

**REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS
IN THE EUROPEAN UNION IN 2004***

January 2005

Reference : CFR-CDF.rep.EU.en.2004



The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union. The content of this opinion does not bind the European Commission. The Commission accepts no liability whatsoever with regard to the information contained in this document.

*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. Henri Labayle, member of the Network, for the information he contributed in the areas of justice and home affairs.

**REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS
IN THE EUROPEAN UNION IN 2004***

January 2005

Reference : CFR-CDF.rep.EU.en.2004

The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union. The content of this opinion does not bind the European Commission. The Commission accepts no liability whatsoever with regard to the information contained in this document.

*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. Henri Labayle, member of the Network, for the information he contributed in the areas of justice and home affairs.

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), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), François Moysse (Luxembourg), 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), Pavel Sturma (Rép. tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par O. De Schutter assisté par V. Verbruggen et V. Van Goethem.

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.

The EU Network of Independent Experts on Fundamental Rights is composed of Elvira Baltutyte (Lithuania), Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (Denmark), Henri Labayle (France), Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), François Moysse (Luxembourg), Jeremy McBride (United Kingdom), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), Ineta Ziemele (Latvia). The Network is coordinated by O. De Schutter with the assistance of V. Verbruggen and V. Van Goethem.

The documents of the Network may be consulted on :

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

TABLE OF CONTENTS

TABLE OF CONTENTS	5
INTRODUCTION	8
I. THE INSTITUTIONAL FRAMEWORK FOR THE PROMOTION AND PROTECTION OF FUNDAMENTAL RIGHTS IN THE UNION	10
1. The Treaty establishing a Constitution for Europe.....	10
1.1. The added value of the Charter of Fundamental Rights	11
1.2. General provisions of the Charter.....	12
<i>Limitations on the rights</i>	12
<i>Cognizability of “principles”</i>	13
<i>Taking into account national laws and practices</i>	14
<i>Clause concerning the level of protection</i>	14
<i>The question of competences</i>	15
1.3. Accession to the European Convention on Human Rights.....	16
2. The Fundamental Rights Agency of the European Union.....	20
2.1. The Mandate of the Agency and the Question of the Legal Basis	21
2.2. The implementation of Article 7 EU (Article I-59 of the European Constitution).....	23
2.3. Mutual observation and mutual learning in the field of fundamental rights	24
2.4. Mainstreaming human rights in the law- and policy-making of the Union.....	27
II. MUTUAL EVALUATION AS A COMPLEMENT TO MUTUAL CONFIDENCE....	30
1. Mutual evaluation in the Area of Freedom, Security and Justice.....	30
2. Mutual evaluation in the establishment of an internal market.....	32
2.1. The place of fundamental rights in the construction of the internal market	33
2.2. Measures accompanying mutual confidence	37
III. A FUNDAMENTAL RIGHTS POLICY FOR THE EUROPEAN UNION	39
CHAPTER I: DIGNITY	43
Article 1. Human dignity.....	43
Article 2. Right to life.....	43
The integrated control of the external borders of the Union	43
Article 3. Right to the integrity of the person.....	44
Protection of subjects in biomedical research	48
Article 4. Prohibition of torture and inhuman or degrading treatment or punishment	49
Article 5. Prohibition of slavery and forced labour	49
Combating human trafficking.....	49
Protection of children from sexual exploitation and child pornography	52
CHAPTER II: FREEDOMS	53
Article 6. Right to liberty and security	53
Detention of a person with a view to his surrender to another Member State.....	53
Article 7. Respect for private and family life	54
Article 8. Protection of personal data	54
The communication of Passenger Names Records (PNR) by airline companies operating transatlantic flights to the US Bureau of Customs and Border Protection	55
The communication by carriers, to the authorities of the State of destination, of data relating to the passengers.....	61
The retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks	64
Article 9. Right to marry and right to found a family.....	68
Article 10. Freedom of thought, conscience and religion.....	68
Article 11. Freedom of expression and of information.....	68
Pluralism of the media.....	68
Article 12. Freedom of assembly and of association.....	69
Article 13. Freedom of the arts and sciences.....	69

Article 14. Right to education	70
Article 15. Freedom to choose an occupation and right to engage in work	70
Article 16. Freedom to conduct a business.....	70
Public procurement policies	70
Article 17. Right to property	72
Article 18. Right to asylum	72
Determination of the status of refugees or of persons qualifying for subsidiary protection.....	72
Definition of minimum standards on procedures for granting and withdrawing refugee status.....	80
Article 19. Protection in the event of removal, expulsion or extradition.....	89
Organization of joint flights for the removal of third-country nationals	89
CHAPTER III : EQUALITY	92
Article 20. Equality before the law.....	92
Article 21. Non-discrimination.....	92
Article 22. Cultural, religious and linguistic diversity	93
Article 23. Equality between men and women.....	93
Mainstreaming the requirement of equal treatment between women and men	93
Extension of the requirement of equal treatment between women and men in the access to, and the provision of, goods and services.....	94
Case-law on equal treatment between men and women	95
Article 24. The rights of the child	97
Article 25. The rights of the elderly	99
Article 26. Integration of persons with disabilities.....	99
CHAPTER IV : SOLIDARITY	100
Article 27. Worker’s right to information and consultation within the undertaking	100
Article 28. Right of collective bargaining and action.....	100
Article 29. Right of access to placement services	101
Article 30. Protection in the event of unjustified dismissal.....	101
Article 31. Fair and just working conditions	101
The organisation of working time	101
The impact of the proposal for a Directive on the services in the internal market.....	104
Contractual autonomy	109
Consumer contracts	111
Employment contracts	111
Reservation concerning mandatory rules	113
Interaction with the “Rome II” Regulation.....	113
Conclusion.....	114
Article 32. Prohibition of child labour and protection of young people at work.....	115
Article 33. Family and professional life	115
Article 34. Social security and social assistance	115
Article 35. Health care.....	116
Assumption of the cost of health care provided in another Member State than the Member State of affiliation	117
Free establishment of healthcare providers	118
Communication on social services of general interest	119
Cooperation on health services and medical care.....	119
Article 36. Access to services of general economic interest	121
The context of the debate on services of general economic interest	121
The need for Member States to respect the definition of general interest	122
Article 37. Environmental protection	126
Article 38. Consumer protection	126
CHAPTER V: CITIZEN’S RIGHTS	126
Article 39. Right to vote and to stand as a candidate at elections to the European Parliament.....	126

