) ; Concl. 2003-2, p. 508 (Slovenia – Article 15 para. 3) ; Concl. 2003-2, p. 614 (Sweden – Article 15 para. 3).. The Committee defers its conclusion concerning the compliance of France with Article 15 para. 3 of the Revised European Social Charter, pending receipt of the information requested on the existence of legislation protecting persons with disabilities from discrimination in the domains cited (housing, telecommunications, transport, cultural and leisure activities). The conclusions of the Committee concerning compliance of Sweden with this provision of the Revised Charter are also deferred pending the receipt of further information. The Committee concludes that, as no such legislation exists in Italy or in Slovenia, the situation in these countries is not in conformity with Article 15 para. 3 of the Revised Charter.

[357] See, however, the Commission « White Paper on European Transport Policy for 2010: a time to decide », COM(2001) 370 final. In its communication of 30 October 2003, the Commission says that it will « promote increased use of accessible public transport, which is an important contribution to the ability to work ».

CHAPTER IV : SOLIDARITY

Article 27. Worker's right to information and consultation within the undertaking

There is no new significant development to be reported under this provision of the Charter, for the period under scrutiny.

Article 28. Right of collective bargaining and action

There is no new significant development to be reported under this provision of the Charter, for the period under scrutiny.

Article 29. Right of access to placement services

There is no new significant development to be reported under this provision of the Charter, for the period under scrutiny.

Article 30. Protection in the event of unjustified dismissal

The safeguarding of employees' rights in the event of transfers of undertakings

In a judgment of 30 November 2003, the European Court of Justice considered that it was in the presence of a « transfer of undertakings » in the meaning of Article 1 of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses[358], in a situation where a catering company (Sodexho) had took over the management of catering services within a hospital, after the contract with the previous catering company, providing patients and staff with meals and drinks, had been terminated. Sodexho had refused to take over its predecessor's employees. In its judgment, the Court recalls that for Directive 77/187 to be applicable, the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract[359]. It considers however that in the circumstances of the case, the catering service cannot be regarded as an activity based essentially on manpower, since « it requires a significant amount of equipment ». According to the Court, « the tangible assets needed for the activity in question - namely, the premises, water and energy and small and large equipment (inter alia the appliances needed for preparing the meals and the dishwashers) - were taken over by Sodexho. Moreover, a defining feature of the situation at issue in the main proceedings is the express and fundamental obligation to prepare the meals in the hospital kitchen and thus to take over those tangible assets. The transfer of the premises and the equipment provided by the hospital, which is indispensable for the preparation and distribution of meals to the hospital patients and staff is sufficient, in the circumstances, to make this a transfer of an economic entity. It is moreover clear that, given their captive status, the new contractor necessarily took on most of the customers of its predecessor » (Recital 36). There is therefore continuity of an economic entity, and the absence of any direct contractual relationship between the transferor and the transferee is not an obstacle to the applicability of Directive 77/187 : the « transfer », says the Court, « may take place through the intermediary of a third party such as the owner or the person putting up the capital » (Recital 39). This conclusion of the Court is notable, as it runs counter to the opinion delivered on 19 June 2003 by Advocate

[358] OJ 1977 L 61, p. 26.
[359] ECJ, 19 September 1995, *Rygaard,* C-48/94, ECR I-2745, Recital 20.

General Geelgoed, according to whom « it is not enough, for there to be a transfer of undertaking, that a contract with a particular person be terminated and followed by the conclusion of a contract with another person, as in this case. The sheer fact that an activity is pursued, when it was previously performed by another undertaking, without a cession of assets or rights cannot be compared with the transfer of an undertaking. The loss of a market cannot as such constitute an indicia of the existence of a transfert in meaning of Directive 77/187 » (par. 93 of the Opinion (our translation)).

To ensure legal security and transparency, the Council adopted subsequently to the facts Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses[360]. This Directive – which cites in its Preamble the Community Charter of the Fundamental Social Rights of Workers adopted on 9 December 1989, but omits mention of the Charter of Fundamental Rights – is intended to clarify the notion of "transfer of undertaking"; it is not meant to change the scope of Directive 77/187/EEC as interpreted by the Court of Justice. It states that there is a transfer within the meaning of the Directive where there is "a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary" (Article 1(1)(b)).

A judgment of 6 November 2003 also adopts a broad reading of the guarantees of the employees under Directive 77/187/EEC. Article 3(3) of this Directive provides that the principles according to which the rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer are transferred from the transferor to the transferee, and according to which the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement, do not cover « employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States ». The Court had previously considered that, as this was an exception to the rule, it should be interpreted restrictively[361]. This also guides the answer of the Court to the first question of interpretation referred to it in the Martin case, where it considers that « except in the cases mentioned in [Article 3(3)], *all* the transferor's rights and obligations arising from the contract of employment or employment relationship with an employee fall within the scope of Article 3(1) and are therefore transferred to the transferee, *regardless of whether or not their implementation is contingent upon the happening of a particular event, which may depend on the will of the employer*. Thus, if, following the transfer, the transferee, like the transferor before him, has the power whether or not to adopt certain decisions in respect of the employee, for example concerning dismissal or the grant of early retirement, once he adopts such a decision, he remains bound, like the transferor before him, by the rights and obligations laid down as the consequence of such a decision by the contract of employment or employment relationship with the transferor as long as the relevant terms thereof have not been lawfully varied » (Recital 29 – our emphasis).

The Court of Justice has seemed to indicate in a judgment of 17 September 2002[362] that Directive 77/187/EEC – today, Directive 2001/23/EC of 12 March 2001 – should guarantee a protection to the workers, male or female, who are less well remunerated than colleagues from the other sex for a work of the same value, even in situations where, after a transfer of a branch of activity to another undertaking, the discrimination complained of cannot be

[360] OJ L 82, of 22.3.2001, p. 16.
[361] ECJ, 4 June 2002, *Beckmann*, C-164/00, ECR I-4893 (Recital 29).
[362] ECJ, 17 September 2002, *Lawrence and others.*, C-320/00, *ECR* I-7325.

attributed to a unique source : the appellants – female workers – had been employed in the provision of cleaning and catering services in schools under the North Yorkshire County Council's control when the Council itself assumed responsibility for the cleaning and catering services in schools and educational establishments under its control. Responsibility for providing those services was subsequently transferred to the private undertakings. In 1995 however, the House of Lords had ruled that the applicants were entitled, for the purposes of securing equal pay without discrimination based on sex, to compare themselves with men who were employed by the Council in other service areas such as gardening, refuse collection and sewage treatment and who performed work of equal value. The activities of these employees had not been transferred, but had remained, instead, within the Council. The Court of Justice concluded that Article 141(1) EC therefore was not applicable : « the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment » (Recital 18). However, the Court noted in its reasoning that the national jurisdiction having referred the question of interpretation « has not referred any question on the protection resulting, in the case before it, from Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26). Its questions relate only to Article 141(1) EC » (Recital 16).

The protection of workers in the event of their employer's insolvency

Article 30 of the Charter also should be read to include the protection of workers in the event of their employer's insolvency. In the case of *Mau*[363], the Court was asked to offer an interpretation of Articles 3 and 4 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer[364] and of Article 141 EC. The applicant, Ms Karin Mau, was on child raising leave at the time of the onset of the employer's insolvency and this was the date chosen by Germany to calculate the guarantees due by guarantee institutions for payment of employees' outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to that date (Art. 3(1) of Directive 80/987/EEC). Under Article 4(2) of the Directive, the Member States must "ensure the payment of outstanding claims relating to pay for *the last three months* of the contract of employment or employment relationship occurring within a period of six months preceding the date of the onset of the employer's insolvency", when this is the choice of the relevant date made by the State concerned. Under German law, the employment of Ms Mau was maintained during the child raising leave, however the main obligations flowing from that employment (obligation to work and to pay remuneration) were suspended. Therefore if the expression "the last three months of the period of employment" were to be interpreted to cover the period of child rearing leave, no remuneration would be guaranteed to Ms Mau. The Court considered however that, if the expression "the last three months of the contract of employment or employment relationship » were to be interpreted as including a period during which no remuneration is to be paid, the social purpose of the Directive would be defeated (« interpretation of the concept of an employment relationship must in particular take account of the social purpose of Directive 80/987, which is to ensure a minimum level of protection for all workers (...). The concept cannot therefore be interpreted in such a way as to allow the minimum guarantees laid down in Article 4(2) of that directive to be reduced to nothing » (Recital 42)). The Court concludes therefore : « Periods during which the employment relationship is suspended on account of child raising are therefore excluded by reason of the fact that no remuneration is due during those periods » (Recital 44).

[363] ECJ, 15 May 2003, *Mau*, C-160/01, nyr.
[364] OJ 1980 L 283, p. 23.

In a judgment offering an interpretation of the same Directive 80/987/EEC of 20 October 1980, the Court considered, in a judgment of 11 September 2003[365], that the protection provided by this Directive precludes a rule as then existed in Austrian law that an employee with a significant shareholding in the private limited company that employs him, but who does not exercise a dominant influence over that company, loses his entitlement to the guarantee in respect of claims for outstanding pay which result from the employer's insolvency and are covered by Article 4(2) of that directive if, in the 60 days from the time he first could have become aware that the company was no longer creditworthy, he fails to make any genuine demand for payment of salary owed to him. Article 10 of Directive 80/987 states, however, that the directive does not affect the option of Member States to take "the measures necessary to avoid abuses", and the Austrian government presented the challenged rule as a means to avoid abuse by employees who are also shareholders, with the risk of collusion of interests this situation implies. The Court considers that to avoid abuses a Member State is, in principle, entitled to take measures that deny such an employee an entitlement to a guarantee in respect of claims for outstanding salary arising after the date on which an employee who is not a shareholder would have resigned on the ground of non-payment of his salary, however there can be no unrebuttable presumption of abusive conduct.

The protection of the workers in the case of collective redundancies

Article 30 of the Charter should also be considered as including the protection of the workers in the case of collective redundancies. In a judgment of 16 October 2003 (C-32/02), the Court found that by not adopting the necessary provisions in respect of employers engaged in non-profit-making activities, the Italian Republic has failed to fulfil its obligations under Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies[366].

Article 31. Fair and just working conditions

Article 31 § 2 of the Charter of Fundamental Rights guarantees the right of every worker to "limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave". This provision is based in particular on Article 2 § 1 of the European Social Charter (not amended by the Revised European Social Charter), which obliges the Contracting Parties "to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit". This paragraph of the European Social Charter has been endorsed by all Member States of the European Union, except, Austria, Denmark, Latvia and the United Kingdom (among the States parties to the European Social Charter), as well as Sweden (which is party to the Revised European Social Charter).

It should be considered, however, given that the right to limitation of maximum working hours is guaranteed by the Charter of Fundamental Rights, that the Member States are obliged to respect this right as supervised by the European Committee of Social Rights from the moment they act within the scope of Community law or the European Union. Article 31 § 2 of the Charter of Fundamental Rights sets forth a right whose status among the fundamental social rights recognized in international labour law is well asserted. This provision is merely the "most reliable and definitive confirmation as a fundamental right" of the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave[367].

[365] ECJ, 11 September 2003, *Walcher*, C-201/01, nyr.
[366] OJ 1998 L 225, p. 16.
[367] See the opinions of Mr Advocate General A. Tizzano delivered on 8 February 2001, preceding ECJ, 26 June 2001, *BECTU*, C-173/99, especially Recital 28 of the opinions (concerning the right to annual paid leave which, in

Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time[368] codifies the changes brought to Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organisation of working time[369], since ten years. It lays down minimal requirements for the protection of the health and safety of the worker in the organisation of work (see article 15 of the directive). The Preamble of Directive 2003/88/EC states that « In view of the question likely to be raised by the organisation of working time within an undertaking, it appears desirable to provide for flexibility in the application of certain provisions of this Directive, whilst ensuring compliance with the principles of protecting the safety and health of workers » (Recital 15). However, one cannot but be struck by the number of derogations which are permitted under this instrument (see chapter 5), either in a number of contexts « by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection » (article 17(2)), or even in certain circumstances by prior individual agreement of the worker (article 22). The reporting procedures provided for by Article 24(2) of the Directive (the reports by the member States on the practical implementation of the Directive will indicate the viewpoints of the two sides of industry) should be an opportunity to assess whether the derogations authorised under the Directive have not, in fact, distracted from the goal of minimal harmonisation, under Article 137(2) EC, to avoid a regulatory competition detrimental to the fundamental social rights of the workers.

Considering the number of derogations which the directive authorizes, it should be underlined that in implementing the directive, the Member States are bound to respect Article 31(2) of the Charter of Fundamental Rights, and therefore also Articles 2(1)and(3) of the European Social Charter on which this provision of the EU Charter of Fundamental Rights in based. To that extent, any violation of the European Social Charter should be considered a violation of European Community law itself, where it is committed by a State implementing EC Law. The Commission would have all the more reason for assuming the role of guardian of the Treaties that is assigned to it by Article 211 EC since, by its very nature, such a violation infringes the unity of the internal market, within which competition must not be distorted[370]. "The objective of ensuring a comparable minimal level of protection as between the various Member States also meets the requirement, dictated by the need to prevent distortion of competition, of avoiding any type of social dumping, that is to say, in the last analysis, ensuring that the economy of one Member State cannot derive any advantage from adopting legislation which provides less protection than that of the other Member States"[371].

There will be no question here of evaluating the compliance of Directive 2003/88/EC with the above-mentioned provisions of European Social Charter. This is a task for the European

Directive 93/104/EC at issue in this case, is given a more absolute and unconditional protection than the other rights set forth in Article 31 § 2 of the Charter).

[368] OJ L 299 of 18/11/2003, p. 9.

[369] OJ L 307, 13/12/1993, p. 18. Directive 93/104/EC has been amended by Directive 2000/34/EC of the European Parliament and of the Council (OJ n° L 195, 1.8.2000, p. 41). On 9 September 2003, the Court delivered its judgment in the case of Jaeger (C-151/02), which concerned the question of the definition of the notions of « working time » and « rest period » under Directive 93/104/EC, when applied to the on-call service (*Bereitschaftsdienst*) provided by doctors in hospitals in Germany. The Court concluded that on-call duty performed by a doctor where he is required to be physically present in the hospital must be regarded as constituting in its totality working time for the purposes of Directive 93/104/EC even where the person concerned is permitted to rest at his place of work during the periods when his services are not required.

[370] See Commission Communication on better monitoring of the application of Community law, COM(2002)725 final, of 20/12/2002.

[371] Opinions of Mr Advocate General A. Tizzano of 8 February 2001, preceding ECJ, 26 June 2001, BECTU, C-173/99, here recital 45 of the opinions.

Committee of Social Rights to perform during its examination of the periodical reports in the system of the European Social Charter. It should be noted, however, that this is a further example of taking into account international human rights law in the development of Community law, and that once again the question arises of knowing what measures the European legislator may be obliged to take in order to minimize the risk of infringement of fundamental rights committed by Member States when they implement Community law.

Article 32. Prohibition of child labour and protection of young people at work

There is no new significant development to be reported under this provision of the Charter, for the period under scrutiny.

Article 33. Family and professional life

There is no new significant development to be reported under this provision of the Charter, for the period under scrutiny.

Article 34. Social security and social assistance

Co-ordination of social security schemes for third country nationals

Before the Amsterdam Treaty entered into force in 1998, the Commission presented its proposal for a Council Regulation (EC) amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community to extend it to third-country nationals[372]. This Regulation was adopted on 14 May 2003[373]. Its Preamble says that the Regulation « respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, in particular the spirit of its Article 34(2) » (Recital 5), a formulation which avoids the language of fundamental rights but nevertheless identifies the initiative of the European legislator as fulfilling the cited provision of the Charter. The Regulation should facilitate the exercise of the the right of third country nationals to move within the Union, as envisaged under Article 45(2) of the Charter, and also implements Article 15(3) of the Charter, although it does not grant a right to enter, to stay or to reside in a Member State or to have access to its labour market.

Reform of social security legislation

The 21 December 2003, a political agreement was concluded within the Employment and Social Affairs Council on the reform of the social security legislation. The present Report, completed in December 2003, could not include this latest development.

[372] OJ C 6, 10.1.1998 p. 15.

[373] Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, OJ L 124 , 20.5.2003, p. 1.

Article 35. Health care[374]

The "principle" of health care

Article 35 of the Charter on health care should undoubtedly be classed among the provisions that establish "principles" rather than "subjective rights" – within the meaning of this distinction which the reviews of Article 52 of the Charter carried out by Working Party II of the European Convention were meant to establish[375]. This distinction, however, does not mean that such a "principle" is not justifiable. At the most, it is the mode of justifiability that differs, rather than the actual possibility of invoking the provision before a judicial authority. It should be considered that Article 35 of the Charter prevents the adoption of any measure taken by the Union institutions or by the Member States acting within the scope of Union law that clearly goes against the objective established by this provision. Despite the ambiguity of the formula adopted by the drafters of Article 52 § 5 of the Charter in the version proposed in the draft European Constitution, the "principles" set forth by the Charter, for example in Articles 26, 35, 37 or 38, cannot be relied upon solely for the purpose of interpreting and reviewing the legality of acts that are intended to implement those principles; on the contrary, the recognition of those principles by the founding authority is helpful where, instead of implementing them, the European legislator or executive commit a sufficiently obvious infringement of those principles to justify an annulment by the court.

This is not contradicted by the references to Community case law which are cited in the explanations of the Presidium to support the textual amendments made to Article 52. In particular, those explanations cite the *Pfizer Animal Health SA* judgment given on 11 September 2002 by the Court of First Instance. In this judgment, the precautionary principle (Article 174 § 2 EC) served to justify the adoption by the Council of a Regulation withdrawing Community authorization for four antibiotics as additives in animal feed. The Court found, "The Community institutions may (…) adopt a measure based on the precautionary principle". Since, according to the Court, this principle was correctly interpreted by the Council, and the precautionary principle may serve in interpreting the Directive laying down the Community rules applying to the authorization, and withdrawal of authorization, of additives for incorporation in feeding-stuffs[376], the application was dismissed[377]. In this case, the precautionary principle did indeed serve in evaluating, in the context of a legality review, any Community act that aimed to implement it. This, however, does not rule out that the said principle may also serve to censure any Community act that commits a sufficiently manifest infringement thereof.

It may be significant in this respect that, in a judgment of 21 October 2003[378], the Court of First Instance of the European Communities specified, "the precautionary principle constitutes a general principle of Community law imposing on the concerned authorities to take, in the precise framework of the exercise of the powers which the relevant regulation attributes to them, the appropriate measures to prevent certain potential risks for public health, security and environment, by imposing the requirements linked to the protection of these interests above economic interests » (Recital 121 (unoffical translation)). This formulation confirms that the precautionary principle may be relied upon not only to justify the fact that such a measure could have been adopted by the Union institutions or by the Member States, although, for example, it affects the interests of an economic operator – as in the *Pfizer* case –, but also to criticize the EU institutions or the Member States for a lack of precaution, for example for having authorized the marketing of medicines or foods containing health risks, even in the absence of scientific certainty in this respect. The identification of positive

[374] On the issue of access to health care for the Roma people, see Article 21 of the Charter of Fundamental Rights.
[375] More particularly by the addition of a fifth paragraph to Article 52 of the Charter of Fundamental Rights.
[376] Directive 70/524/EEC of 23 November 1970 concerning additives in feeding-stuffs (OJ L 270, p. 1).
[377] CFI, 11 September 2002, *Pfizer Animal Health SA v. EU Council*, T-13/99, CFI p. II-3305, recitals 114 et seq.
[378] CFI, 21 October 2003, *Solvay Pharmaceuticals BV*, T-392/02, not yet published.

obligations on the basis of Article 35 of the Charter would be made easier by an interpretation of this provision in accordance with the requirements inferred from Article 11 of the European Social Charter by the European Committee of Social Rights, for example regarding an obligation to protect the public against the health risks connected with the environment or certain materials, or to take measures to guarantee food safety[379].