Article 40. Right to vote and to stand as a candidate at municipal elections.....	126
Article 41. Right to good administration	127
Article 42. Right of access to documents	127
Article 43. Ombudsman.....	127
Article 44. Right to petition.....	127
Article 45. Freedom of movement and of residence	127
Article 46. Diplomatic and consular protection.....	131
CHAPTER VI : JUSTICE.....	131
Article 47. Right to an effective remedy and to a fair trial.....	131
Extension of direct action for annulment by individuals.....	131
Judicial protection in the context of a common foreign and security policy.....	135
Article 48. Presumption of innocence and right of defence	137
Article 49. Principles of legality and proportionality of criminal offences and penalties .	137
Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence.....	137
CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION.....	138

INTRODUCTION

The work programme 2004-2005 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 2005, 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 2004.

Although the report examines the full range of rights, freedoms and principles enumerated in the Charter of Fundamental Rights, three themes are central in the report. First, major developments have occurred during 2004 which will bring about radical transformations in the overall framework through which fundamental rights are protected in the legal order of the Union. The adoption by the Heads of States and Governments of the Treaty establishing a Constitution for Europe¹ and the steps made towards the extension of the European Union Monitoring Centre on Racism and Xenophobia into a Human Rights Agency² will be commented upon in the Introduction to this Report, in order to identify which impacts these developments could have in the future – after 2006 or, for the effective establishment of the Agency, 2007 – for the promotion and protection of human rights in Europe.

Second, important debates have concerned the relationship between market freedoms – the fundamental freedoms recognized by the EC Treaty – and the capacity for States to promote and protect certain rights such as the right of access to health care (Article 25 of the Charter)³, the right of access to services of general economic interest (Article 36), the right of workers to fair and just working conditions (Article 31), or the protection of consumers (Article 38). This, indeed, constitutes the central question raised in the context of proposals made by the European Commission for directives of the European Parliament and the Council on the services in the internal market⁴ or amending Directive 2003/88/EC concerning certain aspects of the organization of working time⁵, and in the debate launched by the Commission's Green paper on services of general interest⁶ which led, in May 2004, to the adoption of a White paper of the Commission⁷. This report will examine the impact on fundamental rights of these proposals.

Third, important progress has been made in the areas of justice and home affairs. A number of instruments have been adopted under the common Community policy on asylum and immigration, in part because of the deadline set by the Treaty of Amsterdam for the adoption of a series of legislative measures to be adopted under Title IV of Part 3 of the EC Treaty⁸, and in part because the enlargement of the Union to ten new Member States will make it more difficult, after 1 May 2004, to find a consensus between the Member States of the Union in this field. The cooperation between the Member States in the field of criminal justice and

¹ OJ C 310 of 16.12.2004, p. 1.

² On 25 October 2004, the European Commission published a consultation document on the Fundamental Rights Agency, which launched a public consultation which was closed on 17 December 2004 (COM(2004) 693 final of 25.10.2004).

³ For the sake of clarity, the original numbering of the provisions of the Charter of Fundamental Rights shall be retained throughout this report.

⁴ COM(2004) 2 final, of 13.1.2004.

⁵ COM(2004) 607 final, of 22.9.2004.

⁶ COM(2003) 270 final, of 21.5.2003.

⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, White Paper on services of general interest, COM(2004) 374 final, of 12.5.2004.

⁸ See Art. 61, a), 62 and 63 EC.

police has also been accelerated, especially after the terrorist attack in Madrid on 11 March 2004 which many have seen to illustrate the need for enhanced cooperation.

This report therefore examines a diversity of themes. There is, however, a unifying message. In an enlarged European Union, especially with the decisional mechanisms inherited from the Treaty of Nice which entered into force on 1 February 2003⁹, legislative harmonisation will become more and more difficult to achieve. Mutual recognition (albeit under the form of the “principle of country of origin” in the field of transborder provision of services) therefore appears, in many fields, the most desirable solution, not only because it is most workable, but also because it respects better the diversity of approaches of the Member States. Mutual recognition, however, as applied between 25 States more and more diverse, whose administrative and legal cultures and whose approaches to the role of the State in the market are sometimes strikingly different, cannot be simply affirmed; insofar as it presumes that the States are to mutually trust themselves, it must be consolidated and ensured by control mechanisms, providing for a mutual evaluation by the Member States. Such mechanisms must complement the enforcement of Community or Union law by the European Commission, acting as guardian of the treaties, and the European Court of Justice. They must act preventively, before the mutual confidence is disrupted, rather than reactively. They must be regular and systematic, rather than ad hoc. And they must not only lead to the adoption of safeguard measures where required, but also to the formulation of legislative proposals at the level of the Union where such initiatives appear to be required. In sum, a more proactive fundamental rights policy is required, in the view of the author of this report, as a necessary accompanying measure of the creation between the Member States of an area of freedom, security and justice based on the principle of mutual recognition.

The preceding *Report on the situation of fundamental rights in the Union in 2003* presented by this author to the Network of independent experts on fundamental rights¹⁰ already emphasized the need for mutual recognition, in an enlarged Union, to be complemented both by evaluation mechanisms ensuring that mutual confidence is maintained, and by a fundamental rights policy based on the identification of issues where certain initiatives should be taken at the level of Union, including harmonization measures. Examining the activities of the institutions of the Union in 2003, that report insisted that the violations of the Charter of fundamental rights 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.¹¹ It sought to locate the risk of violations essentially in the way Member States will implement Union law: rather than in what Union law prescribes, in the situations where it has remained silent. The report drew the conclusion that the Union/Community should in certain circumstances accept that it is under a positive obligation to adopt measures to the extent that the constituting treaties provide the necessary powers to this effect¹². It argued that may not be sufficient that the rights and principles of the Charter are *not violated* by the institutions of the Union, but that, in certain cases, the institutions should accept a *duty to act* in order to ensure that these rights and principles will not be violated by the Member States in the implementation of Union law. The 2004 Report suggested therefore that it should be verified whether, when it has intervened in particular field, the European legislator has adopted all the measures which

⁹ OJ C 180, of 10.3.2001.

¹⁰ This Report was finalized in January 2004. It will be cited here as « the 2004 Report ».

¹¹ See the introduction to the 2004 Report, at II.3.

¹² The 2004 Report deliberately paraphrased in that respect 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 ».

could reasonably prevent the risk of a violation of fundamental in the field in question. It argued, finally, that the principles of subsidiarity and proportionality regulating the exercise by the Union of competences it shares with the Member States should not be seen as constituting an obstacle to such a more proactive role for Union in the promotion and protection of fundamental rights.

It is this more proactive approach, based on the acceptance of an obligation to act imposed on the institutions of the Union by the Charter of Fundamental Rights, that the European Council agreed to take in its conclusions adopted in Brussels on 4 and 5 November 2004, where it stated that

Incorporating the Charter into the Constitutional Treaty and accession to the European Convention for the protection of human rights and fundamental freedoms will place the Union, including its institutions, under a legal obligation to ensure that in all its areas of activity, fundamental rights are not only respected *but also actively promoted*.

This introduction shall briefly develop the general themes which have been evoked. It examines, first, the changes in the framework for the promotion and protection of fundamental rights in the European Union brought about by the Treaty establishing a Constitution for Europe, and to which the Fundamental Rights Agency could contribute (I.). Second, it examines the question of how mutual evaluation between the Member States could contribute to establish and sustain the mutual confidence on which mutual recognition is based both in the area of freedom, security and justice and in the establishment of the internal market (II.). Third, it links the development of such evaluation mechanisms with the idea of a fundamental rights policy for the European Union (III.).

I. THE INSTITUTIONAL FRAMEWORK FOR THE PROMOTION AND PROTECTION OF FUNDAMENTAL RIGHTS IN THE UNION

1. The Treaty establishing a Constitution for Europe

The signature of the Treaty establishing a Constitution for Europe on 29 October 2004¹³ holds the promise of a major improvement, if and when the Treaty will be ratified by all the Member States, in the institutional framework for the promotion and protection of fundamental rights in the Union. In order to contribute to clarifying the debate concerning the impact on fundamental rights of the adoption of the Constitutional Treaty, it has been considered useful to comment in the introduction on the insertion of the Charter of Fundamental Rights in the Constitution, and on the accession of the Union to the European Convention on Human Rights, which represent the most visible contributions of the Constitution to the status of fundamental rights in the Union. Other advances made by the Constitution in the field of specific fundamental rights – including the right of access to justice – shall be commented upon under the relevant provision of the Charter.

The incorporation of the Charter of Fundamental Rights as second part of the Treaty establishing a Constitution for Europe is in line with the proposal made by the European Convention on the basis of the final report of Working Group II of the Convention in the text submitted to the Council Presidency on 18 July 2003. The European Convention accompanied this proposal with certain revisions to the Preamble of the Charter and its Chapter VII containing the general provisions governing the interpretation and application of the Charter.

¹³ The following refers to the text as renumbered : CIG 87/2/04 (REV 2), 29 October 2004. See OJ C 310, of 16.12.2004.

Although it has generally met with approval, the prospect of the incorporation of the Charter in the Constitutional Treaty has also raised various fears. Some question the added value which the incorporation of the Charter may represent (1), while others have raised objections to certain aspects of the Charter, such as the choice of the provisions brought together in the last chapter of the Charter and the adjustments that have been made to those provisions in the context of the Convention on the future of Europe (2). Some fear that the incorporation of the Charter in the Constitutional Treaty would lead to an extension of the powers that have been attributed to the Union by its Member States (3). Finally, questions have been raised with respect to the competing or complementary relationship that exists between the incorporation of the Charter in the Constitutional Treaty and the accession of the European Union to the European Convention on the Protection of Human Rights (4). The following paragraphs aim to shed more light on the debate with respect to the questions that have been raised here.

1.1. The added value of the Charter of Fundamental Rights

The achievements of the European Union in the area of fundamental rights are currently characterized by a great disparity in the sources. Those achievements consist of the general principles of Community law which the Court of Justice has progressively identified by selectively including the fundamental rights; of certain provisions contained in the treaties; and of a relatively substantial body of secondary legislation, more particularly in the areas of freedom of movement, social affairs, non-discrimination and protection of private life, which has been worked out on the basis of various legal sources. The Charter is the visible manifestation of what the European Union has achieved in the area of fundamental rights. In this respect, it can contribute to legal certainty.

It should be underlined that neither the authors of the Charter of Fundamental Rights nor the members of the European Convention in charge of proposing a Constitutional Treaty have sought to give priority at all cost to the concern for legal certainty over that of leaving scope for the fundamental rights that are recognized within the Union to evolve. Article 9(3) of the draft Constitutional Treaty indicates that the Court of Justice must be able to carry on developing the fundamental rights by elaborating the general legal principles whereof it ensures observance, without being prevented from doing so by certain rights in the Charter¹⁴. The Charter itself provides, in Article 53 (having become Article II-113 of the Treaty establishing a Constitution for Europe), that it shall not prevent European Union law from offering more extensive protection of fundamental rights than that offered by the Charter itself¹⁵.

Despite the fact that the Charter thus preserves the possibility for the fundamental rights to evolve, the incorporation in a single text of the fundamental rights already recognized ensures that the institutions will take them into consideration more systematically and that they will be relied upon more frequently in the – national and European – jurisdictional bodies entrusted with the task of applying European Union law. On 13 March 2001, the Commission decided that all proposals for instruments of secondary legislation must first be reviewed for compatibility with the Charter. It claims to comply with the Charter systematically and all proposals for directives or regulations that are specifically connected with fundamental rights contain an additional recital specifying that the instrument observes the rights and principles contained in the Charter. Numerous references to the Charter of Fundamental Rights have

¹⁴ Under Article 9(3) of the Treaty establishing a Constitution for Europe, « Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law ».