Article 35 of the Charter, which asserts health care, also prohibits the Union institutions and the Member States, acting within the scope of Union law, from infringing this principle, as would be the case if they take measures that diminish the standard of health care, without objective and reasonable - that is to say, proportionate - justification. Offering an interpretation of Article 12 of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights considers, "As with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources"[380]. This is in line with the customary case law of the Committee, as well as, generally, with the obligation of non-retrogression with regard to the dimensions of fundamental rights that are realized progressively.

Health care and fundamental freedoms of the EC Treaty

A judgment given on 13 May 2003 by the Court of Justice of the European Communities[381] aptly illustrates the importance which the Community court attaches to the right to health care where the concern of guaranteeing this right is invoked by a Member State in order to justify a restriction on the free movement of goods[382] or the free provision of services[383]. In this judgment, which concerns the sickness insurance system in the Netherlands - which is based on the principle of a provision of sickness benefits in kind rather than reimbursement of medical care costs, and on a system of contracted care provision between the sickness insurance funds and the providers of health care services -, the Court confirmed its case law according to which "the objective of maintaining a high-quality, balanced medical and hospital service open to all, may fall within one of the derogations provided for in Article 56 of the EC Treaty (now, after amendment, Article 46 EC), in so far as it contributes to the attainment of a high level of health protection (…). In particular, that Treaty provision permits Member States to restrict the freedom to provide medical and hospital services in so far as the maintenance of treatment capacity or medical competence on national territory is essential for public health, and even the survival of the population" (recital 67). However, such a restriction on the free provision of services can only be admitted insofar as it is strictly proportional to the mandatory reason of general interest which justifies such a restriction. In this case, the challenged regulation, on the one hand, requires that the patient obtains prior authorization for treatment in a Member State other than the Member State of affiliation, if he wishes to be covered by the sickness insurance fund to which he is affiliated and the care provider has not concluded a contract with that fund; on the other hand, it subjects the granting of such authorization to the condition that the medical treatment of the insured person requires such an authorization. As regards hospital treatment, the Court concedes that such conditions are compatible with the free provision of services, since, in the absence of

[379] For example, Concl. XVI-2.
[380] United Nations Committee on Economic, Social and Cultural Rights, General Comment n°14, "The right to the highest attainable standard of health (Art. 12 of the Covenant)", adopted at the twenty-second session (2000), par. 32.
[381] ECJ, 13 May 2003, *Müller-Fauré*, C-385/99, not yet published.
[382] ECJ, 28 April 1998, *Decker*, C-120/95, *ECR* I-1831.
[383] ECJ, 28 April 1998, *Kohll*, C-158/96, *ECR* I-1931 ; ECJ, 12 July 2001, *Smits and Peerbooms*, C-157/99, *ECR* I-5473.

such conditions being imposed, "the competent State could no longer guarantee that in its territory there would be a high-quality, balanced medical and hospital service open to all and hence a high level of public health protection" (recital 69). The Court, however, specifies in connection with the second condition that the authorization to be treated in another Member State cannot be refused on the ground of the possibility of receiving treatment in the Member State where the sickness insurance fund is established to which the insured person is affiliated unless an identical treatment or treatment presenting the same degree of efficacy for the patient may be secured at an appropriate time at an establishment that has concluded an agreement with the sickness fund in question. On the other hand, the Court arrives at an opposite conclusion as regards non-hospital treatment. The Court is indeed not convinced that "removal of the requirement for prior authorisation for that type of care would give rise to patients travelling to other countries in such large numbers, despite linguistic barriers, geographic distance, the cost of staying abroad and lack of information about the kind of care provided there, that the financial balance of the Netherlands social security system would be seriously upset and that, as a result, the overall level of public-health protection would be jeopardised - which might constitute proper justification for a barrier to the fundamental principle of freedom to provide services" (recital 95).

The judgment clearly illustrates how the principle of free provision of medical services – the possibility for patients to be treated in another member State than that of the sickness insurance fund to which they are affiliated – may have an impact on the capacity of member States to guarantee a health care system which is financially viable and offers a public health care that is open to all. The Court of Justice of the European Communities has no wish to challenge the possibility for Member States to set up and maintain such a system, although at the same time it considers that any obstacle to the free provision of services which is not justified with regard to this objective is incompatible with Community law. Neither Article 31 of the Charter of Fundamental Rights, nor any "fundamental right to health", played a role as such in the judgment of 13 May 2003, although mandatory reasons of general interest that might justify a restriction of the free provision of medical services are connected with it[384].

A Commission Communication has been announced for early 2004 on the future of health care and in particular the health care of the elderly[385]. The EU Network of Independent Experts on Fundamental Rights will examine very scrupulously the substance of the options proposed with regard to Article 35 of the Charter as it should be interpreted in accordance with Article 11 of the (Revised) European Social Charter, and Article 12 on the International Covenant on Economic, Social and Cultural Rights.

Article 36. Access to services of general economic interest

On 21 May 2003, the Commission presented a Green Paper on services of general interest[386], aimed at initiating broad consultation concerning in particular the expediency of adopting a Framework Directive laying down the principles relating to services of general interest underlying Article 16 EC and on the substance of such legislation[387]. The previous report of

[384] In his opinion of 22 October 2002, Mr Advocate General D. Ruiz-Jarabo Colomer notes, "il peut s'agir de trois raisons distinctes: l'une consiste à éviter un risque d'atteinte grave à l'équilibre financier du système de sécurité sociale; la deuxième est déduite de l'objectif de garantir un service médical et hospitalier équilibré et accessible à tous et relève des exceptions pour motifs de santé publique prévues par l'article 46 CE dans la mesure où un tel objectif contribue à la réalisation d'un niveau élevé de protection de la santé; la troisième raison, enfin, réside dans le souci de maintenir la capacité de soins ou la compétence médicale sur le territoire national, maintien essentiel à la santé publique, voire même à la survie de la population » (Recital 44).

[385] See (SOC)116, 10.3.2003.

[386] COM(2003)270 final.

[387] See already the Communication from the Commission on the Status of Work on an Examination of a Proposal for a Framework Directive on Services of General Interest (COM(2002)689 final of 4/12/2002). The European Convention proposed on Article III-6 in the third part of the Constitution, which reads, "given the place occupied

the EU Network of Independent Experts on Fundamental Rights already contained comments on this question. In its *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002*, it underlined the appropriateness of closely linking a reflection on services of general interest in the Union to the protection of certain essential needs in international human rights law[388]. There is no need to reiterate here the argument in favour of a firmer embedding in the fundamental economic and social rights of the reflection on services of general interest, and more particularly on the status that may be given to services of general economic interest, derogating from the rules of the Treaty of Rome in the field of competition, aids granted by States, or guaranteeing fundamental economic freedoms of movement, according to the derogation formula put in place by Article 86 § 2 EC for the benefit of Member States. The important step that has been taken with the adoption of the Green Paper in favour of a clarification of the legal framework applicable to services of general economic interest[389] and of the identification of a European concept of those services and of the rules that should govern the management, evaluation and funding of those services calls for several comments.

In the chapter of the Communication of 21 May 2003 bringing together a set of obligations that are traditionally associated with the concept of service of general economic interest - in particular in the sectorial Directives that have been adopted in order to open up those services to competition, while ensuring that the general interest remains safeguarded -, the Commission cites the *universal service* (ensuring that certain services are made available to "all consumers and users throughout the territory of a Member State, independently of geographical location, and, in the light of specific national conditions, at an affordable price"), *continuity* (i.e. "the provider of the service is obliged to ensure that the service is provided without interruption"), *quality of service* (in terms of safety, billing, protection against disconnection, etc), *affordability* (accessibility for all people, in order to guarantee social and territorial cohesion), *user and consumer protection* (particularly in terms of, besides quality of service and transparency of billing already cited, "choice of service, choice of supplier, effective competition between suppliers, existence of regulatory bodies, availability of redress mechanisms, representation and active participation of users and consumers in the definition of services, and choice of forms of payment")[390].

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by services of general economic interest as services to which all in the Union attribute value as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Constitution, shall take care that such services operate on the basis of principles and conditions, in particular economic and financial, which enable them to fulfil their missions. European laws shall define these principles and conditions". The principle of an intervention of the European legislator to establish the operating principles of services of general economic interest has therefore been acquired in the spirit of the pre-constituent authority.

[388] *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002*, pp. 234-237.

[389] The distinction between services of general non-economic interest and services of general economic interest has been clarified by the case-law. Are not considered as "economic" the activities carried out by bodies whose functions are essentially of a social nature, which do not make profit and whose purpose it is not to carry out an industrial or commercial activity, but have solidarity as their goal. Economic activities, on the other hand, are activities that consist of providing goods or services on a given market. See ECJ, 17 February 1993, *Poucet and Pistre*, joined cases C-159/91 and C-160/91, *ECR* I-637, recital 18; ECJ, 16 November 1995, *Fédération française des sociétés d'assurance and others*, C-244/94, *ECR* I-4013; Communication from the Commission, "Services of General Interest in Europe", COM(2000)580 final, of 20/9/2000, OJ C 17 of 19/1/2001, here par. 28-30. The rules of the EC Treaty on competition law, freedoms of movement or aids granted by States only apply to services of general economic interest. Article 86 §2 EC was designed to allow Member States to develop a policy geared to the general interest where the market does not produce the desired results. This provision provides that the application of the rules of the Treaty to those economic activities, but invested with an obligation of public service, "does not obstruct the performance, in law or in fact, of the particular tasks assigned to them".

[390] On the question of the expediency for the Commission to re-examine the possibility of taking an initiative aimed at better guaranteeing the pluralism of the media, the safeguarding of which is currently entrusted to the Member States (see par. 73 and 74, Green Paper), see what has been said on this issue above under Article 11 of the Charter.

The Green paper presents the concept of *universal service* as implying, in particular, the adoption of specific measures concerning disability, age or education. This is to be welcomed. However, the requirement of non-discrimination on the ground of membership of a national minority seems not to have been fully integrated[391]. Moreover, it is important to present this as constituting an obligation, linked to the requirement of non-discrimination, to effectively accommodate the specific needs of the service user, to the extent at least that this does not impose a disproportionate burden on the provider of services. The formulation which we find in Article 7 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)[392] still remains under what would be desirable, firstly because this provision does not make it mandatory to adopt specific measures in favour of disabled persons - although this is a mere consequence of the obligation to provide services to all persons, without discrimination -, and secondly because the terms used are too vague to allow an objective and transparent evaluation by the national regulatory authorities of the performance of undertakings entrusted with tasks of general interest, from the viewpoint of the requirement of universal service. Furthermore, use must be made of a formula which also guarantees universal service without discrimination to elderly people (who experience, for example, mobility problems or impairment of eyesight or hearing) and persons who are illiterate or are unable to handle certain tools, notably modern information and communication technologies, and for whom special systems ought to be designed, for instance to obtain information, hand in forms or lodge complaints.

With regard to the concept of *continuity*, the Commission Green Paper notes, "At national level, the continuity requirement needs to be reconciled with the employees' right to strike and with the requirement to respect the rule of law" (par. 55). In the perspective of the elaboration of a Framework Directive, it would be a good idea if the case-law developed by the European Committee of Social Rights on the basis of Article 1 § 2 of the (Revised) European Social Charter were to guide a precise identification of the limits not to be exceeded by Member States in any restrictions they might wish to impose, in the name of continuity of public service, on the right to strike, whether in public or in private undertakings. This provision of the European Social Charter guarantees the right of the worker "to earn his living in an occupation freely entered upon"; it includes a protection against the obligation to carry on working and may prevent the imposition of sanctions on any worker who has interrupted his work[393]. Although Article 31 of the European Social Charter (Article G of the Revised European Social Charter) allows restrictions to those rights, such restrictions must be prescribed by law and must be necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals. The European Committee of Social Rights has had, for example, on two occasions to render negative conclusions on Italy, where a particular law n°146 of 1990 permitted the requisitioning of striking workers in essential public services (including public transport or communication services, such as the post office, telecommunications and public media) in conditions which, according to the Committee, went beyond the limits imposed by Article 31 of the European Social Charter, namely on account of the number and type of services concerned[394]. It is particularly important that the Member States adequately define

[391] See, hereabove, the analysis presented under Article 21 of the Charter.
[392] OJ L 108, 24.4.2002, p. 51. According to this provision, concerning « Special measures for disabled users » : « 1. Member States shall, where appropriate, take specific measures for disabled end-users in order to ensure access to and affordability of publicly available telephone services, including access to emergency services, directory enquiry services and directories, equivalent to that enjoyed by other end-users. 2. Member States may take specific measures, in the light of national conditions, to ensure that disabled end-users can also take advantage of the choice of undertakings and service providers available to the majority of end-users ».
[393] For a discussion of the situation that presented itself in Greece in 2002, see *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002*, pp. 210-211.
[394] Concl. XIV-I, p. 483 ; Concl. XV-1, p. 376.

the restrictions to the right to strike which the continuity of public service may justify, so that the workers concerned may know exactly the extent of their obligations in that respect.

As regards the requirements of *quality of service* and *affordability*, the suggestions made in the Green Paper should be appraised while keeping in mind the general framework in which the discussion on the services of general economic interest is situated. In the system of the Treaty of Rome, the possibility for Member States to grant special or exclusive rights to certain undertakings special or to grant them certain aids constitutes a derogation, strictly interpreted, from the rule that all economic activity must be subject to the provisions of the EC Treaty on competition law, the prohibition of State aids, or the freedom of movement.

It is therefore up to the Member States to define the scope of protection which they wish to offer to citizens who are poor or living far from urban areas or infrastructure networks, in the access to services of general interest, subject to harmonization measures taken by the Community. Community law does not provide for any obligation for Member States to provide a minimum service to all in order to cater for the essential needs of the poorest sections of the population in gas, electricity, water, or telecommunications[395]. States may offer such a minimum service, on condition that 1° the organization modalities which they use to this end are strictly regulated, that any benefit granted to an undertaking charged with carrying out tasks of general interest must be justified as necessary for the realization of this obligation, and that any financial compensation for the cost incurred by the obligation to provide a service must be determined according to objective parameters[396]; 2° the States are subject to rigorous budgetary discipline within the framework of the economic and monetary union; and 3° for the supply of certain basic services, for instance in banking or insurance[397], the national authorities are strongly interdependent with other States, and their freedom to follow their own concept of general interest may be limited by their concern not to arouse opportunistic behaviour in consumers residing in other States. Under those conditions, the interpretation that is given of the requirements of subsidiarity and the division of powers between the Union and the Member States does not rule out the risk that Member States may be tempted not to make any progress in the realization of the fundamental economic and social rights which they have nevertheless undertaken to respect at the international level. It would be a good idea to work out compensatory mechanisms. At the very least, one could contemplate setting up a mechanism to promote good practices in Member States in the provision of a basic service, allowing the poorest citizens access to essential social goods, and guaranteeing access to those goods independently of any financial contribution on the part of the user (minimum supply of electricity, gas and drinking water, free transport for people on State benefits, guaranteed access for all to essential banking services irrespective of income, exemption from payment of premiums for certain types of compulsory insurance).

[395] In a Resolution of 1997, the European Parliament considered, "the Union should have the responsibility to ensure that, in accordance with the principle of subsidiarity, the Member States determine for each sector a number of public service obligations which may include fixing the minimum level of services, wherever the market mechanism fails to function throughout the territory of the Union" (Resolution on the communication from the Commission on "Services of general interest in Europe", COM(96)443 – C4-0507/96, res. A4-0357/97, OJ C 14 of 19/1/1998, p. 74 (Recital O)).

[396] Regarding State aids in the area of urban, suburban or regional transport, see ECJ, 24 July 2003, *Altmark*, C-280/00, not yet published.

[397] It is a similar line of reasoning that led the Commission to propose the inclusion of the field of insurance in its proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services, discussed above (Article 23 of the Charter) (see Preamble, p. 12: "…where a move by a single Member State to require unisex tariffs could expose its insurers to undercutting in part of its market by businesses in other Member States").

Article 37. Environmental protection

Like Article 35 of the Charter of Fundamental Rights analyzed above, Article 37 embodies what is generally considered to be a « principle », rather than a « subjective right » of the individual. It should be clear however, that Article 37 of the Charter can be the source of rights to the individual, where such rights are formulated in instruments which implement the principle of the protection of the environment. Moreover, any legislative act – either adopted by the EU institutions or adopted by the Member States acting in the field of application of EU law – which would run counter to the principle formulated in Article 37 of the Charter would constitute a violation of that provision, and therefore should be considered incompatible with EU Law and possibly annulled.

Since the principle of the protection of the environment is formulated as subjective rights that can be invoked directly by an individual, there is nothing to prevent these rights from being considered as having the status of fundamental rights in the legal order of the European Union, as they are enshrined in Article 37 of the Charter of Fundamental Rights. Such is the case with procedural rights, such as the right of access to environmental information, or the right to study the environmental impact of certain public policies that are liable to harm the health of the individual or, more broadly, the individual's right to private and/or family life[398].

The judgment in the case of *Hatton and others v. United Kingdom* is one of the most important judgments delivered by the European Court of Human Rights during the period under scrutiny[399]. The applicants, local residents living in the vicinity of Heathrow Airport in London, complained of numerous disturbances arising from night flights over their homes, obliging some residents to go and live elsewhere. The situation deteriorated since the introduction in 1993 of a noise quota scheme for the night quota period. The initial plan underwent several changes, following court judgments obtained by the local authorities for the areas situated around the three main London airports. After several public consultations, a new plan came into force in October 1999. In the meantime, the applicants had filed an application with the European Commission of Human Rights, claiming the policy set up by the Government in 1993 on night flights at Heathrow resulted in a violation of their rights guaranteed by Articles 8 (private and family life) and 13 (effective remedy) of the Convention. On 2 October 2001, a chamber set up within the third section of the Court delivered its judgment, in which it concluded that these two provisions had been infringed. The judgment of 8 July 2003 was given on referral by the Grand Chamber of the Court, and led to the following opposite conclusion. The Court concluded that there had been no infringement of Article 8 of the Convention, since it considered that the State had not exceeded the wide margin of appreciation that has to be allowed it in the area of environmental policy. It defines the procedural obligations flowing from the "environmental human rights" (§ 122) as follows, "A governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake. However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided" (§ 128). The decision, however, does not call into question the assertion that, since the States are required to "minimise, as far as possible, the interference with these rights, by trying to find alternative solutions (…), a proper and complete investigation and study with the aim of finding the best possible solution

[398] See already Eur. Ct. H.R., *Powell and Rayner v. United Kingdom*, judgment of 21 February 1990, series A n° 172, § 40: since the applicants complained of noise nuisance generated by air traffic during the daytime, the Court considered that Article 8 came into play, since "in each case, the quality of the applicant's private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow Airport".