¹⁵ According to Article II-113 of the Treaty establishing a Constitution for Europe : « Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions. »

appeared in the reports and resolutions of the Parliament as well as in questions of Members of the European Parliament addressed to the Commission and to the Council. The Council has referred to the Charter in several decisions and resolutions. Reference to the Charter is also made in certain instruments adopted in accordance with the co-decision procedure. Article 58 of the Rules of the European Parliament obliges Parliament, during the examination of a legislative proposal, to pay particular attention to compliance with the Charter. Moreover, the European Parliament has used the Charter as a model for its annual reports on the situation of fundamental rights in the European Union. The Charter of Fundamental Rights of the European Union constitutes the benchmark instrument for the monitoring task assumed by the EU Network of Independent Experts on Fundamental Rights since it was set up in September 2002. This body assists the Commission and the European Parliament by evaluating the situation of fundamental rights in the Member States and in the activities of the European Union. All these examples illustrate the motivating effect produced by the adoption of the Charter of Fundamental Rights: now that such a Charter exists, reference to the fundamental rights has become easier, notably by the institutions of the Union. The citizens themselves more and more frequently invoke the Charter of Fundamental Rights in complaints which they address to the European Ombudsman, as well as in the petitions submitted to the European Parliament¹⁶.

The incorporation of the Charter in the Constitutional Treaty will facilitate reference to the fundamental rights even more. Even the Court of Justice, which so far has shown itself careful not to anticipate the will of the constituent authority and has refrained from basing itself on the Charter of Fundamental Rights in its judgments, will no longer hesitate to rely upon the Charter, as the Court of First Instance and, individually, each of the Advocates General of the Court have already done.

1.2. General provisions of the Charter

Articles 51 to 54 of the Charter (which became Articles II-111 to II-114 of the Treaty establishing a Constitution for Europe) contain general provisions concerning the interpretation and application of all its substantive provisions. It is therefore not surprising that those provisions have aroused many comments: they in fact define the status of the rights recognized by the Charter within the constitutional structure of the Union. There are four observations to make concerning those comments¹⁷.

Limitations on the rights

Article 52(1) of the Charter points out, “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.” This formula is inspired by the case law of the Court of Justice, which considers that “limitations may be imposed upon the exercise of fundamental rights, [...] provided that such limitations

¹⁶ See Report on the Impact of the Charter of Fundamental Rights of the European Union and its future status (report by Andrew Duff), doc. EP 313.401, 8 October 2002.

¹⁷ The adjustments which the European Convention has made to the Charter of Fundamental Rights include the incorporation of a clause asserting the value of the explanations relating to the Charter of Fundamental Rights prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention. Article II-112(7) of the Constitution points out, “The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States”. This formula is also used in the Preamble of the Charter. In Declaration no. 12 annexed to the Treaty establishing a Constitution for Europe, the Intergovernmental Conference “takes note” of those explanations. The introduction to the explanations relating to the Charter specifies, “Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter”.

effectively meet objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable intervention that would infringe the very substance of those rights”.

At first sight, the choice of a general limitation clause contrasts with the choice made by the authors of the European Convention on Human Rights. They specified, for each right or freedom that is recognized, the objectives of general interest that might justify a limitation being imposed on it. Nevertheless, according to Article 52(3) of the Charter (Article II-112(3)), “Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”. Reference to the provisions of the European Convention on Human Rights for the interpretation of the corresponding provisions of the Charter of Fundamental Rights extends to the arrangements for the limitations on the rights and freedoms under the Convention¹⁸. In this way, the law of the European Convention on Human Rights takes precedence since it offers a higher level of protection of the fundamental rights. Thus when certain limitations on the rights of the Charter of Fundamental Rights need to be justified by the pursuit of “objectives of general interest recognized by the Union”, the objective being invoked must still appear among the grounds that are considered legitimate by the European Convention on Human Rights for each of the rights in question.

Cognizability of “principles”

Incorporated in the Charter of Fundamental Rights by the European Convention within which the draft Constitutional Treaty was prepared, the new Article 52(5) of the Charter points out:

The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

Some interpret this provision literally by limiting the cognizability of a “principle” to situations where a particular measure has been taken by the Union or by a Member State *in order to implement it*. According to this interpretation, one should wait, in order that “principles” such as environmental or consumer protection¹⁹ produce a useful effect, for the legislature or the executive to take measures aimed at realizing those principles. If this interpretation is allowed, it would prevent us from relying upon the “principles” contained in the Charter in the face of a situation where those principles would be clearly violated by the adoption of certain measures that go against them. In reality, Article 52(5) of the Charter merely acknowledges that “principles” differ from “subjective rights” only in terms of the conditions under which they are relied upon. Principles are indeed cognizable, yet they have

¹⁸ As the explanations of the Praesidium of the Convention specify: “Paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, insofar as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, which are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union”.

¹⁹ It should be pointed out that the boundary between fully cognizable rights and “programmatic” rights – the “principles” – is not always watertight: the members of the European Convention deliberately considered that the question should remain open, since the content of the two categories should be identified case by case on the basis of case law, and several provisions of the Charter may contain elements connected with a right and with a principle.

but a limited use in courts of law: they may serve as “shields” to prevent the adoption of certain acts by institutions of the Union or Member States that would jeopardize what has already been achieved by implementing measures. They cannot serve as “swords”, that is to say, they cannot be invoked in court in order to demand that the legislature or the executive adopt certain measures intended to put them into practice. In this sense, a principle is “implemented” within the meaning of Article 52(5) of the Charter by an act that constitutes a violation of that principle: such an act can therefore be censured in the light of the requirements of that principle, whether as part of an action for annulment of that act or as part of a referral for a preliminary ruling on its validity.

Taking into account national laws and practices

Article 52(6) of the Charter specifies, “Full account shall be taken of national laws and practices as specified in this Charter”. This provision is one of the additions that have been made by the members of the European Convention. Other provisions of the Charter, most of which concern social rights, are recognized or exercised “in the cases and under the conditions provided for by Union law and national laws and practices” (Article 27), “in accordance with Union law and national laws and practices” (Articles 28 and 34(2)), “in accordance with the rules laid down by Union law and national laws and practices” (Articles 34(1) and 34(3)), or “as provided for in national laws and practices” (Article 36).

Those phrases do not mean that, irrespective of the substance of the national practice or law in question, it would in any case comply with the provisions of the Charter, since it is to the national practices and laws that certain provisions of the Charter refer. In a number of cases, it is up to the legislature or the other national authorities to define the conditions for exercising a particular right, for example by regulating the exercise of the right to strike, setting up a social security system or entrusting certain tasks of general interest to service providers. However, what the national authorities have to do is to regulate the right in question, in other words, make it possible to exercise this right by defining its rules: a total suppression of the right in question or the imposition of excessively restrictive conditions for exercising it, resulting in a repudiation of its “essential substance”, would not be in keeping with the requirements of the Charter of Fundamental Rights of the Union.

Clause concerning the level of protection

Article 53 of the Charter (Article II-113 of the Treaty establishing a Constitution for Europe) sets forth, “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”. This article has sometimes been interpreted as introducing an exception to the principle of the pre-eminence of Union law as recognized by Article I-6 of the Treaty establishing a Constitution for Europe, since it asserts that the Charter does not challenge the protection of human rights as guaranteed by “the Member States’ constitutions”. This interpretation is incorrect, however. This provision does not imply that the Union is obliged to respect the fundamental rights as they are defined by the constitutions of the Member States: it is only in their “respective fields of application” that the national constitutions must be observed, that is to say, with respect to acts of Member States that are not governed by Union law. On the other hand, it should be remembered that the Court of Justice has always been careful to take into account the common constitutional traditions of the Member States when identifying the fundamental rights which it considered should feature among the general principles of European law: this process looks set to continue, as

was pointed out above with reference to Article I-9(3) of the Treaty establishing a Constitution for Europe.

The solution that emerges from Articles I-9(3), I-6 and II-113 of the Constitution is the following: although Union law does not have to respect the provisions of each national constitution, the constitutional traditions of the Member States may constitute a source of inspiration for the Court of Justice in its development of the fundamental rights, and the Member States cannot take the fact that the rights recognized in the Charter offer a lower level of protection as a pretext for brushing aside guarantees offered by their national Constitution, there where respect for those guarantees is compatible with Union law.

The question of competences

The Union can only act within the limits of the competences conferred upon it by the Member States to attain the objectives set out in the Constitution²⁰. This principle of conferral is an essential guarantee for the balance of relations established between the Member States and the Union. Article 51(2) of the Charter of Fundamental Rights (Article 111(2) of the Treaty establishing a Constitution for the Union) provides that the adoption of the Charter shall not change this balance. This provision sets out that the Charter “does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution”. The incorporation of the Charter in the Treaty therefore has no impact on the division of competences between the Member States and the Union. This principle breaks down into two distinct rules.

Firstly, *the Charter of Fundamental Rights does not establish any new competences for the Union which it does not already hold by virtue of other parts of the Constitution*. The only effect of the Charter is to regulate the exercise of the competences held by the Union or by the Member States when they implement Union law. The Charter therefore imposes limits on how those competences are exercised. Not only can the Union not exceed the competences that have been conferred upon it, but it also remains obliged, when exercising those competences, to respect the fundamental rights set forth in the Charter. And where the Member States act as decentralized administration of the Union – in which capacity they are obliged to apply the European laws, implement European framework laws, or give effect to regulations or decisions -, they must also respect those fundamental rights. After all, Member States cannot be allowed to ignore the limits of fundamental rights that are imposed on Union law when Union law itself is obliged to respect those limits.

The second rule is that *the Charter does not extend the field of application of Union law*. Certain situations remain governed solely by the law of the Member States without the action of those Member States having any connection whatsoever with Union law. Such is the case when the Member States do not implement Union law and are not covered by an exception that is provided for by Union law for their benefit – which, for example, specifies under what conditions certain restrictions on the fundamental freedom of movement recognized by the Treaty or on the cross-border provision of services can be tolerated. The Charter of Fundamental Rights would not be invocable in such cases. Naturally, the Member States in any case remain obliged to respect the fundamental rights and freedoms defined in the international instruments to which they are parties. The only purpose of the Charter is to *accompany* the transfer of competences from the Member States to the Union in order to guarantee that the whole of Union law continues to respect fundamental rights, even there where the Member States act as actors of Union law. The purpose of the Charter is not to

²⁰ Article I-11 of the Treaty establishing a Constitution for the Union reveals the principle of conferral governing the competences of the Union.

apply independently: it only applies insofar as another rule of Union law applies, and in combination with that rule.

It is therefore not justified to maintain, for example, that the social rights set forth in the Charter are imposed in the national legal systems of the Member States, inheriting the virtues – pre-eminence and direct applicability – of European Union law. Those social rights will only be invocable with respect to acts adopted by the institutions of the Union, and the Member States will be obliged to comply with them only insofar as they act in the Union's field of application (for example, transposing a framework law or enforcing a delegated law or regulation). The Member States of the Union are not obliged to comply with the Charter when they adopt acts that have no connection whatsoever with Union law.

Thus the rule according to which the Charter does not modify the division of existing competences between the Union and the Member States is joined by the rule according to which the Charter does not have the effect of extending the field of application of Union law. The Charter will not be invocable in situations that come under the exclusive authority of the Member States and that are not affected at all by Union law. The fact that those two rules are recalled here, as set forth in Article 51(2) of the Charter of Fundamental Rights (Article 111(2) of the Treaty establishing a Constitution for Europe), should however not lead us to underestimate the possibilities that the Union has at its disposal for contributing to respect for fundamental rights in the Union. According to the future Constitution, the Union may take the necessary measures to combat certain forms of discrimination, within the limits imposed by observance of the subsidiarity and proportionality of its action²¹. It may adopt measures in the area of asylum and immigration, including family reunification and repatriation of illegal residents²². It may take certain measures in the area of social policy, for example improving the working environment to protect the health and safety of workers, or encouraging information and consultation of workers²³. It may foster judicial cooperation in criminal matters by encouraging the approximation of the laws and regulations of the Member States with a view to the mutual recognition of judgments and judicial decisions in criminal matters²⁴ or by adopting measures establishing minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension²⁵, and in this way contribute to the protection of certain fundamental values by using the tool of criminal law. The examples are legion. Furthermore, Article I-3 of the Treaty establishing a Constitution for Europe includes among the objectives of the Union the promotion of its values, such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (Article I-2); this makes possible the use of the flexibility clause with respect to implicit powers, if action by the Union should prove necessary within the framework of the Union's policies regarding the establishment of an internal market and an area of freedom, security and justice (Article I-18). The Charter of Fundamental Rights will necessarily influence the way in which those competences are exercised. It does not, however, have the effect of extending the list of those competences that have been conferred upon the Union by the Member States.