[399] Eur. Ct. H.R. (GC), *Hatton and others v. United Kingdom*, judgment of 8 July 2003, application n° 36022/97.

(…) should precede the relevant project"[400]. However, the judgment delivered on 8 July 2003 by the Grand Chamber considers, "Having regard to the general nature of the measures taken, (…) the authorities were entitled to rely on statistical data based on average perception of noise disturbance" (§ 125) and to adopt certain measures, even if, for some residents who are particularly sensitive to noise, the negative impact might be such as to oblige them to move.

The *Hatton* judgment reaffirms that the States Parties to the European Convention on Human Rights have to regulate the activities of private persons in order to combat the environmental disturbances for which they may be directly responsible. Making instruments available to businesses to allow continuous monitoring of their environmental performance would be a first step in making them more responsible for the environment. On 10 July 2003, the Commission adopted a Recommendation on guidance for the implementation of Regulation (EC) No 761/2001 of the European Parliament and of the Council allowing voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) concerning the selection and use of environmental performance indicators[401]. The Recommendation seeks to facilitate the establishment of environmental reports, on the environmental performance of private organisations. It insists to that effect on the principles of comparability (enabling to identify changes in the environmental performance), balance between problematic (bad) and prospective (good) aspects, continuity (facilitating comparisons in time), timeliness (regular updating of indicators to ensure reactivity to new developments), clarity and understandability.

The instruments which the European Community and Union have at their disposal to safeguard the right to environmental protection are diverse. During the period under scrutiny, three important instruments were adopted that reflect this concern. They are aimed at criminalizing serious environmental offences and combating impunity for crimes that cause damage to the environment by approximating the criminal laws of the Member States; ensuring the right of access to environmental information; and guaranteeing public involvement in the development of environmental policy.

Criminalizing serious environmental offences

The first important instrument adopted during the period under scrutiny is the Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law[402]. The Framework Decision is adopted on the basis of Article 29, Article 31(e) and Article 34(2)(b) TEU[403]. It lists a number of serious environmental offences (Articles 2 and 3). And it encourages Member States to adopt criminal sanctions against both physical and legal persons[404], and to provide for extra-territorial jurisdiction, « in such a way as to avoid that physical or legal persons would escape prosecution by the simple fact that the offence was not committed in their territory » (Preamble, Recital 9). Article 8 of the Framework Decision provides that each Member State shall establish its jurisdiction, *inter alia*, where 1° the offence « has been committed fully or in part in its territory, even if the effects of the offence occur entirely elsewhere » ; or 2° « for the benefit of legal persons with a registered office in its territory » ; or 3° « by one of its nationals if the offence is punishable

[400] Eur. Ct. H.R. (3rd section), *Hatton and others v. United Kingdom*, judgment of 2 October 2001, application n°36022/97, § 97.
[401] OJ *L 184 of 23/7/2003, p. 19.*
[402] OJ L 29 of 5/2/2003, p. 55.
[403] This is despite the fact that the European Commission had submitted in March 2001 a proposal for a Directive of the European Parliament and the Council concerning the protection of the environment by criminal law based on Article 175(1) of the Treaty establishing the European Community (COM(2001)139 final, OJ C 180 E, 26/6/2001, p. 238). See also the modified proposal of 30 September 2002, COM(2002)544 final, OJ *C 020 E , 28/1/2003, p. 284*.
[404] See Article 6 of the Framework Decision. Legal persons will be liable where the offence has been committed for its benefit by a natural person having a leading role in the organisation, or where the commission of the offence can be attributed to the lack of supervision or control by the legal person.

under criminal law where it was committed or if the place where it was committed does not fall under any territorial jurisdiction ». The latter two grounds of extra-territorial jurisdiction, based on the active personality principle of jurisdiction, remain optional : under Article 8 § 2 of the Framework Decision, « any Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances ». However, where a Member State decides not to make an offence punishable where it is committed outside its national territory by one of its nationals, the State must agree to extradite its national so that he may be prosecuted in the State where the offence was committed : Article 9(1) of the Framework Decision, indeed, says that « Any Member State which, under its law, does not yet extradite its own nationals shall take the necessary measures to establish its jurisdiction over the offences provided for in Articles 2 and 3 when committed by its own nationals outside its territory ». The purpose of the Framework Decision therefore is to avoid impunity for the serious environmental crimes.

The Preamble of the Framework Decision (Recital 10) state that the Council of Europe Convention on the protection of the environment through criminal law, of 4 November 1998[405], « has been taken account of » in the drafting of the Decision. This Convention also provides that the Parties establish their jurisdiction with respect to criminal offences which it defines – which, like Framework Decision 2003/80/JHA, may be committed intentionally or not (negligence) –, notably where the offence in question has been committed on the territory of the State Party, "by one of its nationals if the offence is punishable under criminal law where it was committed or if the place where it was committed does not fall under any territorial jurisdiction » (article 5(1) of the Convention). Article 5 § 2 of the Convention adds, "Each Party shall adopt such appropriate measures as may be necessary to establish jurisdiction over a criminal offence established in accordance with [the] Convention, in cases where an alleged offender is present in its territory and it does not extradite him to another Party after a request for extradition ». This additional guarantee against impunity is not provided for in Framework Decision 2003/80/JHA, which is regrettable. The refusal to extradite may in fact be based on another reason than the fact that the person whose extradition is requested has the nationality of the requested Member State – for example, the procedures in the requesting Member State do not meet the requirements governing fair trial, or the requesting State does not offer guarantees as to its willingness to ensure effective suppression of the offences in question. The Convention of the Council of Europe also encourages the Parties to provide, at the expense of perpetrators of offences causing serious damage to the environment, for an obligation to reinstate the environment (Article 8). The Framework Decision makes no reference to such a way of remedying damage caused, although the Framework Decision does provide among the sanctions applicable to a legal person an obligation to « adopt specific measures in order to avoid the consequences of conduct such as that on which the criminal liability was founded » (article 7, e), of the Framework Decision). Finally, the Convention of the Council of Europe encourages the States Parties to provide for groups that aim to protect the environment the right to participate in criminal proceedings concerning offences established in accordance with the Convention (Article 11). Framework Decision 2003/80/JHA is silent on this issue.

In 2005-2006, an evaluation is scheduled of the implementation by the Union Member States of Framework Directive 2003/80/JHA of 27 January 2003 (see Article 10 § 2). It would be desirable to contemplate, in the long term, the alignment of the provisions of the Framework Decision to the provisions of the Council of Europe Convention. The latter has so far only been ratified by Estonia (26/4/2002); it has been signed by a minority of the European Union Member States (Germany, Austria, Belgium, Denmark, Finland, France, Greece, Italy, Luxembourg, Sweden).

[405] ETS n° 172.

Guarantee the right of the public to access to environmental information

Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC[406] is based on the idea that « Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment » (Preamble, Recital 1). This Directive also seeks to ensure the compatibility of EC law with the UN/ECE « Aarhus » Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which the EC signed on 25 June 1998 together with the fifteen Member States[407]. Article 3(1) of the Directive states its governing principle : « Member States shall ensure that public authorities are required (…) to make available environmental information held by or for them to any applicant at his request and without his having to state an interest ». Any limitation to the right to have access to environmental information must be restrictively interpreted. Even where exceptions may be invoked in accordance with the directive[408], public authorities should make environmental information available in part where it can be separated from the information falling within the scope of the exceptions (Recital 17).

The Directive provides that, if environmental information is transmitted against a charge, that charge must be reasonable, i.e ., it should not exceed to cost incurred (Article 5). Access to justice must be guaranteed where the information requested is denied (Article 6). In order to achieve the widest possible systematic availability and dissemination to the public of environmental information, the directive promotes the use of computer telecommunication and electronic technology. Article 7, on the dissemination of the information, which details this obligation, also provides that « Without prejudice to any specific obligation laid down by Community legislation, Member States shall take the necessary measures to ensure that, in the event of an imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information held by or for public authorities which could enable the public likely to be affected to take measures to prevent or mitigate harm arising from the threat is disseminated, immediately and without delay » (Art. 7(4)).

Ensure public participation in respect of the drawing up of certain plans and programmes relating to the environment

Like the abovementioned Directive 2003/4/EC, Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC[409] seeks to ensure the compatibility of EC Law with the UN/ECE « Aarhus » Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. This Convention seeks, inter alia, to « guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being » (Preamble, Recital 6). Directive 2003/35/EC therefore amends Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private

[406] OJ L 41, 14/2/2003, p. 26. The Directive replaces Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (OJ L 158, 23/6/1990, p. 56). Directive 90/313/EEC is repealed with effect from 14 February 2005.
[407] The Convention entered into force on 1 October 2001.
[408] Article 4(2) f) includes among the exceptions the need to protect personal data, as provided, i.a., by Directive 95/46/EC.
[409] OJ L 156, 25/6/2003, p. 17.

projects on the environment[410], and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control[411], to ensure their full compatibility with the provisions of the Århus Convention.

The Aarhus Convention on access to information, public participation in decision making and access to justice regarding environmental matters

The Aarhus Convention, which is explicitly referred to both in Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and in Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, may be taken into account not only for the interpretation of these directives, but also, if an incompatibility emerges, to assess their legality. In the *Nakajima All Precision Co. Ltd* judgment of 7 May 1991, the Court confirmed that where a secondary law instrument "was adopted in order to comply with the international obligations of the Community", the latter is obliged to respect those obligations in the instrument which it adopts[412]. Directive 2003/88/EC should also be interpreted taking into account the relevant case-law of the European Court of Human Rights, which derived from Article 8 of the European Convention on Human Rights a right of access to environmental information[413]. Finally, on 24 October 2003, the Commission presented a proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters[414]. The adoption of this third instrument will complete the definition by the Community of the obligations incumbent upon the Member States under the Aarhus Convention. The latter text is examined under Article 47 of the Charter.

In accordance with Article 175(1) EC, the European Community is competent for becoming a Party to the Aarhus Convention. The Commission has proposed a Council Decision to that effect[415]. It has also proposed the adoption of a Regulation ensuring the application of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies[416], which relates to all three pillars of the Aarhus Convention. The relevant provisions of the proposed Regulation are commented upon under, respectively, Article 42 of the Charter (with respect to access to environmental information and the obligation imposed on public authorities to collect and

[410] OJ L 175, 5/7/1985. The Court of Justice of the European Communities considered that this Directive could be relied upon directly by individuals before the national judicial authorities against the public authorities, which will allow the latter to compensate for the consequences of an incomplete or deficient transposition: ECJ, 24 October 1996, *Kraaijeveld et al.*, C-72/95, *ECR* I-5403; ECJ, 16 September 1999, *WWF et al.*, C-435/97, *ECR* I-5613; ECJ, 19 September 2000, *Linster*, C-287/98, *ECR* I-6917. This reliance is one way only, i.e. it cannot justify, conversely, that the public authorities impose obligations on individuals directly by virtue of the Directive in order to compensate for the deficient or incorrect transposition. This reliance does not apply vis-à-vis other individuals. However, the fact that the Directive can be relied upon against the public authorities and can consequently have an impact on the rights and interests of other individuals does not derogate from this principle: see the opinions of Mr Advocate General Ph. Léger of 25 September 2003, presented in the case C-201/02, *The Queen, ex parte Wells*.

[411] OJ L 257, 10/10/1996.

[412] ECJ, 7 May 1991, *Nakajima*, C-69/89, *ECR* I-2069, recital 31. See also ECJ, 26 October 1982, *Kupferberg*, 104/81, recital 11, *ECR* 3641; ECJ, 16 March 1983, *SIOT*, 266/81, recital 28, *ECR* 731; ECJ, 23 November 1999, *Portugal v. Council*, C-149/96, *ECR* I-8395, recital 29. With regard to WTO law, the Court of First Instance of the EC confirms, "it is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Community judicature to review the legality of the Community measure in question in the light of the WTO rules" (CFI, 11 January 2002, *Biret International SA v. Council,* T-174/00, *ECR* II-17, recital 63).

[413] Eur. Ct. H.R., *Guerra and others v. Italy*, judgment of 19 February 1998, *Rec.* 1998-I; *McGinley and Egan v. United Kingdom*, judgment of 9 June 1998.

[414] COM(2003)624 final of 24/10/2003.

[415] Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision making and access to justice regarding environmental matters, COM(2003)625 final of 24/10/2003.

[416] COM(2003)622 final of 24/10/2003.

disseminate environmental information) and Article 47 of the Charter (with respect to access to justice in environmental matters).

Article 38. Consumer protection

There is no new significant development to be reported under this provision of the Charter, for the period under scrutiny.

CHAPTER V: CITIZEN'S RIGHTS

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

During the period under scrutiny, the following initiatives were taken at European Union level.

• Article 19, paragraph 2, EC provides that every Union citizen residing in a Member State of which he does not have the nationality has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State where he is residing. Article 14 of Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in elections to the European Parliament for citizens of the European Union residing in a Member State of which they are not nationals[417] authorizes a Member State to request a derogation from this principle if the proportion of citizens of the Union of voting age who reside in it but are not nationals of it exceeds 20 % of the total number of citizens of the Union residing there who are of voting age. This derogation has been granted to Luxembourg. The Commission, in the context of the report that was presented on 27 January 2003, examined the appropriateness of maintaining this derogation for Luxembourg[418]. The Commission concluded that the reasons invoked for granting this derogation are still warranted.

• In order to guarantee that all voters are able to effectively exercise their right to vote in the elections to the European Parliament, which will take place from 10 to 13 June 2004, the Commission issued a communication aimed at stimulating the implementation in the new Member States of the Community acquis in this area and to encourage the timely registration of all Union citizens - including nationals of other new Member States - in the electoral register, in the current as well as in the acceding Member States[419]. The Commission urges all acceding States, who have not yet done so, to transpose Directive 93/109/EC without delay, in order to establish a legal basis for the right of Union citizens to vote and stand as candidates in the elections to the European Parliament. It also urges the current Member States and the acceding Member States to take the necessary measures to ensure that Union citizens and

[417] OJ L 329 of 30/12/1993, p. 34.
[418] Article 14 § 3 of Directive 93/109/EC provides, "18 months prior to each election to the European Parliament, the Commission shall submit to the European Parliament and to the Council a report in which it shall check whether the grant to the Member States concerned of a derogation pursuant to Article 8b (2) of the EC Treaty [now Article 19 EC, which provides in §2, that the detailed arrangements for the exercise of right to vote and to stand as a candidate at elections to the European Parliament for European Union citizens residing in a Member State of which they are not nationals may provide for derogations where warranted by problems specific to a Member State] is still warranted and shall propose that any necessary adjustments be made (…)".
[419] Communication from the Commission to the European Parliament and the Council on measures to be taken by Member States to ensure participation of all citizens of the Union to the 2004 elections to the European Parliament in an enlarged Union, COM(2003)174 final of 8/4/2003.

nationals of the acceding States residing in their territory are entered on the electoral rolls for the elections to the European Parliament in good time before the elections.

• In an important judgment of 18 February 1999, the European Court of Human Rights considered that the impossibility for residents of Gibraltar to take part in the elections to the European Parliament, taking into account the extension of the latter's competences when the Treaty on European Union came into effect, constituted a violation of Article 3 of the First Additional Protocol to the European Convention on Human Rights[420]. In a declaration adopted on 29 October 2003 on the subject of the complaint lodged by Spain against the United Kingdom for alleged violation of Community law as far as the right to vote in European Parliament elections in Gibraltar is concerned[421], the Commission declared, "following an in- depth analysis of the Spanish complaint and an oral hearing held on the 1st of October, the Commission considers that the UK has organised the extension of voting rights to residents in Gibraltar within the margin of discretion presently given to Member States by the EU law. However, given the sensitivity of the underlying bilateral issue, the Commission at this stage refrains from adopting a reasoned opinion within the meaning of Article 227 of the Treaty and invites the parties to find an amicable solution".

• In the opinion of 14 May 2003 on Access to European Union Citizenship, the European Economic and Social Committee asked the European Convention that the right to vote and to stand as candidate in elections, derived from European citizenship, in municipal as well as in European elections, be extended to third country nationals who are stable or long-term residents in the European Union. The conclusions of this opinion are the following[422] :

Granting EU citizenship to third-country nationals who are stable or long-term residents is a positive step that demonstrates the EU's commitment to integrating all residents, regardless of nationality.

The immigrant population of the Member States is set to rise. Many of these people will be stable or long-term residents. There will be an all-round increase in mobility as freedom of movement evolves. The Convention must consider whether the present political and legal bases are adequate or not for promoting integration.

The EESC calls on the Convention, in drafting the first EU Constitution, to apply the principle of equality to everyone, be they Member State or third country nationals, who resides on a legal and stable basis in the Union.

The EESC calls on the Convention to provide a new criterion for granting Union citizenship: citizenship should be linked not only to nationality of a Member State, but also to stable residence in the Union.

The EESC therefore proposes to the Convention that Article 7 (Citizenship of the Union) be granted not only to nationals of the Member States but to all persons who reside on a stable or long-term basis in the European Union. Union citizenship will be

[420] Eur. Ct. H.R., *Matthews v. United Kingdom*, judgment of 18 February 1999, application n° 24833/94.
[421] At the adoption of Council Decision 2002/772/EC,Euratom of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom , OJ L 283 of 21/10/2002, p. 1, the UNited Kingdom declared that it would guarantee the faithful execution of the *Matthews* judgment.
[422] Opinion CES SOC/41 of 14 May 2003 on Access to European Union citizenship. See also, on the right to vote in municipal and European elections, Opinion CES 1321/2001 on the Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents.

additional to but will not replace national citizenship. In this way such persons will be European citizens and therefore equal before the law.

This opinion follows upon the reference to a form of "civic citizenship" put forward by the Commission in its proposals for aligning progressively the status of third country nationals with that of the nationals of the Member States[423]. The right to vote in municipal elections should undoubtedly form part of the core of rights and obligations which third country nationals should be recognized as nationals of the Member States, in conformity with the notion of civic citizenship. The Convention on the Participation of Foreigners in Local Public Life, opened for signature in the Council of Europe on 5 February 1992[424], stipulates that States parties to that instrument undertake in principle "to grant all foreign residents the right to vote and to stand as candidates in local elections, provided that they fulfil the same conditions as those which apply to national citizens and, in addition, have resided legally and regularly in the State in question during the five years preceding the elections" (article 6(1)).

Article 40. Right to vote and to stand as a candidate at municipal elections

It is referred to the third question analyzed under Article 39 of the Charter.