1.3. Accession to the European Convention on Human Rights

The Charter of Fundamental Rights of the Union is defined as a catalogue of rights that are proper to the Union and form an essential part of the competences which the Union exercises, either directly (through its institutions, bodies and agencies) or indirectly (through the Member States). The Charter is not comparable to a convention which the Member States

²¹ Article III-124.

²² Articles III-266 and III-267.

²³ Article III-210.

²⁴ Article III-270.

²⁵ Article III-271.

have signed between them, obliging them to respect a certain number of fundamental rights. It is therefore not comparable to a European Convention on Human Rights that is applicable solely between the Union Member States. It is not in competition with the international or European instruments for the protection of human rights that are binding on the Union Member States at the international level.

This means that the incorporation of the Charter of Fundamental Rights in the Constitutional Treaty in no way diminishes the value of the Union's accession to the European Convention on Human Rights, as provided by Article I-9(2) of the Treaty establishing a Constitution for Europe. The two steps are complementary. The establishment in the Member States' constitutions of a more or less extensive range of fundamental rights does not prevent those States from acceding to the European Convention on Human Rights or other international instruments for the protection of human rights. Likewise, the incorporation of the Charter of Fundamental Rights in the European Constitution does not invalidate the accession of the Union to the European Convention on Human Rights. And just as it is all the easier for the States parties to the European Convention on Human Rights to comply with the obligations of that Convention since their internal constitutional law ensures effective protection of fundamental rights, so it will be all the easier for the Union to meet its obligations under the European Convention on Human Rights since it will be endowed with an internal mechanism for the protection of those rights through the incorporation of the Charter of Fundamental Rights in the Constitutional Treaty. For the States as well as for the Union, the undertaking to comply with an international instrument for the protection of human rights does not make it unnecessary to improve this protection in the internal order. On the contrary, such an undertaking encourages the pursuit of such improvement.

The accession of the European Union to the European Convention on Human Rights is a hypothesis that has been explored mainly since 1990, when the European Commission published a communication on this subject. In 1996, in an opinion delivered at the request of the Council of the European Union, the Court of Justice pointed out that such an accession, on account of its "constitutional scope", requires as its legal basis an express provision in the treaties²⁶. The Treaty establishing a Constitution for Europe therefore appropriately sets forth, "The Union shall accede 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". Similarly, the Committee of Ministers of the Council of Europe adopted on 13 May 2004 a Protocol no. 14 amending the European Convention on Human Rights, which provides that the Union can accede to this instrument²⁷. This Protocol is due to become effective in 2005 or 2006, as soon as it has been ratified by all the States parties to the Convention. Although the adoption of Protocol no. 14 has a greater political than legal significance in this respect, since it does not dispense with a subsequent modification of the European Convention on Human Rights defining the practical details of the Union's accession to this instrument²⁸, the conditions have been gradually created to allow the Union – of which the Constitutional Treaty explicitly establishes the international legal status – to accede to the European Convention on Human Rights. This hypothesis sometimes arouses incomprehension or scepticism. The implications of this accession should be considered from three angles.

Firstly, the Union's accession to the European Convention on Human Rights will not lead to any changes in the division of competences between the Union and the Member

²⁶ ECJ, 28 March 1996, Accession by the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94, ECR, p. I-1759.

²⁷ Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Article 17 (amending the existing Article 59 ECHR).

²⁸ See the Explanatory Memorandum to Protocol 14, at para. 101-102 (stating that « further modifications to the Convention will be necessary in order to make such accession possible from a legal and technical point of view (...). As a consequence, a second ratification procedure will be necessary in respect of those further modifications, whether they be included in a new amending protocol or in an accession treaty »).

States²⁹. This division of competences will continue to be governed by European Union law only. It is not up to the European Court of Human Rights, which is the guardian of the European Convention on Human Rights, to rule on this. When the European Court of Human Rights, having received an application claiming a violation of the Convention, establishes the existence of such a violation, it will be up to the Union and the Member States, under the supervision of the Court of Justice, to determine which measures need to be adopted in order to put an end to the violation that has been established, and who – the Union or the Member States – should take action to this effect. Doubts have been expressed about the neutrality of the accession of the Union to the European Convention on Human Rights with respect to the existing division of competences, bearing in mind in particular that the European Court of Human Rights has not hesitated to impose on the contracting Parties the observance not only of obligations of abstention, but also of so-called “positive” obligations, consisting in the obligation to act by adopting certain measures, notably of a legislative nature. In fact, the Union will only be obliged to discharge such “positive” obligations insofar as it has the necessary competences. It is only in the areas where the Member States have conferred competences upon it that, in certain cases, it may be obliged to exercise them in order to ensure an effective protection of the rights and freedoms enshrined in the European Convention on Human Rights. Precisely as the Charter of Fundamental Rights of the Union “does not establish any new power or task for the Union, or modify powers or tasks defined in the other parts of the Constitution” (Article 51(2) of the Charter), so the undertaking by the Union to observe the European Convention on Human Rights does not create any new competences or tasks for it, nor will it affect the existing division of competences between the Union and the Member States.

Secondly, the accession of the European Union to the European Convention on Human Rights will not lead to the subordination of one international organization – the European Union – to another – the Council of Europe, within which the European Convention on Human Rights had been opened for signature; nor will it entail a subordination of the Court of Justice of the European Communities to the European Court of Human Rights. At present, the Court of Justice is particularly anxious to follow the interpretation of the European Court of Human Rights when rights and freedoms enshrined in the European Convention for the Protection of Human Rights are invoked before it. The European Convention has become effectively integrated in the legal order of the Union. The accession will not change this situation. On the contrary, it will offer a useful clarification: it will confirm that, in the interpretation of the European Convention on Human Rights, the European Court of Human Rights will have the final say. This will not in any way prevent the Court of Justice from developing the fundamental rights in its case law, either on the basis of the Charter of Fundamental Rights or on the basis of general legal principles defined in particular in the context of the common constitutional traditions of the Member States. The only restriction on the development of this case law lies in the condition that the minimum threshold which is the European Convention on Human Rights must in any case be observed. This is in fact already the case. The accession of the Union to the European Convention on Human Rights will offer certainty that the Union will be represented as such in the European Court of Human Rights and on the Committee of Ministers of the Council of Europe which oversees the enforcement of the Court’s judgments. This situation will be more satisfactory than the situation that exists today, where the compatibility of acts of the Union with the European Convention on Human Rights is in fact reviewed by the European Court of Human Rights, albeit in an indirect way – since this review takes place through the international responsibility of the Union Member States, who are all contracting parties to the European Convention on Human Rights – and without the Union being represented in any way in the control bodies.

²⁹ See Article 2 of the Protocol (no. 32) concerning Article I-9(2) of the Constitution on the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Heads of State and Government adopted a declaration (no. 2) concerning Article 9(2) of the Treaty establishing a Constitution for Europe, which reads:

The Conference agrees that the Union's accession to the European Convention on the Protection of Human Rights and Fundamental Freedoms should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention.

By mentioning the need to “preserve the specific features of Union law”, the declaration refers to the respect due to the principle of autonomy of Union law³⁰. This principle is derived from the rule according to which the Court of Justice ensures observance of the law in the interpretation and application of the Constitution³¹ as well as from the rule according to which the Member States undertake not to submit a disagreement on the interpretation or application of the Constitution to any other mode of settlement than those provided for by the Constitution³². The Court of Justice saw in those provisions the expression of a general principle, according to which the Court itself must remain the ultimate interpreter of the Constitution of the Union, and more particularly the rules in the Constitution establishing the division of competences between the Union and its Member States. The principle of autonomy of the Union’s legal order consequently rules out that the Court of Justice can be bound by the interpretation which another court of law may give of Union law. Situated according to Opinion 1/91 of 14 December 1991 “at the foundations of the Community”, this principle in fact implies that questions of interpretation and application of Union law cannot be settled according to procedures outside the European Union, but only according to the rules of settlement which the Union itself has instituted³³. Nevertheless, this principle does not exclude all forms of international commitment of the European Union that are placed under the control of an international court outside the Community’s legal order³⁴. In this sense, the wording of the second sentence of the declaration concerning Article 9(2) of the Treaty establishing a Constitution for Europe is unfortunate, since it seems to suggest the – mistaken – idea that the accession of the Union to the European Convention on Human Rights should necessarily involve a regular, even intensified, dialogue between the Court of Justice of the European Union and the European Court of Human Rights, whereas such a dialogue constitutes neither a legal nor a practical condition.

Thirdly, Article 9(2) of the Constitutional Treaty cannot be interpreted *a contrario*: while this provision explicitly provides that the Union shall accede to the European Convention on Human Rights, this does not rule out that, on the basis of other legal foundations, the Union can accede to other international instruments for the protection of human rights³⁵. Such accession may be considered where the conclusion of an agreement is necessary in order to

³⁰ Consequently, when an individual application is filed in accordance with Article 34 of the European Convention on Human Rights against the Union or a Member State, the Party concerned must be identified in accordance with the arrangements defined in Union law, under the ultimate control of the Court of Justice. See Article 1 of the Protocol (no. 32) relating to Article I-9(2) of the Constitution on the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

³¹ Article 220 EC (former article 164 of the EC Treaty); Article I-29(1), par. 1, of the European Constitution.

³² Article 292 EC (former article 219 of the EC Treaty); Article III-375(2) of the European Constitution.

³³ See ECJ, 14 December 1991, Opinion 1/91, ECR, p. I-6079 (“First EEA opinion”); ECJ, 10 April 1992, Opinion 1/92, ECR, p. I-2821 (“Second EEA opinion”).

³⁴ Opinion 1/91, par. 40 (“The Community’s competence in the area of international relations and its authority to enter into international agreements necessarily entails the possibility of submitting to the decisions of a court of law that has been set up or designated by virtue of such agreements for the interpretation and application of their provisions”).

³⁵ See in this respect the Amendments to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), allowing the European Communities to accede, adopted by the Committee of Ministers of the Council of Europe at its 675th meeting of 15 June 1999.

achieve, within the framework of the Union's policies, one of the objectives referred to in the Constitution, or is provided for in a legally binding Union act, or is likely to affect an internal act of the Union³⁶. For example, the Union may accede to international conventions providing for the elimination of racial discrimination (Convention on the Elimination of All Forms of Racial Discrimination (CERD)³⁷), discrimination against women (United Nations Conventions on the Elimination of All Forms of Discrimination against Women (CEDAW)³⁸), promoting and protecting the rights of persons with disabilities or guaranteeing the status of refugees³⁹, insofar as it has already adopted important measures in those areas within the Union. Similarly, the importance of European secondary law in the areas covered by the European Social Charter concluded in Turin in 1961 and the revised European Social Charter of 1996⁴⁰ could justify the accession of the Union to the latter instrument. This is in keeping with a development which not only acknowledges that the Union is a subject in international law, but also infers the international authority of the Union from the range of competences that have been conferred upon it by the Member States and which it has exercised.

2. The Fundamental Rights Agency of the European Union

The conclusions adopted by the Member States' Representatives at the Brussels Council of 12-13 December 2003 call for the creation of a Human Rights 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 Xenophobia⁴¹. This decision has been confirmed by the European Council in the conclusions adopted at its meeting of 4-5 November 2004. At its meeting in Brussels on 16-17 December 2004, the European Council

called for further implementation of the agreement by the representatives of the Member States meeting within the European Council of December 2003 to establish an EU Human Rights Agency which will play a major role in enhancing the coherence and consistency of the EU Human Rights policy⁴².

³⁶ The general rule is that provided by Article III-323 § 1 of the Constitution : « The Union may conclude an agreement 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 referred to in the Constitution, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. ». See also Art. I-13 of the Constitution, which defines areas of exclusive competence of the Union, and provides in § 2 that « The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope ». On this last hypothesis, see the Opinion of the Council Legal Service of 12 February 2004, reacting to the recommendation of the Commission to the Council asking to be authorized to participate in the negotiations for the Convention on Promotion and Protection of the Rights and Dignity of Persons with Disabilities (Communication of the Commission 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", COM(2003) 16 final, of 24.1.2003). The Legal Service of the Council concludes in that contribution that, to the extent that certain rules being negotiated within the United Nations Convention may affect, or even alter the scope of, the Community rules laid down in Council Directive 2000/78/EC or in Directive 95/46/EC 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), only the Community can conclude on these issues, while the Member States remain competent to conclude on all those provisions in the Convention that are not covered by Community legislation.