Article 41. Right to good administration

The proceedings conducted in the field of competition law by the Commission where it acts according to its powers of investigation and inquiry in the sanctioning of anti-competitive practices are where the rights of Article 41 of the Charter may be most frequently invoked[425]. Article 41(2) of the Charter guarantess, *inter alia*, "the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy". In its *Cimenteries CBR SA v. Commission* judgment of 15 March 2000, the Fourth Chamber of the Court of First Instance (extended composition) had considered that the impossibility for the undertakings concerned to have access to all the elements of the file held by the Commission did not justify the total annulment of a 1994 Decision by the Commission imposing fines on these undertakings operating in the grey and white cement sector, for infringing Article 85(1) of the EC Treaty (now Article 81(1) EC). Indeed, the Court of First Instance considered that even if such an access to the file had been granted by the Commission, these undertakings « would not have had even a small chance of altering the outcome of the administrative procedure. Those applicants have not therefore shown in that regard that there was any breach of their rights of defence during the administrative procedure » (Recital 3342). In his opinion delivered on 11 February 2003 on the appeal against that judgment by Irish Cement Ltd, Advocate General Ruiz-Jarabo Colomer concluded that the appeal should be rejected. Relying explicitly on Article 41(2) of the Charter of Fundamental Rights, the Advocate General considered that the right to consult the file, far from being « an end in itself », is merely « another tool at the service of the right of

[423] Communication of the Commission on a Community Immigration Policy, COM(2000) 757 final; see also COM(2001)127 final.

[424] ETS n° 144. The Convention came into force on 1 May 1997.

[425] On the rights of defence in the context of such proceedings, see Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under [Articles 81 EC and 82 EC], OJ 1998 L 354, p. 18, replacing Regulation n° 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47). See now Art. 27(2) of Council Regulation (EC) n° 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1), which states in part : « The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. (…)»

defence ». Therefore such procedural defects « are irrelevant if, in spite of everything, the person concerned has enjoyed the appropriate rights of defence » (point 34). The judgment of the Court of First Instance should therefore not be annulled (points 35 and 36) :

> …the instrumental nature of the right of access to the file entails a further consequence. Even where access has not been properly granted, or where there have been defects in the way in which it was granted, and the person concerned has therefore been less able to defend himself, the decision subsequently adopted may be annulled only if it is found that, if the proper procedural routes had been scrupulously followed, the outcome could have been more advantageous for the person concerned or if, precisely because of the procedural defect, it is impossible to ascertain whether the decision would have been different. In each case the final decision must be annulled and, if appropriate, the procedure repeated in order to put it right.
>
> In short, defects in the procedure do not have a life of their own in isolation from the substance of the case. If a decision taken in the wake of a defective procedure is annulled because, owing to the defects in the procedure leading to its adoption, it is wrong in substance, the decision is annulled because it is incorrect in substance, not because of the procedural defect. The defect in form assumes an independent existence only when, because it occurred, it is impossible to form an opinion about the decision which was adopted.

Article 42. Right of access to documents

The right guaranteed in Article 42 of the Charter of Fundamental Rights has been concretized through the adoption of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents[426], adopted on the basis of Article 255 EC[427]. Article 11 of this Regulation imposes on each institution to create a public register of the documents it holds, before the date of 3 june 2002. It should be emphasized that the public register should also mention any documents to which Article 4 of the Regulation may apply, although this provision relates to the exceptions to the principle of the right of access to all documents held by the institutions of any citizen of the Union, or any natural or legal person residing or having its registered office in a Member State. Instead, Article 11 of the Regulation states that :

> 1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.
> 2. For each document the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. *References shall be made in a manner which does not undermine protection of the interests in Article 4*.

Therefore even documents to which access may be denied, in part or in totality, under any of the exceptions listed under Article 4, should be registered, and their existence therefore made

[426] OJ L 145, 31.5.2001, p. 43.
[427] Neither Article 42 of the Charter of Fundamental Rights, nor Regulation n° 1049/2001, guarantee in principle a right to access to the documents held by the other institutions, bodies or agencies of the Community. However, in conformity with the Joint Declaration relating to Regulation n° 1049/2001 (OJ C 173, du 27.6.2001), the Commission has proposed amending the Regulations founding the Community bodies to ensure that the guarantees of Regulation n° 1049/2001 are also fully respected in this context : see COM(2002)406 final.

known to the public. Indeed, this is required if the right to partial access to documents, as formulated under Article 4(6) of the Regulation, is to be effectively exercised. This provision states that : « If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released. » However, any request for partial access presupposes that the existence of the document is known to the applicant[428]. In sum, therefore, may only be excluded from the public register the documents of each institution which are considered sensitive, under the definition and according to the modalities of Article 9 of the regulation, which provides that such documents shall be recorded in the register or released only with the consent of the originator (i.e., the institutions or the agencies established by them, the Member States, third countries or International Organisations) (Article 9(3))[429]. This is not to say, of course, that such documents should be removed from any form of public scrutiny, even exercised indirectly though the representatives of the citizens. Article 9(7) of Regulation n° 1049/2001 provides that « The Commission and the Council shall inform the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions ». Such an agreement was concluded between the Council and the Parliament in the field of security and defence policy on 20 November 2002[430].

With the exception of this latter category of documents, all the documents produced within an institution should be recorded, without delay, in the register established according to Article 11 of Regulation 1049/2001. To justify its choice to include in the register which it made available to the public on 3 June 2002 only legislative documents, the Commission refers to the priority which the Regulation would have given to this category, which the Regulation defines as « documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States ». The distinction between legislative and other documents is in fact relevant only with respect to the direct access to documents (see Article 12(2) of the Regulation). It has no role to play in the context of Article 11, which concerns the establishment of the register. The position of the Commission, as it is expressed in its first report on the application of Regulation (EC) n° 1049/2001, presented in April 2003[431], therefore contradicts the clear wording of the Regulation.

Article 4(6) of the Regulation concerns partial access to documents. It says that « If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released ». However, in practice, it follows from the fact that a document is only partially accessible that it will not be made directly accessible, although direct accessibility to documents should be the rule according to Article 12(1) of the Regulation. It would advisable to provide for direct accessibility of the documents which are at least partly accessible, simply by deleting the portions of the document, or the information relating to specific delegations or persons, which should not be made public, in accordance with the exceptions provided for in Article 4 of the Regulation. This would avoid the need for each person wishing to have access to a document which is only partially accessible, to have to introduce a specific request to that effect.

[428] By way of illustration, on 31 December 2002, the public register of the Council referred to 2944 documents « P/A », partially accessible, out of a total of 375154 documents. See the Annual Report of the Council on the Implementation of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (adopted on 28 March 2003 by the Working Party on Information of the Council).

[429] Thus, in 2002, the Council of the European Union had produced 250 sensitive documents, of which 77 only have been registered on the public register. All of these 77 documents had been classified as « confidentiel », representing the lowest degree of confidentiality in the classification of Article 9(1) of the Regulation. No « top secret » document has been produced during that period. 38 « secret » documents have been produced, none of which was mentioned in the public register. See the Annual Report of the Council on the Implementation of Regulation (EC) No 1049/2001, cited above.

[430] OJ C 298, 30.11.2002, p. 1.

[431] COM(2003)216 final, of 29.4.2003, para. 1.3., p. 6.

With a view to make possible the entry into force vis-à-vis the European Community of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, the Commission has proposed the adoption of a Regulation of the European Parliament and of the Council on the application of the provisions of this instrument to EC institutions and bodies[432]. If the proposed Regulation is adopted, Regulation 1049/2001 should in the future be considered to apply to any natural or legal person, regardless of nationality or residency or to whether the legal person has its registered seat or an effective centre of its activities in a Member State, where a request if made for access to environmental information. Moreover, a right of access to information in environmental matters will be invocable, not only vis-à-vis Community « institutions » as defined by Article 7 EC, but also to any body of the Community[433]. Moreover, in accordance with Article 5 of the Aarhus Convention, the collection and dissemination of environmental information will conform to more detailed provisions than those currently contained in Regulation 1049/2001[434]. Indeed, one of the important aspects of this Convention, which goes beyond the right of the public to have access to information which is held by the public authorities, concerns the obligation of the Parties – thus, also, the institutions and bodies of the Community – to collect, organize and disseminate information relating to environmental matters, so that public debate becomes possible and is encouraged to be based on objective and updated information, and so that these Parties are obliged to monitor their own practices with respect to environment, inter alia by their obligation to produce periodic reports on their performances. Article 5 of the Aarhus Convention reads :

> 1. Each Party shall ensure that:
> (a) Public authorities possess and update environmental information which is relevant to their functions;
> (b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;
> (c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.
> 2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by:
> (a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;
> (b) Establishing and maintaining practical arrangements, such as:
> (i) Publicly accessible lists, registers or files;
> (ii) Requiring officials to support the public in seeking access to information under this Convention; and
> (iii) The identification of points of contact; and
> (c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.
> 3. Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:
> (a) Reports on the state of the environment, as referred to in paragraph 4 below;

[432] COM(2003)622 final, of 24.10.2003.
[433] See Art. 3 of the proposed Regulation, cited above.
[434] See Art. 4 of the proposed Regulation, cited above.

(b) Texts of legislation on or relating to the environment;
(c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements; and
(d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention, provided that such information is already available in electronic form.
4. Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.
5. Each Party shall take measures within the framework of its legislation for the purpose of disseminating, inter alia:
(a) Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government;
(b) International treaties, conventions and agreements on environmental issues; and
(c) Other significant international documents on environmental issues, as appropriate.
6. Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.
7. Each Party shall:
(a) Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals;
(b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention; and
(c) Provide in an appropriate form information on the performance of public functions or the provision of public services relating to the environment by government at all levels.
8. Each Party shall develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices.
9. Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and offsite treatment and disposal sites.
10. Nothing in this article may prejudice the right of Parties to refuse to disclose certain environmental information in accordance with article 4, paragraphs 3 and 4.

Article 43. Ombudsman

Article 43 of the Charter reiterates the contents of Article 195 § 1, par. 1, EC, also adopted in Article 2 § 2 of the Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties[435]. The "maladministration in the activities of the Community institutions and bodies" that may justify the intervention of the European Ombudsman is, however, not defined in this decision. It does not consist solely in the infringement of the right to good administration, as is defined in Article 41 of the Charter in relatively open terms[436]. In the exercise of his duties, the European Ombudsman has

[435] Decision 94/262 of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, OJ L 113, p. 15.
[436] See the formulation of Article 41 § 2 of the Charter (the right to good administration "*includes*":…").

had on several occasion to insist on the importance of the respect due to the right of access to documents (Article 42 of the Charter); he has also attached great importance for the interpretation of this clause to Article 1 of the Treaty on European Union, as amended by the Treaty of Amsterdam, and which henceforth stipulates that, within the Union, decisions "are taken *as openly as possible* and as closely as possible to the citizen". However, more generally, the Ombudsman considers being confronted with a case of "maladministration" in the event of an infringement of any right that is recognized in the Charter, such as the right not to be discriminated against in accordance with Article 21 of the Charter (the European Ombudsman has thus obtained an undertaking from the Commission and the European Parliament to abolish the age limits in competitions for recruitment to those institutions).

The European Ombudsman has drafted a Code of Good Administrative Behaviour, which serves as a guide in the handling of complaints that are lodged with him. This Code was approved in substance by the European Parliament in a Resolution of 6 September 2001. However, the European Ombudsman found that, despite the generally favourable reactions of the Community institutions, bodies and agencies to the proposal to adopt such a code based on the model he had drafted, only a small minority of institutions, bodies and agencies had actually adopted such a code and agreed to undertake to comply with it[437]. The adoption of such a code, which had to be drawn up as uniformly as possible for all the institutions, bodies and agencies of the European Community, would have the advantage of explaining the standards that should govern the relations between the European administration and the citizens, which is to the advantage of officials and public alike. It should be emphasized that, with the exception of the right of access to documents, the elements of the right to good administration (for example the right to impartial and fair treatment, without unnecessary delay, of the cases, the right of every person to be heard before any unfavourable individual decision is taken against him, the right to be informed of the reasons for decisions that are taken, and the right to be informed about possible remedies) remain relatively imprecise and inaccessible in the absence of a codification of those elements.

Taking note of the obstacles to the voluntary adoption of the Code of Good Administrative Behaviour by the Community institutions, bodies and agencies, the European Ombudsman recommended the adoption of European administrative legislation, applicable to all Community institutions and bodies. When this proposal was formulated in April 2000, Article 308 EC was identified as an adequate legal basis for the adoption of such legislation in the form of a Regulation. It is not certain, however, that this legal basis is sufficient, since the guarantee of good administration does not figure among the Community objectives[438]. But a joint declaration by the institutions to comply with a Code of Good Administrative Behaviour would offer, in symbolic terms, the same advantages as the adoption of a Regulation. In terms of accessibility for the public, the publication of this Code in part C of the Official Journal, annexed to the joint declaration, would suffice; from the legal point of view, such a joint declaration would constitute an undertaking from the institutions that may be relied upon, for example, to support an action for annulment or an action of extracontractual liability before the Community courts[439].

[437] See the Special Report of the European Ombudsman to the European Parliament, following an own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour (OI/1/98/OV), drawn up on the basis of information gathered on 1 March 2000.

[438] The Draft Treaty establishing a Constitution for Europe, presented by the European Convention, was meant to fill this gap by incorporating in the Constitution a provision (Article III-304) stating, "the Institutions, bodies and agencies of the Union shall have the support of an open, efficient and independent European administration", and "European laws shall establish specific provisions to that end".

[439] According to the principle of *patere legem quam ipse fecisti*: see CFI, 5 March 1997, *WWF UK v. Commission*, T-105/95, *ECR,* p. II-313, recitals 53 to 55.

The debates held in the Convention on the Future of Europe have highlighted the expediency of clarifying the extrajudicial remedies that are open to natural or legal persons in the Union. These remedies have the advantage of not being expensive, of being subject to formal requirements that are not very strict, of being swift, and of alerting the institutions of the Union to certain situations which, in many cases, go beyond the individual case of the person making use of such remedies. An inter-institutional agreement between the Commission, the European Parliament and the European Ombudsman could appropriately define, for the benefit of the public, the respective conditions of intervention of the European Commission (Article 211 CE), the European Parliament through its Committee on Petitions (Article 44 of the Charter of Fundamental Rights, Article 21 par. 1 EC and Article 194 EC), and the Ombudsman (Article 43 of the Charter of Fundamental Rights, Article 21 par. 2 EC and Article 195 EC), in the handling of requests addressed to those institutions in the form of petitions or complaints. In order to maximize one of the functions of these mechanisms, which is to alert the Union institutions to certain general situations calling for initiatives on their part, it may be useful to consider calling upon the EU Network of Independent Experts on Fundamental Rights, or the future Human Rights Agency, to prepare opinions on the initiatives that might be solicited from the institutions by complaints or petitions that highlight difficulties associated with the implementation of the rights enshrined in the Charter of Fundamental Rights of the European Union.

Article 44. Right to petition

The latest information on the exercise of the right to petition is contained in the report drawn up in the European Parliament by Mrs Laura González Álvarez[440]. It is not necessary here to discuss the quantitative[441] and qualitative data that emerge from this document. On the other hand, it should be underlined that this report reiterates the observation made above in connection with the European Ombudsman that there should be a better co-ordination between the European Commission, which receives complaints from individuals who feel that Community law has been violated with respect to them, the European Ombudsman, and the Committee on Petitions of the European Parliament. An improvement of this co-ordination could justify a review of the inter-institutional agreement of 12 April 1989. It could be coupled with a definition of the tasks of a Human Rights Agency in the European Union, whose deliberations and proposals should be inspired by the content of the complaints or petitions that are lodged by European citizens or persons residing in the European Union, where they are concerned with structural problems going beyond the case of the individual petitioner. Reference is made on this point to the Introduction to the present report.

Article 45. Freedom of movement and of residence

Citizens of the European Union

After having received the opinion of the European Parliament as expressed in a resolution adopted on 11 February 2003, which suggested a number of amendments to the initial proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[442], the Commission submitted an Amended proposal for this Directive[443]. This initiative

[440] **A5-0239/2003, 19/6/2003.**

[441] The report reveals that, for the period under scrutiny (from 12 March 2002 to 10 March 2003), the Committee on Petitions received 1514 petitions, compared with 1283 the previous year. The Committee declared 642 petitions admissible and 202 inadmissible (compared with 744 and 293 respectively the previous year); the examination of 573 petitions has been completed (compared with 506 the previous year). 1080 petitions are still under examination, compared with 1041 the previous year.

[442] COM(2001) 257 final, of 23/5/2001.

is justified by the need to remedy the sectorialized, piecemeal approach which has been characteristic of the Community legislation in this domain, to facilitate, by providing legal clarity, the exercise of the right of free movement and residence guaranteed by Article 18 EC. The proposal has carefully taken into account a number of fundamental rights requirements, for instance by organising the suspensive effect of the appeal against the removal decision (Article 29(3)), or by providing, in accordance with the case-law of the European Court of Justice based on Articles 12 and 17 EC and (for what concerns social and medical assistance) with the European Social Charter, that « Union citizens residing within the territory of the host Member State shall enjoy equal treatment with the nationals of that State in areas covered by the Treaty » (Article 21(1)).

The EU Network of Independent Experts on Fundamental Rights has already examined specific aspects of the proposed directive, at different stages of its elaboration. Therefore a general commentary is not required in this Report. It will be useful, however, to make two observations on the proposal as amended by the Commission in April 2003.

The notion of « family members »

The Amended proposal contains a definition of the « family member » of the citizen of the Union which refers to the « spouse », to the « partner to whom the Union citizen is linked by registered partnership or with whom he/she has a duly attested durable relationship, if the legislation of the host Member State recognises the situation of unmarried couples, in accordance with the conditions laid down in any such legislation », and to the direct descendants and direct relatives in the ascending line of these first two categories (Article 2(2)). Except for the reference to a registered partnership, which the Commission agreed to insert, the Commission has thus chosen to reject the proposal of the European Parliament to amend this clause so as to recognise as a « family member » the spouse of the same sex in the same way as the spouse of a different sex, or the registered partner in accordance with the legislation of the Member State of origin, and nonmarried partners in accordance with the legislation or practice of the host or home Member State. In fact, the Commission goes no further than what is required by the case-law of the European Court of Justice on this issue[444].

The result of this choice is that the freedom of movement and residence of citizens of the Union who are homosexuals will be less effective than the same freedom of other citizens of the Union. In many cases, citizens living in a durable homosexual relationship will be hesitate to disrupt their family life by seeking employment or taking up a job opportunity in another Member State. The result is also that Member States may decide that the couples married under the Belgian or Dutch civil law may or may not be recognized for the purposes of family reunification, on the basis of whether these are opposite-sex couples or same-sex couples, without violating the Directive. Because it entails such consequences, the solution proposed should be subjected to the strictest scrutiny. In its Opinion n° 1-2003 delivered on 10 April 2003, the EU Network of Independent Experts had considered :

> […], the European Commission questioned the Network of Independent Experts on the matter of knowing whether the non-recognition of same-sex marriages and registered partnerships on the basis of the law of the Member State of origin is contrary to the requirements of the European Convention on Human Rights. Articles 8 and 14 of that instrument are mentioned in the request for an opinion.
>
> The reply to this […] question must be a qualified one. It suggests that account must also be taken of Article 12 of the European Convention on Human Rights, which guarantees the right to marry.

[443] COM(2003)199 final, of 15/4/2003.
[444] ECJ, 17 April 1986, *Reed*, C-59/85 ECR 1283.

For the purposes of the amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, the Commission contemplated - at the moment when the present opinion was sought - defining "family members" as comprising a) the "spouse", and b) "the partner, to whom the Union citizen is linked by a registered partnership or by a duly attested stable relationship, if the legislation of the host Member State recognizes the situation of unmarried couples and in accordance with the conditions laid down in such legislation" (proposal for a new Article 2 (Definitions), par. 2).

In its opinion of February 2003, adopted on the recommendation of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (rapporteur G. Santini), the European Parliament proposed three amendments to this Article 2 par. 2 of the proposal for a Directive. Firstly, it proposed an amendment of Article 2 par. 2 a), to make this clause refer to the spouse, "irrespective of his or her sex, in accordance with the applicable national legislation". Secondly, it proposed the insertion of an Article 2 par. 2, a b), in order to include among "family members" "the registered partner, irrespective of his or her sex, in accordance with the applicable national legislation". Thirdly, it proposed a rewording of Article 2 par. 2 b) of the proposal for a Directive in order to make reference to "the unmarried partner, irrespective of his or her sex, with whom the applicant has a stable relationship, if the legislation or practice of the host Member State and/or Member State of origin treats unmarried couples as equivalent to married couples and in accordance with the conditions laid down in any such legislation".

According to the request for an opinion which the Commission addressed to the Network of Experts, the first proposal was not retained, since the Court of Justice of the European Communities "stated in its judgment in the case of D and Kingdom of Sweden v. the Council that the term "marriage", according to the definition generally accepted by the Member States, designates a union between persons of the opposite sex."

This judgment, however, does not have the scope assigned to it by the request for an opinion. At issue in the case of *D. and Kingdom of Sweden v. the Council*[445] was not the marriage between persons of the same sex, but the registered partnership concluded in accordance with the Swedish law of 23 June 1994. If the registered partnership does indeed produce, according to the Swedish law, "the same legal effects as marriage, save in the exceptions that are provided (...)", it no less remains an institution distinct from marriage as such. The Court did not resolve the question of knowing whether the concept of "married official" could have extended to an official married to a person of the same sex, assuming - as is currently the case in the Netherlands and Belgium - that this possibility would exist by virtue of the law governing the civil status of the person concerned.

It should also be noted that, immediately after having asserted that "It is not in question that, according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex" (Recital 34), [the judgment *D. and Kingdom of Sweden v. Council*] adds, "Since 1989 an increasing number of Member States have introduced, alongside marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex and conferring on such unions certain effects which, both between the partners and as regards third parties, are the same as or

[445] ECJ, 31 May 2001, *D. v. Council of the European Union,* joined cases C-122/99 P and C-125/99 P, *ECR* I-4319.

comparable to those of marriage" (Recital 35). The Court only refuses to treat these forms of partnership as equivalent to marriage because, in its opinion, "apart from their great diversity, such arrangements for registering relationships between couples not previously recognised in law are regarded in the Member States concerned as being distinct from marriage" (Recital 36). In the case of *D. and Kingdom of Sweden v. Council*, which constituted the final argument for refusing to treat registered partnerships according to Swedish law as equivalent to marriage, we have two legal situations that remain distinct (see Recital 37). We cannot foresee what the position of the Court would have been if, on the contrary, it was faced with an identical legal situation, simply extended to same-sex couples.

It should be remembered that, in a letter of 15 May 2001, in which he based himself on Article 1 b of the Staff Regulations and Article 9 of the Charter of Fundamental Rights, the Director-General for Personnel and Administration considered that the marriage of an official recognized under the Dutch Civil Code as amended since 1 April 2001 should be assimilated to any other marriage recognized in a Member State. On 15 October 2001, in other words, subsequent to the judgment in the case of *D. and Kingdom of Sweden v. the Council*, the Commission confirmed this assimilation[446].

Three additional reasons lead us to think that the judgment in the case of *D. and Kingdom of Sweden v. the Council* of 31 May 2001 cannot be relied upon in order to reject an extension of the concept of "spouse" used by the Community legislator for the purposes of an instrument aimed at facilitating the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Firstly, the Court of Justice of the European Communities refuses in this judgment to interpret *contra legem* the terms of Annex VII to the Staff Regulations of the European Communities, but does not rule out that the Community legislator may choose such an option (the developments observed by the Community judicature do not allow the latter to "interpret the Staff Regulations in such a way that legal situations distinct from marriage are treated in the same way as marriage. (...) Only the legislature can, where appropriate, adopt measures to alter that situation (...)" (Recitals 37 and 38)). Indeed, the fact that the term "spouse" cannot be extended by case-law interpretation to an unmarried partner in a homosexual relationship - as the Court found in its judgment of 31 May 2001 - does not mean that the concept of spouse cannot be extended by the Community legislator to the spouse of the same sex, where it deems it necessary to incorporate such a specification in an instrument of secondary Community law […].

Secondly, in the *D. and Kingdom of Sweden* judgment of 31 May 2001, as already in the *Reed* judgment of 17 April 1986, the Court of Justice of the European Communities seems particularly careful to keep its case-law in line with the legislative developments which it observes in the Member States. In the *Reed* judgment, it is only "in the absence of any indication of a general social development which would justify a broad construction" of the term "spouse" in Article 10 of Regulation 1612/68 that the Court holds that this term refers to a marital relationship only (Recital 15). In the *D. and Kingdom of Sweden* judgment of 31 May 2001, the Court only ruled out that the registered partnership under Swedish law may be assimilated to marriage after having noted, "The existing situation in the Member States (…) as regards recognition of partnerships between persons of the same sex or of the opposite sex reflects a great diversity of laws and the absence of any general

[446] See the reply of Commissioner Vitorino to written question E-3261/01 submitted by J. Swiebel on 23 November 2001, OJ C 28 E of 6/2/2003, p. 3; also the reply to Mrs Buitenweg, OJ C 93 E of 18/4/2002, p. 131.

assimilation of marriage and other forms of statutory union" (Recital 50). The opening up of marriage to same-sex couples in Dutch and Belgian law might lead the Court to alter its point of view in the future.

Thirdly, while the *D. and Kingdom of Sweden* case concerned the application for a household allowance filed by a Council official, the proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States is concerned with the effective freedom of movement for citizens of the Union and their family members, an effectiveness which would reinforce the extension of the term "spouse" to spouses of the same sex, there where a marriage between persons of the same sex has been validly concluded. It is obvious that the impossibility for a citizen of the Union to be joined by his spouse in the Member State where he has chosen to take up residence for the sole reason that the spouse is of the same sex does not contribute to the effective freedom of movement and residence for citizens of the Union. It should also be noted that, in the *D. and Kingdom of Sweden* case, the Court of Justice of the European Communities found that the plea introduced by the applicant in his appeal, namely that the refusal to recognize registered partnerships concluded under Swedish law as being equivalent to marriage constituted an obstacle to the freedom of movement for workers, had to be judged inadmissible, since this was a fresh plea introduced for the first time in the appeal. The Court of Justice of the European Communities therefore did not rule on the value of this plea.

Generally speaking, it should be observed that, in the context of the elaboration of a new Community instrument bringing together the existing instruments relating to the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, the Community legislator has two options. Either, basing itself on the requirement of non-discrimination on grounds of nationality (Article 12 EC), it provides that the right to family reunification will be granted to - married or unmarried - same-sex or opposite-sex partners, where the host Member State recognizes forms of cohabitation other than marriage, or, basing itself rather on the concept of mutual recognition, it provides that the right to family reunification will be granted to - married or unmarried - same-sex or opposite-sex partners, where the relationship between the partners is recognized in the Member State of origin. Choosing the first option would lead to paradoxical situations: a Swedish woman, linked by a registered partnership to another Swedish woman in accordance with the law of 1994, cannot rely upon this partnership to be joined in Italy by her partner, unless this State recognizes the situation of unmarried couples. Conversely, however, two Italian men, living together in a stable relationship, can rely on the fact that Sweden recognizes unmarried couples through the institution of registered partnerships in order to benefit, in Sweden, from the right to family reunification. Moreover, the second solution is more conducive to an effective freedom of movement and residence […].

It should also be pointed out that the solution that consists of making the recognition of the right of a citizen of the Union to be joined in another Member State by a family member who is not his "spouse" subject to the recognition in the host Member State of the situation of *de facto* or *de jure* couples may in the long term pose problems of compatibility with the requirements of fundamental rights.

In the implementation of Article 18 EC, the Community legislator is obliged to respect the fundamental rights, namely those enumerated in the Charter of Fundamental Rights of the European Union. Those rights include the right to respect for private life (Article 7), the right to non-discrimination, notably on grounds of sexual orientation (Article 21 § 1), and the right to marry (Article 9).

The European Commission of Human Rights acknowledged that the removal of a foreign national from the territory of a State party to the European Convention on Human Rights may constitute an infringement of the private life of the person concerned when the latter has established a relationship in that State with a person of the same sex and the removal would lead to the break-up of that relationship[447]. As a result, by not allowing a stable relationship between two partners to be maintained in the host Member State after one of the partners has exercised his right to freedom of movement or residence, the legislator imposes a restriction on this freedom, the compatibility of which with the requirements of private life[448] could be called into question.

Unlike heterosexuals, homosexuals cannot legally marry, unless they have Belgian or Dutch nationality or reside in the Netherlands. Acknowledging *ex officio* that a "spouse" is a family member, yet making the recognition of an unmarried partner as a family member subject to the condition that the host Member State recognizes the situation of *de facto* or *de jure* couples, thus leads to putting European Union citizens of a specific sexual orientation at an obvious disadvantage. It is true that such a difference in treatment between marriage and other forms of partnership does not constitute direct discrimination on grounds of sexual orientation: the *ex officio* recognition of "spouse" as family member for the purposes of family reunification is to the detriment not only of a homosexual person who has no access to the institution of marriage, but also of a person who has established a non-matrimonial relationship with a partner of the opposite sex[449]. We need to ask ourselves whether such a situation, which might constitute a form of indirect discrimination towards homosexual persons, does not call for a particularly strict justification, which goes beyond the mere objective of protecting the traditional family.

Article 12 of the European Convention on Human Rights states, "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right". In a judgment of 11 July 2002, faced with the situation of a male-to-female transsexual who was prevented from marrying a man with whom she had a relationship, the European Court of Human Rights interpreted this provision as securing "the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby

[447] European Commission of Human Rights, application n°9369/81, *X and Y v. United Kingdom*, decision of 3 May 1983, *D.R.,* 32, p. 220; application n°12513/86, *W.J. and D.P. v. United Kingdom,* decision of 13 July 1987; application n°16106/90*, B. v. United Kingdom*, decision of 10 February 1990, *D.R.,* 64, p. 278; application n°14753/89, *C. and L.M.,* decision of 9 October 1989.

[448] The requirements of the right to respect for family life may also need to be taken into account, since the European Court of Human Rights agrees that this notion also encompasses "de facto" family life (Eur. Ct. H.R., *Elsholz v. Germany* (application no. 25735/94), judgment of 13 July 2000, § 43), notably in case of cohabitation (Eur. Ct. H.R., *Saucedo Gomez v. Spain* (application n° 37784/97), decision of 26 January 1999 (cohabitation lasting eighteen years but without the consequences recognized in marriage attached to it)). So far, however, the European Court of Human Rights has not yet extended the notion of family life to same-sex couples.

[449] Attention should be drawn, however, to the fact that, since in most Member States marriage is not open to same-sex couples, persons of homosexual orientation are the only ones to suffer the consequences of the privileged regime awarded to marriage. In the area of equal treatment between men and women, the fact that only the latter can become pregnant sufficed for the difference in treatment based on the state of pregnancy to be considered by the Court of Justice of the European Communities as direct discrimination on grounds of sex (ECJ, 8 November 1990, *Dekker*, C-177/88, *ECR* I-3941, Recital 12). From this point of view, the impossibility for same-sex couples to have access to an institution which grants them - notably in terms of the freedom of movement and residence guaranteed to citizens of the Union by Article 18 EC - identical rights to those enjoyed by opposite-sex couples, could be considered as constituting direct discrimination against those persons on grounds of sexual orientation.

> introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired"[450]. Moreover, by attaching particular importance to the choice made by the drafters of the Charter of Fundamental Rights of the European Union of departing from the wording of Article 12 of the Convention when they drafted Article 9 of the Charter (the absence of any reference to "men and women" was, according to the Court, "no doubt deliberate"), the Court concluded that "the very essence of the applicant's right to marry has been infringed".
>
> The significance of the latter judgment should not be underestimated. It is premature to conclude from the judgment that the European Court is prepared to derive from Article 12 of the European Convention on Human Rights an obligation for the States parties to the Convention to open the institution of marriage to same-sex couples. However, by authorizing Member States to refuse to recognize as "spouses" partners who in another Member State married a citizen of the Union who exercised his or her right to freedom of movement and residence in accordance with Community law, the Community legislator cannot allow Member States to use this freedom to infringe the very essence of the right to marry. Maintaining the respect due to the fundamental rights is always implicit in the use which the national authorities may make [of their margin of appreciation in the adoption of measures falling] within the scope of Community law. We may ask ourselves whether, by not recognizing a marriage that has been validly concluded in another Member State, the host Member State does not infringe Article 12 of the Convention, the significance of which would no longer amount to guaranteeing the right of men and women to marry in order to found a family.

The Amended Proposal for a Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States does not address these arguments. However contested the interpretation of the judgment of the European Court of Justice of 31 May 2001 may be, it is however in any case certain that this judgment does not prohibit the Community legislator from following upon the suggestion of the European Parliament, concerning the definition of « members of the family » in the text under discussion. Considering the importance of the stakes involved for homosexual persons, a more complete justification could have been expected from the Commission. The Amended Proposal suggests that it would be acceptable for a Member State to make a distinction between heterosexual marriage and homosexual marriage, even where the « marriage » is intended as a single institution by the State of origin (in practice, today, Belgium and the Netherlands) – which distinguishes this from the situation of *D. and Kingdom of Sweden v. Council*. It will be recalled in this regard that, according to the European Court of Human Rights, "Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification »[451].

Article 4 (Nondiscrimination) of the amended proposal says that « Member States shall give effect to the provisions of this Directive without discrimination between those entitled thereunder on grounds of sex, sexual identity, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of an ethnic minority, property, birth, disability, age or sexual orientation ». Moreover, Article 34 (More favourable national provisions) states that the Member States may adopt or maintain laws, regulations or administrative provisions more favourable to the persons covered by this Directive. Member States are encouraged to use this opportunity to fully implement the right

[450] Eur. Ct. H.R. (GC), *Christine Goodwin v. United Kingdom* (application n° 28957/95), judgment of 11 July 2002, §§ 98-99.

[451] Eur. Ct. HR (1st section), *Karner v. Austria* judgment of 24 July 2003, Appl. no. 40016/98, § 37, citing the judgments of the Court in *Smith and Grady v. the United Kingdom,* nos. 33985/96 and 33986/96, § 90, EHCR 1999-VI ; and *S.L. v. Austria*, no. 45330/99, § 37, 9 January 2003.

of the citizens of the Union to move and reside freely in the Member States, without discrimination on the grounds of their sexual orientation.

Territorial scope of the right of residence

Article 19 (Territorial scope) of the amended proposal submitted by the Commission states that « The right of residence and the right of permanent residence shall cover the whole territory of the Member State. Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals ». It should be asked whether, where nationals of other Member States are liable to banishment or prohibition of residence, the less rigorous measure consisting in the imposition of territorial restrictions on the right of residence should not be preferred, in conformity with the principle according to which the restrictions to the fundamental right of the citizen of the Union to move and reside freely on the territory of the Member States should be kept to a minimum. Indeed, Article 18 EC guarantees to every citizen of the Union the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect. Among these limitations, are those mentioned in Article 39(3) EC and which Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health[452] has circumcribed in closer detail[453]. The case of *Oteiza Olazabal*[454], which is based on those provisions, bears a close relationship to the question raised with respect to Article 19 of the amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

The case concerned the situation of a Spanish national of Basque origin who had been sentenced in France to 18 months' imprisonment and to a four-year ban on residence for conspiracy to disturb public order (*ordre public*) by intimidation or terror, and was suspected of links with the ETA. The European Court of Justice considers that the prohibition imposed on Mr Oteiza Olazabal to move in 31 French departments – restrictions on his freedom of movement justified by the need to keep him at distance from his contacts in Spain – could be justified, after the French authorities had made the choice not to expel him to Spain. The Court notes expressly that " the referring court starts from the premiss that reasons of public order preclude the residence of the migrant worker in question on part of the territory, and that, without the possibility of imposing a measure prohibiting residence in that part of the territory, they could justify a measure prohibiting residence in the whole of the territory » (Recital 36). It is therefore only where a more severe measure – expulsion for reasons of public order – would be acceptable that a less rigorous measure – the restriction imposed on the freedom of movement on the national territory – may be accepted. The Court considers that « In situations where nationals of other Member States are liable to banishment or prohibition of residence, they are also capable of being subject to less severe measures consisting of partial restrictions on their right of residence, justified on grounds of public policy » (Recital 41) ; although it is not necessary that identical measures be capable of being applied by the Member State in question to its own nationals, it is moreover required that « the conduct which the Member State concerned wishes to prevent gives rise, in the case of its own nationals, to punitive measures or other genuine and effective measures designed to combat it » (Recital 45).

[452] OJ, English Special Edition 1963-1964, p. 117.

[453] See, now, Article 25 of the amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[454] ECJ, 26 November 2002, *Oteiza Olazabal*, C-100/01, *ECR* I-10981. This judgment has not been examined in the previous report by the EU Network of Independent Experts in Fundamental Rights.

In the future, it should therefore be asked whether, in conformity with the principle of proportionality which applies to any restrictions imposed on the fundamental freedom to move (Recital 43 of the judgment), a Member State will not be required to resort to the least restrictive measure consisting in a limitation on the right to move within the national territory, rather than to the extreme measure of expulsion, where the former measure suffices to attain the objective pursued.

Third country nationals

In accordance with the powers that are assigned to the Community by Article 62 §§ 1 and 3 and by Article 63 § 4 EC, Article 45 § 2 of the Charter provides, "Freedom of movement and residence may be granted (…) to nationals of third countries legally resident in the territory of a Member State". Submitted in 2001[455], the proposal for a Council Directive concerning the status of third-country nationals who are long-term residents was agreed upon in the Council on 22 September 2003. Two observations need to be made on the adopted text.

Individuals qualifying for status of long-term resident

The initial proposal of the Commission was that the status of long-term resident would be available to « all third-country nationals who reside legally in the territory of a Member State on a long-term basis. This category covers refugees with recognised status under the Geneva Convention and third-country nationals who are members of the family of a citizen of the Union. The only excluded categories are those who are not intending to actually settle, in particular persons resident in order to study or to engage in a seasonal occupation and those enjoying temporary protection. Lastly, persons enjoying a subsidiary or additional form of protection are not within the scope of the proposal as these concepts have not been harmonised in the Community »[456]. The latest version of the text however excludes refugees from the status which the directive seeks to open. Although favored by the European Parliament[457], this solution is hardly satisfactory, as it creates the risk of two different categories of third-country nationals who are long-term residents in the EU, and as it adds unnecessary complexity.

Enhanced protection against expulsion for long-term residents

The proposal for a Directive concerning the status of third-country nationals who are long-term residents provides that Member States may take a decision on expulsion when the person concerned constitutes an actual and sufficiently serious threat to public order or national security, which expressly excludes all economic considerations, and such decision must be taken with consideration for the person, that is to say, taking into account all aspects of his personal situation. The foreign national has the right to appeal to the courts. It is regrettable that the proposal for a Directive does not clearly assert, as had been initially planned, that an appeal to the courts against an expulsion decision has a suspensive effect. Bearing in mind that, if the person is a long-term resident, the risk of infringement of the right to respect for private and family life is clearly inherent in such a decision, the decision should only be taken if there is a guarantee of effective appeal to a competent national authority. It emerges from the case-law of the European Court of Human Rights that such an appeal must have a suspensive effect if it is to have the desired effectiveness[458]. The reference to the subsidiarity

[455] Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, COM(2001)127 final of 13.3.2001.
[456] COM(2001)127 final, par. 5.3.
[457] Report on the proposal for a Council Directive concerning the status of third-country nationals who are long-term residents (COM(2001)127 – C5-0250/2001 – 2001/0074(CNS)) (A5-0436/2001) (rapp. Baroness Ludford).
[458] Eur. Ct. H.R., *Jabari v. Turkey*, judgment of 11 July 2000, application n° 40035/98, § 50; Eur. Ct. H.R. (3rd section), *Conka v. Belgium*, judgment of 5 February 2002, application n° 51564/99, §§ 79-95. See also Recommendation n° R(98)13 of the Committee of Ministers of the Council of Europe to the Member States on the

principle which justified the withdrawal of this guarantee in the text of the Directive seems hardly convincing: even if the States do not have the choice whether or not to assign a suspensive effect to the appeal lodged against an expulsion decision, they in any case can still choose the means by which they can fulfil this obligation. The fact of taking into account the length of residence in the Union in order to afford enhanced protection against expulsion embodies the wish to follow the instructions of Recommendation 2000(15) of the Committee of Ministers[459], as well as the lessons that can be learnt from the case-law of the European Court of Human Rights.

Article 46. Diplomatic and consular protection

This right is implemented, at the level of the Union, by Decision 95/553/EC of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations[460], and by Decision 96/409/CSFP of the Representatives of the Governments of the Member States, meeting within the Council of 25 June 1996 on the establishment of an emergency travel document[461]. The reader is referred to the national reports on the situation of fundamental rights in 2003, for an overview of the implementation of these instruments at the level of the Member States.

CHAPTER VI : JUSTICE

Article 47. Right to an effective remedy and to a fair trial

The right to an effective remedy in the system of legal remedies organized by the EC Treaty

In 2002, the Court of First Instance has suggested a modification of the traditional understanding of the requirements laid down by Article 230 al. 4 EC for the admissibility of actions of annulment lodged by private applicants against Community acts of a general nature[462]. This modification was proposed in reference, in particular, to Article 47 of the Charter. The Court of First Instance considered that neither the possibility to seek a preliminary ruling on the validity of any Communtiy act, nor the possibility of an action for damages for extra-contractual liability of the EC institutions, could compensate for the lacuna in the judicial protection of the individual resulting from the *Plaumann* reading of Article 230 al. 4 EC (then Art. 173 al. 2 EEC Treaty)[463]. Therefore the Court of First Instance proposed, in Jégo-Quéré, « in order to ensure effective judicial protection for individuals », to consider that « a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard » (Recital 51).

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right to rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights, adopted by the Committee of Ministers on 18 September 1998, at the 641st meeting of the Ministers' Deputies (although this recommendation ostensibly only envisages rejected asylum-seekers, it constitutes in fact an authoritative interpretation of Article 13 ECHR in the context of removal decisions for whichever grounds, including public order and public security).

[459] Rec(2000)15 concerning the security of residence of long-term migrants, Committee of Ministers, 13 September 2000

[460] OJ L 314 of 28.12.1995.

[461] OJ L 168 of 6.7.1996.

[462] C.F.I., 3 May 2002, *Jego-Quéré v. Commission*, T-177/01.

[463] ECJ, 15 July 1963, *Plaumann v. Commission*, 25/62, ECR, p. 197.

In the *Union de Pequeños Agricultores* judgment of 25 July 2002[464], the European Court of Justice however rejected this expansion of the right of the individual to seek the annulment of a Community act of a general nature. The Court considered that the Community judicature could not assume a modification of the conditions laid down in the EC Treaty. By doing so, even in the name of effective judicial protection, the Community judicature would be exercising a power to modify the Treaty which is reserved to the Member States : it is for these Member States, « if necessary, in accordance with Article 48 EU, to reform the system currently in force » (Recital 45). However, the Court went on to add (Recitals 41 and 42) :

> …it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.
> In that context, in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.

In a later judgment of 10 December 2002[465], where it was requested to give judgment on the validity of a directive where the Member State concerned has not implemented this instrument, the Court considered that it should consider such a request for a preliminary ruling admissible. It rejected an argument that this constituted a means to circumvent the restrictions imposed by Article 230 al. 4 EC on the right of private individuals to seek the annulment of Community acts other than decisions addressed to them. Referring to its judgment in *Unión de Pequeños Agricultores* the Court noted that

> in the complete system of legal remedies and procedures established by the EC Treaty with a view to ensuring judicial review of the legality of acts of the institutions, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of that article, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community judicature under Article 241 EC or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity (Recital 39)

The Draft Treaty establishing a Constitution for Europe is aimed at responding to the request from the Community court to bring the legal remedies provided for in the Union into line with the requirements of Articles 6 and 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union. Article III-270 of the draft European Constitution provides, "Any natural or legal person may, (…) institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, *and against a regulatory act which is of direct concern to him or her and does not entail implementing measures*"[466]. The inter-governmental conference convened under the Italian presidency of the Council did not lead to an agreement on the draft Constitution. In the meantime, it is advisable to make up for the incapacity of the founding authority of the Union to ensure this alignment, in accordance with the provisions of the EC Treaty as interpreted by the Court of Justice of the European Communities[467]. The domestic

[464] ECJ, 25 July 2002, *Union de Pequeños Agricultores v. Council,* C-50/00.
[465] ECJ, 10 December 2002, *Imperial Tobacco*, C-491/01, nyr.
[466] This formula is in line with the suggestion made by the Court of First Instance in the *Jégo-Quéré* judgment of 3 May 2002.
[467] In the *Philip Morris* judgment of 15 January 2003 (joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01), the Court of First Instance considered, "It is not for the Community judicature to usurp the function of the founding authority of the Community in order to change the system of legal remedies and procedures

courts of the Member States must broadly interpret their authority to hear appeals aimed at preventing the risk of infringement of rights or interests resulting from the application vis-à-vis the applicant of a rule of Community law or State measures ensuring the execution thereof, modelled on the *Festellungsklage* provided for in German law.

It is true that Member States are free to organize remedies available before their domestic judicial authorities, even when those remedies are used to invoke rights derived directly from Community law, provided that the detailed procedural rules governing actions are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)[468]. However, Article 47 of the Charter of Fundamental Rights is binding on Member States in the organization of remedies based on European law. They are also obliged to co-operate faithfully in the achievement of the Community's tasks (Article 10 EC). In a judgment of 11 September 2003, the Court of Justice of the European Communities reiterated, "While it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection"[469]. This right is undermined if the domestic remedies do not allow the addressee of Community law, which directly affects the adoption of a Community instrument of general scope, to institute proceedings before the domestic courts in order to request that the Court of Justice of the European Communities be asked to give a preliminary ruling on the validity of the instrument in question, even before this instrument has given rise to execution measures against the applicant.

The Commission could usefully encourage a comparative study of the remedies available before the national jurisdictions of the Member States in such a situation. Such a study would exhibit to which extent the effectiveness of judicial protection differs according to the Member State where the subject of EC Law resides or conducts his/her activities, and if necessary, it could lead to call for an adaptation of the powers of the national jurisdictions where the judicial protection appears insufficient with regard to the requirements of Article 47 of the Charter. The Commission could, basing itself on the results of such a study, present a communication identifying the obligations which follow for the Member States, in the organisation of remedies before the national courts, from Article 47 of the Charter of Fundamental Rights and Article 10 EC. It is important to ensure that, when the contribute to the implementation of European law, the national courts respect all the requirements which follow from the right to an effective remedy, although this may in certain cases require that their powers be adapted to that purpose. The Court of Justice has already asserted that the procedural rules of domestic law are not beyond challenge where some of those rules prevent the addressee of Community law from profitably availing himself of the rights that are conferred on him by Community law[470]. A more active attitude on the part of the Commission in this area can but contribute to the uniformity of application of Community law, which

established by the Treaty" (Recital 124). In this case, the CFI finds that the companies in question cannot seek the annulment of Commission decisions to commence legal proceedings before the courts of the United States, since these decisions do not produce binding and definitive legal effects. The CFI considers, "It may seem desirable that individuals should have, in addition to the possibility of an action for damages [provided for in Articles 235 EC and 288, par. 2, EC], a remedy under which actions of the Community institutions liable to prejudice their interests but which do not amount to decisions may be prevented or brought to an end", yet it does not have the authority to alter the terms of reference it receives from the EC Treaty (Recital 124).

[468] ECJ, 20 September 2001, *Courage and Crehan*, C-453/99, *ECR* I-6297, recital 29.

[469] ECJ, 11 September 2003, *Safalero*, C-13/01, recital 50, and reference to the judgment of 11 July 1991, *Verholen et al.*, C-87/90 to C-89/90, *ECR* I-3757, recital 24.

[470] See for example ECJ, 2 August 1993, *Marshall v. Southampton and South West Hampshire Area Health Authority*, C-271/91, *ECR* I-4367 (amount of damages that can be obtained for a victim of prohibited discrimination); or ECJ, 19 June 1990, *Factortame*, C-213/89, *ECR* I-2433 (interim legal protection).

depends on the remedies which individuals have at their disposal to demand compliance therewith[471].

The right of access to justice in environmental matters in the system of the European Community

The present report has already noted that, with a view to make possible the entry into force vis-à-vis the European Community of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, the Commission has proposed the adoption of a Regulation of the European Parliament and of the Council on the application of the provisions of this instrument to EC institutions and bodies[472]. One of the most controversial questions during the consultations which preceded the formulation by the Commission of its proposal, concerned the implementation of Article 9 of the Aarhus Convention.

Article 9(1) of the Convention was not the source of any difficulties. The provision concerns only the right to a judicial remedy where the request to have access to environmental information is met with a refusal. According to Article 9(1) :

> Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 [obligation of the public authorities to grant to the public access to the information in environmental matters which are requested from them] has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.
> In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.
> Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

The European Community has complied with this requirement by adopting Articles 7 and 8 of Regulation 1049/2001. This requires no further elaboration.

Article 9(2) of the Aarhus Convention states :

> Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
> (a) Having a sufficient interest or, alternatively,
> (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 [these are the decisions, acts or omissions which are

[471] See, e.g., the Explanatory Memorandum preceding the Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM(2003)624 final of 24.10.2003. Concerning a proposal which aims at setting out a common framework for Member States to ensure the respect of environmental law, inter alia by granting *jus standi* to environmental organisations before the national jurisdictions of the Member States, the Commission notes that « Community inaction [would] result in different levels of environmental protection and different standards of environmental law enforcement at Member State level » . The proposal of the Commission is commented upon hereunder.
[472] COM(2003)622 final, of 24/10/2003. See further on this proposal hereabove, under Article 38 of the Charter.

> enumerated in Annex I to the Convention, or are considered to have an important impact on the environment] and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.
> What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.
> The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Article 2(5) of the Aarhus Convention, to which Article 9(2) refers, says that the expression "the public concerned" refers to

> the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

Therefore, Article 6(2) of the Aarhus Convention provides, in essence, that must be able to challenge any decision, act or omission of the public authorities which have or may have an important effect on the environment, any person with an interest because that person is or may be affected by that decision, act, or omission, or any non-governmental organisation acting in favor of the environment, without prejudice of the conditions which the internal law of the Party to the Convention may impose for the identification of these organisations. It would be a violation of the Convention to impose exceedingly rigorous conditions, or conditions which are arbitrary, or which for any other reason affect the substance of the right of environmental non-governmental organisations to file court proceedings, and therefore would run counter the objective of « giving the public concerned wide access to justice » in the domain covered by the Convention.

According to Article 6(3) of the Aarhus Convention :

> In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Finally, paragraphs 4 and 5 of Article 6 define the conditions which the remedy has to fulfil to be considered « effective » in the context of environmental litigation :

> … the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.
> In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and

> judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

To conform the existing system of judicial review with the requirements of Article 9 of the Aarhus Convention, the Commission proposes to create an internal administrative review, introduced by a "request for internal review » (Article 9 of the proposed Regulation). This request must allege that the act or the omission constitutes a violation of the applicable environmental law. The request must be filed within four weeks of the act adopted or after the date it should have been adopted. The institutions or bodies to which the request for internal review is addressed must answer within twelve weeks in principle, and at most eighteen weeks[473]. If the institution or body denies the request[474], an action for annulment or for failure to act may be filed with the European Court of Justice, in the conditions defined respectively in Article 230(4) EC and 232(3) EC. Article 11 of the proposed Regulation (« Proceedings before the Court of Justice ») provides :

> 1. Where the qualified entity which made a request for internal review according to Article 9 considers that a decision by the Community institution or body in response to that request is insufficient to ensure compliance with environmental law, the qualified entity may institute proceedings before the Court of Justice in accordance with Article 230(4) EC Treaty, to review the substantive and procedural legality of that decision.
> 2. Where a decision on a request for internal review made according to Article 9 has not been taken by the Community institution or body within the period mentioned in that Article, the qualified entity may institute proceedings before the Court of Justice in accordance with Article 232(3) EC Treaty.

The request for internal review and, therefore, the judicial review before the European Court of Justice, are only available to entities recognized as "qualified". The criteria for the identification of entities as "qualified" are listed in Article 12 of the proposed Regulation. Article 13 provides that the Commission will elaborate a procedure for the recognition of qualified entities, according to the criteria set in Article 12. The Commission will have to create and constantly update a register of entities considered qualified to contribute to the preservation of the legality in environmental matters, although a case by case "ad hoc" recognition, for specific procedures, also will be possible. Finally, even recognized qualified entities will not be able to request an internal review of any decision affecting the environment adopted by the Community institutions or bodies : it is also required, according to Article 10, that "the subject matter in respect of which a request for internal review is made is covered by its statutory activities" : the Explanatory Memorandum of the Commission says that, in particular, "the subject of the procedure must fall into the statutory and geographical activity of the entity".

The procedure through which the entities seeking to be recognized as « qualified » will obtain this recognition, on the basis of the criteria listed in Article 12, is of course subject to the control of the Court of Justice[475]. This procedure was chosen as it made it possible for the Community to implement Article 6 of the Aarhus Convention without modifying the system

[473] In what is an apparent translation mistake, the French version mentions eighteen weeks.
[474] The request for internal review must precede the filing of an action for annulment or for failure to act before the European Court of Justice. This is in conformity with what is provided by Article 6(2), 2nd indent, of the Aarhus Convention, cited above.
[475] A denial of the recognition which is requested will be an individual decision adressed to the entity concerned, which can be challenged under Article 230(4) EC. The absence of a legal personality under the national laws of the Member States will not constitute an obstacle to the admissibility of such an action : see, mutatis mutandis, ECJ, 8 October 1974, *Syndicat général du personnel des organismes européens v. Commission of the European Communities*, 18/74, ECR 933, Recitals 5-11.

of remedies created by the Treaty of Rome. By answering to the « qualified entity » that it will not review the decision it has taken, the Community institution or body addresses to that entity a decision, which will be challenged through the normal avenue of an action for annulment ; if it does not answer within the prescribed time limits, an action for failure to act will be available to the entity having made the request. Thus, although these entities would normally not be seen as having a direct and individual interest sufficient to seek the annulment of the decision affecting the environment under the criteria of Article 230(4) EC, they will have the required standing, under this mechanism, to seek a judicial review of those decisions, and give an opportunity to the Community judicature to verify their compatibility with European environmental law[476].

The Aarhus Convention does not exclude that such a selection is made amongst the entities seeking to act to ensure that public authorities comply with environmental law, where these entities have no direct interest in such proceedings, i.e., where their subjective rights have not been violated and where they have not been directly affected by the act they seek to challenge. Article 2(5) of the Convention says only that should be recongized an "objective" interest to seek judicial review of such acts potentially impacting upon the environment "non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest ». It does not appear that the criteria listed in Article 12 of the proposed Regulation are unreasonable, or go beyond what Article 2(5) of the Aarhus seems to accept. Where it recognizes the entities seeking to be considered « qualified » to act in the name of the preservation of the environment, the Commission is still under the control of the European Court of Justice, which is a guarantee against the risk of misuse of powers or discrimination.

The right of access to justice in environmental matters in the Member States

The Aarhus Convention which the European Community and the fifteen Member States signed on 25 June 1998 comprises three pillars. The right of access to environmental information was the object of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC[477]. The right to take part in decision-making processes was the object of Directive 2003/35/EC of the European Parliament and the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC[478]. Finally, the Commission has proposed a Directive of the European Parliament and of the Council on access to justice in environmental matters, which seeks to implement, with regard to the Member States in a domain attributed to the Community by Articles 174 and 175 EC, the third pillar of the Aarhus Convention, namely « the right to recourse to administrative or judicial procedures to dispute acts and omissions of private persons and public authorities violating the provisions of environmental law »[479]. The system set in place by this latter directive is identical, mutatis mutandis, to the implementation of the "access to justice" pillar of the Aarhus Convention which the Commission has proposed[480]. Therefore the reader is referred back to the previous discussion on this point.

[476] In other fields too, the Community legislature has sometimes acted, through secundary legislation, to recognize a private person as « interested » in a particular procedure, which has been considered as investing that person with the legal interest required for the filing of an action for annulment, under Article 230(4) EC. See, e.g., in the field of State aids, CFI, 12 December 1996, *AIUFASS*, C-380/94 (interested persons authorized to present their views in the framework of the procedure of Article 88(2) EC) ; or ECJ, 28 January 1986, *Cofaz e.a. v. Commission*, 169/84, *ECR* 391, Recital 23.
[477] OJ L 41 of 14.2.2003, p. 26. See hereabove, the commentary of Article 37 of the Charter.
[478] OJ L 156, of 25.6.2003, p. 17. See hereabove, the commentary of Article 37 of the Charter.
[479] COM(2003)624 final, of 24.10.2003.
[480] COM(2003)622 final, of 24.10.2003.

Improving access to justice in cross-border disputes

Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes[481] seeks to promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice. The directive is based on the idea that it would be unacceptable if a person were unable to assert his/her rights in court because of his/her personal financial situation, in cross-border disputes relating to civil or commercial matters : if legal aid were not available in the State in which the court is sitting, rights would be left unremedied, and cross-border transactions may be discouraged and become less attractive to vulnerable persons. Directive 2002/8/EC is based on Article 65(c) of the Treaty, which provides for the adoption of measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States. Article 47 of the Charter of Fundamental Rights is mentioned in the Preamble. The common minimum standards which the Directive imposes relate to legal aid in the broadest sense of the expression : it covers, indeed, pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing a case before a court and representation in court – including appeals lodged by, or against, the beneficiary (Article 9(3)) – and assistance with or exemption from the cost of proceedings (see Article 3(2) of the Directive). Legal aid as defined in the directive for cross-border disputes in civil and commercial matters is to be recognized to the citizens of the Union, but also to third-country nationals residing lawfully in a Member State (Article 4).

This instrument will play an important role in guaranteeing effective access to justice to litigants seeking to sue another person or have a judicial decision enforced in a Member State other than the one in which the litigant is domiciled or habitually resides. It offers a clear illustration of the complementarity between the development of an area of freedom, security and justice and the promotion of fundamental rights. It is particularly to be welcomed that Article 15 of the Directive, which relates to the processing of applications to legal aid, complements Articles 6 ("Conditions relating to the substance of disputes", providing in particular that "Member States may provide that legal aid applications for actions which appear to be manifestly unfounded may be rejected by the competent authorities") and 12, by requiring certain guarantees – an independent and impartial examination of the manifestly unfounded character of the action for which legal aid is applied for, abd the guarantee that any decision on the application will in the final instance be subject to review by a court – the absence of which could have led to a violation of Article 6(1) ECHR. The system which the Directive provides for seems to fulfil the requirements set forth on this question by the European Court of Human Rights[482]. Formally, it does not seem that these guarantees would

[481] OJ L 26 of 31.1.2003, p. 41.

[482] See Eur. Ct HR (3d section), *Del Sol c. France* judgment of 26 February 2002 (Appl. n° 46800/99). In this case where the applicant has been denied legal aid for proceedings before the Court of Cassation because of the the lack of an arguable ground of appeal on points of law – a reason explicitly contemplated by the French Law no. 91-647 of 10 July 1991 – , the European Court of Human Rights considered that such a system " was undoubtedly intended to meet the legitimate concern that public money should only be made available to applicants for legal aid whose appeals to the Court of Cassation have a reasonable prospect of success. (…) it is obvious that a legal-aid system can only operate if machinery is in place to enable a selection to be made of those cases qualifying for it" (§ 23). However the Court insisted that before deciding that Article 6(1) ECHR had not been violated – the "svery essence of the right of access to a court" had not been infringed – it had " due regard to the quality of a legal-aid scheme within a State" (§ 25). Indeed, the Court considered that "The scheme set up by the French legislature offers individuals substantial guarantees to protect them from arbitrariness. The Legal Aid Office of the Court of Cassation is presided over by a judge of that court and also includes its senior registrar, two members chosen by the Court of Cassation, two civil servants, two members of the *Conseil d'État* and Court of Cassation Bar and a member appointed by users (section 16 of the Law of 10 July 1991 cited above and Article 16 of its implementing decree of 19 December 1991). Moreover, an appeal lies to the President of the Court of Cassation against refusals of legal aid (section 23 of the Law). In addition, the applicant was able to put forward her case both at first instance and on appeal" (§ 26). See also Eur. Ct. HR (3d sect.), *Essaadi v. France* judgment of 26 February 2002, Appl. n° 49384/99.

apply to the decisions taken by the transmitting authorities of the Member State in which the applicant is domiciled or habitually resident, where these authorities refuse to transmit the application for legal aid as they consider that it is manifestly ill-founded (Article 13(3)(a)). Indeed, when he/she encounters such a refusal, the applicant may directly request the competent authorities of the Member State in which the court is sitting or where the decision is to be enforced to grant the legal aid applied for (Article 13(1)(a)). It is hoped, however, that the transmitting authorities will not use their powers under Article 13(3)(a) as if they were to function as a filtering mechanism for ill-founded applications, as this should normally be performed by the authorities of the State where the court is sitting, according to a procedure to which the guarantees of Article 15 shall apply. It will particularly important, in the evaluation which will be made of the Directive, to verify how the transmitting authorities have exercised their functions.

In the interpretation of the duties of the Member States under the Directive, it should be kept in mind that the right to legal aid is simply a tool towards the realization of the end which is sought, i.e., effective access to justice. Where the mechanism provided in compliance with Directive 2002/8/EC is not sufficient to this effect, even where the implementation of the Directive has been deemed satisfactory in the first place, the competent authorities may be under a duty to act : they may have to adopt measures to ensure effective access to justice, where the system fails. The recent case-law of the European Court of Human Rights has emphasized that the right to an effective access to a court requires that the authorities adopt measures in reaction to situations where the legal aid which is granted appears unsufficient in the course of the proceedings, for instance because the legal representative of the applicant does not perform his/her function properly, or because the representatives who are designated appear reluctant to pursue the proceedings[483].

Article 48. Presumption of innocence and right of defence

The role of the Advocate General in the European Court of Justice

In the case of *Kaba* (n° 2), the European Court of Justice was requested by the Immigration Adjudicator (United Kingdom) to answer two questions relating to a case which had already led to first judgment by the European Court of Justice on 11 April 2000[484]. The first question was formulated thus :

> What mechanisms are there for the referring court or the parties to the proceedings (before the referring court and the ECJ) to ensure that the obligations under Article 6 ECHR are complied with and therefore to ensure that no infringement of Article 6 ECHR arises either under the domestic human rights legislation or before the Court of Human Rights?
> Was the procedure followed in this case in compliance with the requirements of Article 6 ECHR and, if not, how does this affect the validity of the first judgment?

Indeed, Mr Kaba complained that, upon answering the Immigration Officer in the first case, the European Court of Justice has violated the right to adversarial proceedings, by not reopening the oral proceedings after the Advocate General within the European Court of Justice had delivered his opinion. In his opinion of 11 July 2002, Advocate General Ruiz-Jarabo Colomer had considered that the European Court of Justice should reaffirm its order of 4 February 2000 in the case of *Emesa Sugar*, where it considered that the case-law of the European Court of Human Rights, finding an incompatibility between the role of the

[483] See, e.g., Eur. Ct. HR (2nd section), *Bertuzzi v. France* judgment of 13 February 2003 (Appl. n°36378/97), § 30.
[484] ECJ, 11 April 2000, *Kaba*, C-356/98, ECR I-2623.

Advocate General before Courts of cassation[485], could not be considered to apply to the Advocate General before the European Court of Justice, of which he/she is a member and in the administration of justice by which the Advocate General takes part in a fully impartial and independent manner[486]. Since the order in *Emesa Sugar*, however, the European Court of Human Rights has delivered another judgment going one step further towards finding a possible incompatibility between the requirements of Article 6 ECHR and the role of the Advocate General before the European Court of Justice, as it found such an incompatibility in the role of the commissaire du gouvernementl before the French Conseil d'Etat, with which it presents many similarities[487]. AG Ruiz-Jarabo Colomer stated in his opinion (points 104-105)[488]:

> It is true that, in its judgment of 7 June 2001 in *Kress* v *France*, the European Court of Human Rights, in assessing, *inter alia*, whether the inability of the parties to respond to the submissions of the Commissaire du Gouvernement was compatible with Article 6(1) ECHR, stated: 'No one has ever cast doubt on the independence or impartiality of the [Commissaire du Gouvernement], and the Court considers that his existence and institutional status are not in question under the Convention. However, the Court is of the view that the [Commissaire's] independence and the fact that he is not responsible to any hierarchical superior, which is not disputed, are not in themselves sufficient to justify the assertion that the non-disclosure of his submissions to the parties and the fact that it is impossible for the parties to reply to them are not capable of offending against the principleof a fair trial.' This enabled the Strasbourg Court to reiterate its case-law, according to which 'the concept of a fair trial also means in principle the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision'.
>
> It seems that what was being sought was not so much the protection of a fundamental right as the imposition of a uniform conception of the organisation of the procedure, without explaining the need for it in terms going beyond the 'doctrine of appearances'. It is legitimate to wonder - as did the seven judges who each cast their own independent votes on the matter - whether, for the purposes of the Convention, the limits of 'European control' may not be exceeded in the light of the specific nature of national rules, which remain legitimate in so far as they fulfil the obligations to achieve a certain result which flow from the requirements of the Convention.

In its judgment of 6 March 2003, the European Court of Justice considered it did not have to answer the question from the Immigration Adjudicator concerning a possible incompatibility between the requirements of the rights protected under the European Convention of Human Rights and the organisation of the procedure before the European Court of Justice. However, this simply provides one more illustration for the need to ensure accession of the European Community/Union to the European Convention on Human Rights, to ensure a better division of tasks between the two jurisdictions, and limit the risk of any divergences of interpretation

[485] See esp. Eur. Ct. HR, judgment *Vermeulen v. Belgium* of 20 February 1996, Rep. 1996-I, p. 224 ; judgment *Van Orshoven v. Belgium* of 25 June 1997, Rep. 1997-III, p. 1039.
[486] ECJ, order of 4 February 2000, *Emesa Sugar*, C-17/98, ECR I-665.
[487] See Eur Ct HR (GC), judgment *Kress v. France* of 7 June 2001, Appl. N°39594/98. The Court considers that the notion of fair trial « implique (…) en principe le droit pour les parties à un procès de prendre connaissance de toute pièce ou observation soumise au juge, fût-ce par un magistrat indépendant, en vue d'influencer une décision, et de la discuter » (§ 74). In *Kress*, it concludes that Article 6(1) ECHR has not been violated, but only because, in the procedure as it is organized before the French Conseil d'Etat, the counsel can inquire with the commissaire du gouvernement, before the hearing, about the general sense of his/her conclusions, and may moreover reply, by a written note, to these conclusions, « *ce qui permet, et c'est essentiel aux yeux de la Cour, de contribuer au respect du principe du contradictoire* » (§ 76 – our emphasis).
[488] The footnotes are omitted from the extracts of the Opinion.

which do not find their definitive solution. The question whether or not the *Kress* case-law would apply to the Advocate General before the European Court of Justice is a question of interpretation of the requirements of the European Convention on Human Rights, which are the main source of the fundamental rights protected in the EU legal order; as the European Court of Justice has rightly noted[489], the European Court of Human Rights should be recognized the last word on this question.

Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union

In February 2003, the Commission adopted the *Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*[490]. Article 31 EU states that common action on judicial cooperation in criminal matters shall include (a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions; [..](c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such co-operation". The Commission considered that these provisions could justify the adoption of measures seeking to reinforce the mutual confidence between the Member States, by the common definition of a limited number of minimal guarantees for the accused person : the Green Paper proposes to offer such common definitions with respect to the right to legal assistance and representation – in particular the possibility, upon the moment of the arrest, to seek the assistance of lawyer, and possibly to be granted de defence lawyer free of charge –, to the right to a competent and qualified translator and/or interpreter, to the right of members of certain vulnerable categories (aliens, children, persons with a disability or who are emotionally fragile, persons who cannot read or write, refugees or asylum-seekers, alcoholics or drug addicts) to specific protection, to the right to consular assistance for non-nationals, and – lastly – to the right to be adequately informed about the rights afforded, by being presented with a "letter of rights" describing in understandable language the rights recognized to person deprived of his/her liberty. The Green Paper does not cover certain rights, which will form the object of further initiatives : the right to bail (provisional release) where appropriate; the right to fairness in obtaining and handling evidence, including the right against self-incrimination and the right to cross-examine witnesses, and the principle of *ne bis in idem*.

The initiative of the Commission has generally been very favourably welcomed by the stakeholders. It clearly shows a willingness, obviously encouraged by the perspective of the enlargement of the Union (see point 1.9.), to anchor the mutual confidence on which judicial cooperation in criminal matters is based – particularly through mutual recognition of criminal judicial decisions – in guarantees which often are situation above the minimal threshold set by the European Convention on Human Rights. The method has been to take the rights of the ECHR as a departure point, but to identify, through a comparison of how these rights have been implemented in the Member States, the best or more promising practices, the generalisation of which throughout the Union would make it possible to ground mutual confidence on a high level of protection of fundamental rights.

Whether it proceeds in stages or not, an initiative of the Union seeking to identify the fundamental rights the recognition of which to the suspects throughout the Union from the moment of the arrest, according to a common definition of these rights, could include a set of rights which offer an adequate against the specific risk of ill-treatment in the hands of the police. These rights could be described in the "letter of rights" to be delivered to the accused,

[489] ECJ, 10 April 2003, *Steffensen*, C-276/01, Recital 72. This also would follow from Article 52 § 3 of the Charter of Fundamental Rights.
[490] COM(2003)75 final, of 19.2.2003. At the moment of writing, the Framework Decision which is being prepared by the Commission on the basis of the Green Paper has not been released yet. Therefore the comments are based solely on the Green Paper.

and be accompanied by the indication of the complaint mechanisms which may be resorted to where the police has allegedly committed abuses. These rights should be defined according to the standards set by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which have been elaborated on the basis of the practical experience of the Committee with situations of detention[491] (see also the excerpts of the 12th General Report of Activities of the CPT, which offer a more complete and detailed list):

- from the moment of the arrest, the accused person must have access not only to a lawyer, but also to a doctor, and he/she must be able to contact a third person, f.i. a relative, and inform that person of his/her situation, unless certain exceptions can be justified in order to protect the legitimate interests of the police investigation, to the extent that such clearly defined exceptions are strictly limited in time, and are accompanied by appropriate safeguards;
- from the moment of detention, the accused person must receive a statement of his/her rights in a language both accessible and understandable, and the accused person must sign a declaration according to which he/she has been provided that information; it could be provided for instance that, when a person refuses to sign such a declaration, he/she will not be questioned in the absence of a lawyer, as the presence of a lawyer may be considered to compensate for the possible ignorance of a person concerning his/her rights;
- the questioning must have as objective to establish facts, and not to lay pressure on the person suspected of having committed an offence, and this ought to be mentioned to the person accused before he/she is questioned;
- the questioning must take place under material conditions which do not put the person questioned in a vulnerable position;
- the questioning must be performed by identified police officers, which implies, i.a., that blindfolding the person questioned must be prohibited;
- intimidating objects, which could be used to threaten or cause ill-treatment to the accused person, must be removed from the locale where the questioning takes place.

The rights of the person detained because of suspicions that he/she may have committed an offence. Extracts from the 12th General Report of Activities of the CPT (2002)[492]

34. The **questioning of criminal suspects** is a specialist task which calls for specific training if it is to be performed in a satisfactory manner. First and foremost, *the precise aim of such questioning* must be made crystal clear: that aim should be to obtain accurate and reliable information in order to discover the truth about matters under investigation, not to obtain a confession from someone already presumed, in the eyes of the interviewing officers, to be guilty. In addition to the provision of appropriate training, ensuring adherence of law enforcement officials to the above-mentioned aim will be greatly facilitated by the drawing up of a code of conduct for the questioning of criminal suspects.

35. Over the years, CPT delegations have spoken to a considerable number of detained persons in various countries, who have made credible claims of having been physically illtreated, or otherwise intimidated or threatened, by police officers trying to obtain confessions in the course of interrogations. It is self-evident that a criminal justice system which places a premium on *confession evidence* creates incentives for officials involved in the investigation of crime - and often under pressure to obtain results - to use physical or psychological coercion. In the context of the prevention of torture and other forms of ill-

[491] The question of which guarantees should be afforded in the obtention of evidence, e.g. through questioning, is the object of a distinct initiative of the Commission. It is difficult however to separate the two questions : the conditions under which an accused person is arrested and informed of his/her rights as a matter of course has consequences on the appreciation which will be made of the declarations that person will have made, either upon being arrested or in the course of subsequent questioning.

[492] *CPT/Inf (92) 3*, para. 34 ff. The CPT standards. « Substantive » sections of the CPT's General Reports, CPT/Inf/E (2003).

treatment, it is of fundamental importance to develop methods of crime investigation capable of reducing reliance on confessions, and other evidence and information obtained via interrogations, for the purpose of securing convictions.

36. The **electronic (i.e. audio and/or video) recording of police interviews** represents an important additional safeguard against the ill-treatment of detainees. The CPT is pleased to note that the introduction of such systems is under consideration in an increasing number of countries. Such a facility can provide a complete and authentic record of the interview process, thereby greatly facilitating the investigation of any allegations of ill-treatment. This is in the interest both of persons who have been ill-treated by the police and of police officers confronted with unfounded allegations that they have engaged in physical ill-treatment or psychological pressure. Electronic recording of police interviews also reduces the opportunity for defendants to later falsely deny that they have made certain admissions.

37. The CPT has on more than one occasion, in more than one country, discovered **interrogation rooms** of a highly intimidating nature: for example, rooms entirely decorated in black and equipped with spotlights directed at the seat used by the person undergoing interrogation. Facilities of this kind have no place in a police service. In addition to being adequately lit, heated and ventilated, interview rooms should allow for all participants in the interview process to be seated on chairs of a similar style and standard of comfort. The interviewing officer should not be placed in a dominating (e.g. elevated) or remote position vis-à-vis the suspect. Further, colour schemes should be neutral.

38. In certain countries, the CPT has encountered the practice of **blindfolding** persons in police custody, in particular during periods of questioning. CPT delegations have received various - and often contradictory - explanations from police officers as regards the purpose of this practice. From the information gathered over the years, it is clear to the CPT that in many if not most cases, persons are blindfolded in order to prevent them from being able to identify law enforcement officials who inflict ill-treatment upon them. Even in cases when no physical ill-treatment occurs, to blindfold a person in custody - and in particular someone undergoing questioning - is a form of oppressive conduct, the effect of which on the person concerned will frequently amount to psychological ill-treatment. The CPT recommends that the blindfolding of persons who are in police custody be expressly prohibited.

39. It is not unusual for the CPT to find **suspicious objects** on police premises, such as wooden sticks, broom handles, baseball bats, metal rods, pieces of thick electric cable, imitation firearms or knives. The presence of such objects has on more than one occasion lent credence to allegations received by CPT delegations that the persons held in the establishments concerned have been threatened and/or struck with objects of this kind. A common explanation received from police officers concerning such objects is that they have been confiscated from suspects and will be used as evidence. The fact that the objects concerned are invariably unlabelled, and frequently are found scattered around the premises (on occasion placed behind curtains or cupboards), can only invite scepticism as regards that explanation. In order to dispel speculation about improper conduct on the part of police officers and to remove potential sources of danger to staff and detained persons alike, items seized for the purpose of being used as evidence should always be properly labelled, recorded and kept in a dedicated property store. All other objects of the kind mentioned above should be removed from police premises.

40. As from the outset of its activities, the CPT has advocated a trinity of rights for persons detained by the police: **the rights of access to a lawyer and to a doctor and the right to have the fact of one's detention notified to a relative or another third party of one's choice**. In many States, steps have been taken to introduce or reinforce these rights, in the light of the CPT's recommendations. More specifically, the right of access to a lawyer during police custody is now widely recognised in countries visited by the CPT; in those few countries where the right does not yet exist, plans are afoot to introduce it.

41. However, in a number of countries, there is considerable reluctance to comply with the CPT's recommendation that the right of **access to a lawyer** be guaranteed from the very outset of custody. In some countries, persons detained by the police enjoy this right only after

a specified period of time spent in custody; in others, the right only becomes effective when the person detained is formally declared a "suspect".

The CPT has repeatedly stressed that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs. The CPT recognises that in order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer should be arranged.

The right of access to a lawyer must include the right to talk to him in private. The person concerned should also, in principle, be entitled to have a lawyer present during any interrogation conducted by the police. Naturally, this should not prevent the police from questioning a detained person on urgent matters, even in the absence of a lawyer (who may not be immediately available), nor rule out the replacement of a lawyer who impedes the proper conduct of an interrogation. The CPT has also emphasised that the right of access to a lawyer should be enjoyed not only by criminal suspects but also by anyone who is under a legal obligation to attend - and stay at - a police establishment, e.g. as a "witness". Further, for the right of access to a lawyer to be fully effective in practice, appropriate provision should be made for persons who are not in a position to pay for a lawyer.

42. Persons in police custody should have a formally recognised right of **access to a doctor**. In other words, a doctor should always be called without delay if a person requests a medical examination; police officers should not seek to filter such requests. Further, the right of access to a doctor should include the right of a person in custody to be examined, if the person concerned so wishes, by a doctor of his/her own choice (in addition to any medical examination carried out by a doctor called by the police). All medical examinations of persons in police custody must be conducted out of the hearing of law enforcement officials and, unless the doctor concerned requests otherwise in a particular case, out of the sight of such officials.

It is also important that persons who are released from police custody without being brought before a judge have the right to directly request a medical examination/certificate from a recognised forensic doctor.

43. A detained person's **right to have the fact of his/her detention notified to a third party** should in principle be guaranteed from the very outset of police custody. Of course, the CPT recognises that the exercise of this right might have to be made subject to certain exceptions, in order to protect the legitimate interests of the police investigation. However, such exceptions should be clearly defined and strictly limited in time, and resort to them should be accompanied by appropriate safeguards (e.g. any delay in notification of custody to be recorded in writing with the reasons therefor, and to require the approval of a senior police officer unconnected with the case or a prosecutor).

44. Rights for persons deprived of their liberty will be of little value if the persons concerned are unaware of their existence. Consequently, it is imperative that persons taken into police custody are **expressly informed of their rights** without delay and in a language which they understand. In order to ensure that this is done, a form setting out those rights in a straightforward manner should be systematically given to persons detained by the police at the very outset of their custody. Further, the persons concerned should be asked to sign a statement attesting that they have been informed of their rights.

45. The CPT has stressed on several occasions **the role of judicial and prosecuting authorities** as regards combating ill-treatment by the police. For example, all persons detained by the police whom it is proposed to remand to prison should be physically brought before the judge who must decide that issue ; there are still certain countries visited by the CPT where this does not occur. Bringing the person before the judge will provide a timely

opportunity for a criminal suspect who has been ill-treated to lodge a complaint. Further, even in the absence of an express complaint, the judge will be able to take action in good time if there are other indications of ill-treatment (e.g. visible injuries; a person's general appearance or demeanour).
Naturally, the judge must take appropriate steps when there are indications that ill-treatment by the police may have occurred. In this regard, whenever criminal suspects brought before a judge at the end of police custody allege ill-treatment, the judge should record the allegations in writing, order immediately a forensic medical examination and take the necessary steps to ensure that the allegations are properly investigated. Such an approach should be followed whether or not the person concerned bears visible external injuries.
Further, even in the absence of an express allegation of ill-treatment, the judge should request a forensic medical examination whenever there are other grounds to believe that a person brought before him could have been the victim of ill-treatment.
The diligent examination by judicial and other relevant authorities of all complaints of ill-treatment by law enforcement officials and, where appropriate, the imposition of a suitable penalty will have a strong deterrent effect. Conversely, if those authorities do not take effective action upon complaints referred to them, law enforcement officials minded to ill-treat persons in their custody will quickly come to believe that they can do so with impunity.
46. **Additional questioning by the police of persons remanded to prison** may on occasion be necessary. The CPT is of the opinion that from the standpoint of the prevention of ill-treatment, it would be far preferable for such questioning to take place within the prison establishment concerned rather than on police premises. The return of remand prisoners to police custody for further questioning should only be sought and authorised when it is absolutely unavoidable. It is also axiomatic that in those exceptional circumstances where a remand prisoner is returned to the custody of the police, he/she should enjoy the three rights referred to in paragraphs 40 to 43.
47. Police custody is (or at least should be) of relatively short duration. Nevertheless, **conditions of detention in police cells** must meet certain *basic requirements*. All police cells should be clean and of a reasonable size for the number of persons they are used to accommodate, and have adequate lighting (i.e. sufficient to read by, sleeping periods excluded) ; preferably cells should enjoy natural light. Further, cells should be equipped with a means of rest (e.g. a fixed chair or bench), and persons obliged to stay overnight in custody should be provided with a clean mattress and clean blankets. Persons in police custody should have access to a proper toilet facility under decent conditions, and be offered adequate means to wash themselves. They should have ready access to drinking water and be given food at appropriate times , including at least one full meal (i.e. something more substantial than a sandwich) every day. Persons held in police custody for 24 hours or more should, as far as possible , be offered outdoor exercise every day.
Many police detention facilities visited by CPT delegations do not comply with these minimal standards. This is particularly detrimental for persons who subsequently appear before a judicial authority ; all too frequently persons are brought before a judge after spending one or more days in substandard and filthy cells, without having been offered appropriate rest and food and an opportunity to wash.
48. The duty of care which is owed by the police to persons in their custody includes the responsibility to ensure their *safety and physical integrity*. It follows that the proper monitoring of custody areas is an integral component of the duty of care assumed by the police. Appropriate steps must be taken to ensure that persons in police custody are always in a position to readily enter into contact with custodial staff.
On a number of occasions CPT delegations have found that police cells were far removed from the offices or desks where police officers are normally present, and were also devoid of any means (e.g. a call system) enabling detained persons to attract the attention of a police officer. Under such conditions, there is considerable risk that incidents of various kinds (violence among detainees; suicide attempts; fires etc.) will not be responded to in good time.
49. The CPT has also expressed misgivings as regards the practice observed in certain countries of each operational department (narcotics, organised crime, anti-terrorism) in a

police establishment having its own detention facility staffed by officers from that department. The Committee considers that such an approach should be discarded in favour of a *central detention facility*, staffed by a distinct corps of officers specifically trained for such a custodial function. This would almost certainly prove beneficial from the standpoint of the prevention of ill-treatment. Further, relieving individual operational departments of custodial duties might well prove advantageous from the management and logistical perspectives.
50. Finally, the **inspection of police establishments by an independent authority** can make an important contribution towards the prevention of ill-treatment of persons held by the police and, more generally, help to ensure satisfactory conditions of detention. To be fully effective, visits by such an authority should be both regular and unannounced, and the authority concerned should be empowered to interview detained persons in private. Further, it should examine all issues related to the treatment of persons in custody: the recording of detention; information provided to detained persons on their rights and the actual exercise of those rights (in particular the three rights referred to in paragraphs 40 to 43); compliance with rules governing the questioning of criminal suspects; and material conditions of detention.
The findings of the above-mentioned authority should be forwarded not only to the police but also to another authority which is independent of the police.

It would also be useful to identify the norms specifically applicable to situations where certain pressures could be exercised on a detained person to convince him/her to accept a transaction proposed by the prosecuting authorities, the recognition of guilt, accompanied by the payment of a transactory fee, resulting in the abandonment of the prosecution. The circumstances faced by particularly vulnerable persons are adequately taken into account by the Green Paper, for instance with respect to persons who have young children in care or other persons who could be tempted to agree to any proposal which could shorten the time in custody (see point 6.1.). However, the temptation to waive certain procedural guarantees against an undertaking by the authorities that there will be no criminal prosecution, even if this leads the accused person to make statements recognizing that he or she has committed the offences and to pay a transactory fee, raises questions – relating to the conditions under which a person may validly renounce the right to have access to a court – which do not concern only the members of vulnerable categories[493].

The *Green Paper* presented by the Commission adequately deals with the compliance with the common minimal standards and the issue of monitoring the practice of State authorities; as well as with the sanctions which, possibly, could be adopted where it is found that these norms are not complied with by a Member State. The reflection on this issue must clearly distinguish between 1° the adoption by the national authorities of general measures ensuring, for instance, that a Framework Decision listing the minimal guarantees recognized to suspects and defendants in criminal proceedings, and 2° the practice of national authorities. The practice should conform to those general measures; this however may not always be the case. It is clear that a Network of Independent Experts composed of one expert per Member State is not sufficiently well equipped to monitor compliance with the minimal norms as identified in the *Green Paper* in all individual cases. Such a network however – such as the EU Network of Independent Experts on Fundamental Rights – could usefully contribute to the monitoring of compliance by fulfilling two tasks at the first level : it could examine whether the general measures required for the implementation of the minimal norms defined in EU Law have been adopted, and, for instance, have been made widely known to the competent authorities, and whether the required executing measures have been adopted; and it could systematically examine, using the list of rights identified as a common concern at EU level, the findings which have been made concerning the particular Member States by international jurisdictions or organs, such as the European Court of Human Rights or the CPT. A monitoring in that

[493] We may refer to the discussion of this issue by Advocate General Ruiz-Jarabo Colomer, in his Opinion of 19 September 2002, preceding the judgment of the Court in *Gözutok and Brügge*, commented hereafter under Article 50 of the Charter.

form remains of course at a general level. It would not suffice to bring to the attention of the Union all individual situations where the rights included in the list of minimal norms are violated. However, this is primarily a task for the national jurisdictions to perform. Quite apart from the question of subsidiarity, a monitoring by an EU instance which would deal with individual cases would add little value, if any at all, to the mechanisms existing at the national level.

With respect to sanctions, the Green Paper rightly identifies the need to devise a reaction in the presence of "persistent breaches not serious enough to fall within the ambit of Article 7 EU" (point 9.4.) or, mutatis mutandis, under that of Article 39 of the Accession Treaty of 16 April 2003. It may be said that, where the evaluation conducted at a general level identifies a failure by a Member State to meet its obligations in this context, the judicial authorities of another Member State would be justified in refusing to execute the European Arrest Warrant and, therefore, in refusing to surrender a wanted person. Article 1(3) of the 13 June 2002 Framework Decision on the European Arrest Warrant would appear to justify such a refusal. This however does not compensate for the lacunae of the current Title VI of the Treaty on the European Union, concerning the procedures available for sanctioning the failure by a member State to comply with its obligations as defined in an instrument adopted under this Title.

Article 49. Principles of legality and proportionality of criminal offences and penalties

The Introduction to the present report indicates (under II.3) several courses that are open to the European legislator in order to prevent more effectively infringements of fundamental rights in the area of application of Community law. Furthermore, the Introduction emphasizes that, where prevention has failed, the Commission must treat the infringement of Community law resulting from a violation of fundamental rights committed in the implementation of Community law as a trivial hypothesis of a failure by a State in the obligations imposed on it by Community law, liable to give rise to infringement proceedings. In this context, attention should be drawn to the special difficulty posed by the transposition of Community directives, particularly Framework Directives. On the one hand, there is a risk that the domestic statute which operates the transposition of the directive into domestic law reproduces its formulations, even where they are general or vague, to the detriment of the legality principle. Member States are obliged not to restrict the scope of the directive in the transposition thereof, while at the same time ensuring the transposition in sufficiently precise terms to avoid the criticism of undermining the legality principle. It is not always easy to strike the right balance here[494].

On the other hand, the Directives generally leave Member States the choice of appropriate sanctions to ensure the application of the directive in full, although those sanctions must be effective, proportional and dissuasive, according to the formula which the Court of Justice has established and which the European legislator has adopted. Member States must respect this requirement of effectiveness, while at the same time bearing in mind the principle of proportionality of sanctions: this is the second dilemma they face. In its judgment of 6 November 2003, the Court of Justice was led to emphasize, "Whilst it is true that the protection of private life requires the application of effective sanctions against people processing personal data in ways inconsistent with Directive 95/46 [[495]], such sanctions must always respect the principle of proportionality. That is so *a fortiori* since the scope of

[494] See Eur. Ct. H.R., *Cantoni v. France*, judgment of 15 November 1996, *Rec.* 1996-V (absence of violation of Article 7 of the European Convention on Human Rights, despite the alleged imprecision of Article L. 511 of the Public Health Code ensuring the transposition into French law of Directive (EEC) 65/65 of 26 January 1965 (OJ L 369 of 9/2/1965): the French law had simply copied the definition of "medicinal product" given by the Directive, despite the fact that these terms are relatively general, which made it necessary to seek advice in order to know the exact meaning of those terms).

[495] See Article 24 of Directive 95/46/EC.

Directive 95/46 is very wide and the obligations of those who process personal data are many and significant" (Recital 88)[496].

So far, the issue of "improving legislative procedures" in Community law has been addressed essentially on the basis of the principles of subsidiarity and proportionality, and the necessity of catering to the diversity of contexts in which Community law has been called upon to be applied, which often rules out making detailed legislation. Nevertheless, it is necessary to reflect on how to couple this - obviously important - concern with the requirement for Member States to respect fundamental rights, in particular Article 49 of the Charter of Fundamental Rights, in the implementation of Community law.

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

The originality of Article 50 of the Charter, compared with Article 4 of Additional Protocol n°7 to the European Convention on Human Rights, lies in the extension to the European Union of the *ne bis in idem* rule, which the latter Article only provides for within the jurisdiction of the same State. In the case of *Gözutok and Brügge*, in which the Court of Justice of the European Communities gave judgment on 11 February 2003[497], two national courts - German and Belgium - asked the Court whether the *ne bis in idem* principle enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders[498], also applied to procedures for the discontinuation of criminal proceedings without involvement of a court. Article 54 C.I.S.A. provides, "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party." In this case, a Turkish national residing in the Netherlands and working in Germany, Mr Gözütok, and a German national, Mr Brügge, had respectively accepted a settlement proposed by the Dutch public prosecutor, and another proposed by the German public prosecutor. Nevertheless, they had been prosecuted for the same offences before a German court (Mr Gözütok) and a Belgian court (Mr Brügge), which led to the referrals for a preliminary ruling. Considering that the procedure for the discontinuation of criminal proceedings through a settlement proposed by the public prosecutor involves a decision by "an authority required to play a part in the administration of criminal justice in the national legal system concerned" (Recital 28), and penalizes the unlawful conduct which the accused is alleged to have committed by imposing on him certain obligations such as the payment of a fine (Recital 29), the Court replies affirmatively to the question of interpretation of Article 54 of the Convention implementing the Schengen Agreement. The Court consequently infers an obligation of mutual recognition of decisions entailing the discontinuation of criminal proceedings from the right not to be tried or punished twice for the same offence. The lack of harmonization of the criminal laws of the Member States in procedures for the discontinuation of criminal proceedings forms no obstacle to this. The Court finds that the effect of Article 45 of the Convention implementing the Schengen Agreement (C.I.S.A.) is not dependent on a harmonization or approximation of the criminal laws of the Member States (Recital 32). The Court infers from this (in Recital 33 of the judgment):

[496] For example, according to the Court, "It is for the referring court to take account, in accordance with the principle of proportionality, of all the circumstances of the case before it, in particular the duration of the breach of the rules implementing Directive 95/46 and the importance, for the persons concerned, of the protection of the data disclosed" (Recital 89).
[497] ECJ, 11 February 2003, *Gözutok and Brügge*, joined cases C-187/01 and C-385/01, not yet published.
[498] OJ L 239, 22/9/2000, p. 19.

> In those circumstances, whether the *ne bis in idem* principle enshrined in Article 54 of the CISA is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.

The Court derives this broad interpretation of the terms of Article 54 of the CISA from the general framework in which this provision is situated, namely that of enhancing European integration by maintaining and developing the Union as an area of freedom, security and justice (Recitals 35 to 37). The Court notes that it would be paradoxical to make the obligation of mutual recognition of decisions to discontinue criminal proceedings subject only to decisions taking the form of judgments or decisions adopted by the courts: such a restrictive interpretation would in fact mean that the perpetrators of more serious offences, for which in any case court action is required, would enjoy greater freedom of movement than perpetrators of minor offences, with respect to whom only the public prosecutor can decide to make a settlement.

The obligation of mutual recognition of decisions taken by the authorities of another Member State is limited by the respect for the fundamental rights, whether they be the rights of the accused or those of the civil parties[499]. As concerns the accused, it should be remembered that in the case of a blatant disproportion between the punishment which the accused risks being given following criminal proceedings leading to a conviction, on the one hand, and the settlement that is proposed to him on the other hand, the consent of the accused may be vitiated, and thus his waiver of his right to have his case tried before a court considered invalid[500]. The recognition of a settlement that has been reached in another Member State and that discontinues the criminal proceedings is based on the assumption that the consent of the accused has been validly obtained. This does not mean that the *ne bis in idem* rule should be dismissed in such an assumption, since the institution of criminal proceedings in another Member State does not compensate for the damage suffered in the first Member State, but on the contrary aggravates it. If the case arises, it will be up to the accused to assert before the European Court of Human Rights that his right of access to justice has been infringed on account of the circumstances in which the criminal proceedings were discontinued and of the consequences that resulted for him.

As concerns the rights of the victims, it should be remembered that the European Convention on Human Rights does not guarantee for the victim the right to have a criminal conviction obtained against the perpetrator of the offence that caused damage to him, but only that of receiving compensation for that damage, and to the extent of having access to a competent court in order to justify his claim for compensation[501]. In response to an argument raised by the Belgian government according to which a decision to discontinue criminal proceedings following a settlement can only be classed as a final judgment justifying the application of the

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[499] Eur. Ct. H.R., *Pellegrini v. Italy*, judgment of 20 July 2001, application n° 30882/96, § 40. See the opinion of Mr Advocate General Ruiz-Jarabo Colomer of 19 September 2002, preceding the *Gözutok and Brügge* judgment, particularly §§ 92-94 of the opinions.

[500] Eur. Ct. H.R., *Deweer v. Belgium*, judgment of 27 February 1980, Series A n° 35. With reference to the latter decision, Mr Advocate General Ruiz-Jarabo Colomer notes, in Recital 95 of his opinions, "The freedom to accept or refuse the settlement is fundamental. At first sight, one might doubt the existence thereof, since the accused must in fact accept the proposal of the public prosecutor if he is to avoid criminal prosecution. Nevertheless, this circumstance does not vitiate his consent insofar as the threat of instituting certain proceedings is admissible if the means used and the objective pursued are legitimate."

[501] While the civil party cannot claim the benefit of Article 6 of the Convention when its only aim is to obtain the conviction of the person who committed the offence that caused damage to the civil party, it can nevertheless do so if its action is aimed at securing monetary compensation and the outcome of the criminal proceedings is a directly determining factor for civil rights and obligations. See Eur. Ct. H.R., *Tomasi v. France*, judgment of 27 August 1992; *Acquaviva v. France*, judgment of 21 November 1995; *Hamer v. France*, judgment of 7 August 1996.

ne bis in idem principle on the prior condition that the rights of the victim have been duly safeguarded, the Court notes that the said principle "does not preclude the victim or any other person harmed by the accused's conduct from bringing a civil action to seek compensation for the damage suffered" (Recital 47).

Greece has proposed the adoption of a new Framework Decision, the aim of which is to uniformize both the interpretation and the practical implementation of the "ne bis in idem" principle[502]. The legal basis of this instrument would be Articles 29, 31(d) and 34(2)(b) EU. It will replace Articles 54 to 58 of the Convention implementing the Schengen Agreement. Article 1, b), of the proposed Framework Decision defines a "judgment" as « any final judgment delivered by a criminal court in a Member State as the outcome of criminal proceedings, convicting or acquitting the defendant or definitively terminating the prosecution, in accordance with the national law of each Member State, *and also any extrajudicial mediated settlement in a criminal matter*; any decision which has the status of res judicata under national law shall be considered a final judgment ». This takes into account the extended interpretation given to the rule of *ne bis in idem* by the European Court of Justice.

[502] Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the "ne bis in idem" principle, OJ C 100 , 26/4/2003, p. 24.