³⁷ UN Gen. Ass. Res. 2106 A(XX) of 21 December 1965. All the 25 Member States of the EU have ratified this instrument.

³⁸ UN Gen. Ass. Res. 34/180 of 18 December 1979. All the 25 Member States of the EU have ratified this instrument.

³⁹ Geneva Convention on the status of refugees of 28 July 1951 and New York Protocol of 31 January 1967.

⁴⁰ ETS, n° 163.

⁴¹ OJ L 151 of 10.6.1997, p. 1.

⁴² Presidency Conclusions, Brussels European Council of 16-17 December 2004, EU doc. 16238/04, CONCL 4, at para. 70.

In the meantime, the European Commission has published a consultation document on the “Fundamental Rights Agency”. This communication, released on 25 October 2004, has launched a process of dialogue with all interested stakeholders which included the submission of written contributions and a public hearing held on 25 January 2005. The European Commission is expected to make a proposal on the Agency in May 2005. The Human Rights Agency should be established on 1 January 2007, under the new Financial Framework for the period 2007-2013⁴³.

In the view of the author of this report, the establishment of an EU Human Rights Agency should be welcomed as an opportunity to improve the integration of a concern for fundamental rights in the legislation and policies of the Union. According to the wish expressed by the European Council, the Agency should have an essentially coordinating function : it should not substitute itself to the efforts already made in the field of human rights in the Union, but improve the coherence and consistency of those efforts and offer them the institutional and logistical support they sometimes lack, as well as a sound informational basis on which to base the fundamental rights policy of the Union, by the collection and analysis of data relating to the situation of fundamental rights in the Union and, possibly, in third countries with whom the Union has entered into a relationship including a human rights dimension. In particular, close links should be established between the Agency and other relevant actors in the field, which include the European Ombudsman, the future European Gender Institute⁴⁴, the Personal Representative of the Secretary General/High Representative in the area of Common Foreign and Security Policy⁴⁵, and the EU Network of Independent Experts on Fundamental Rights. At this juncture of the public debate launched by the European Commission, and writing prior to the public hearing at the end of January 2005, the author of this report would like to make the following observations concerning the role of the Agency and its potential contribution to improving the coherence and the consistency of the fundamental rights policy of the Union.

2.1. The Mandate of the Agency and the Question of the Legal Basis

Although the Agency will probably not be established before the entry into force of the Constitution, which is planned to occur on 1 November 2006,⁴⁶ the question of its legal basis – and, in relation to the legal basis, the scope of its mandate – should be discussed presently under the existing Treaties. It is essential in the view of the author of this Report that the Agency covers not only areas of Community law, but also Union law, including at least Title VI of the Treaty on the European Union. The reports of the EU Network of independent experts on fundamental rights have illustrated, since 2002, the importance of the human rights dimension being taken fully into account in the establishment of an area of freedom, security and justice, including in the fields of judicial cooperation in criminal matters and of police cooperation. Therefore, the Agency should be established on two combined legal bases⁴⁷.

⁴³ For the proposals of the Commission, see its Communication to the Council and Parliament, Financial Perspectives 2007-2013, COM(2004) 487 final, of 14.7.2004.

⁴⁴ Presidency Conclusions, Brussels European Council of 17-18 June 2004, para. 43. The Commission has adopted a proposal for a Regulation on the Gender Institute (COM(2005)71final of 8.3.2005).

⁴⁵ The Brussels European Council « welcomed the decision to appoint a Personal Representative of the SG/HR on Human Rights in the area of CFSP as a contribution to the coherence and continuity of the EU Human Rights policy, with due regard to the responsibilities of the Commission » (Presidency Conclusions, Brussels European Council of 16-17 December 2004, EU doc. 16238/04, CONCL 4, at para. 52).

⁴⁶ Article IV-447 of the Treaty establishing a Constitution for the Union.

⁴⁷ This is not unusual : see, e.g., Council Decision of 6 December 2001 on the development of the second generation Schengen Information System (SIS II) (886/2001/JHA), OL L 328 of 13.12.2001, p. 1 (adopted pursuant to Articles 30(1)(a) and (b), Articles 31(a) and (b) and Articles 34(2)(c) of the Treaty of the European Union, under Title VI thereof) ; and Council Regulation (EC) No 2424/2001 of 6 December 2001 on the development of the second generation Schengen Information System (SIS II), OL L 328 of 13.12.2001, p. 4 (adopted under Article 66 EC).

First, it should be set up on the basis of Articles 284 EC and/or Article 285 EC, with Article 308 EC. The use of the flexibility clause of Article 308 EC is justified, in the view of this author, insofar as respect for human rights within the Union is a condition for the establishment of a common market referred to in Article 2 EC. The need to ensure the promotion and protection of human rights within the European Union, an objective which may be facilitated by the setting up of the Human Rights Agency, may be presented as necessary to the establishment of an internal market characterized by the abolition between the Member States of obstacles to the free movement of goods, persons, services and capital, since according to the settled case-law of the Court of Justice the Member States may invoke the need to respect the fundamental rights in order to justify certain restrictions on the fundamental freedom of movement recognized by the Treaty of Rome, more particularly the free movement of goods and the free provision of services⁴⁸. It should be remembered in this connection that it is because of the obstacles to the cross-border provision of services that may be presented by the existence of various mechanisms to protect privacy with respect to the processing of personal data that have been adopted 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 data⁴⁹. The Preamble of this Directive sets forth,

“Whereas the establishment and functioning of an internal market in which, in accordance with Article 7a of the Treaty [which after amendment became Article 14 EC], the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded (3rd recital);

and

Whereas the difference in levels of protection of the rights and freedoms of individuals, notably the right to privacy, with regard to the processing of personal data afforded in the Member States may prevent the transmission of such data from the territory of one Member State to that of another Member State; whereas this difference may therefore constitute an obstacle to the pursuit of a number of economic activities at Community level, distort competition and impede authorities in the discharge of their responsibilities under Community law; whereas this difference in levels of protection is due to the existence of a wide variety of national laws, regulations and administrative provisions (7th recital)”.

In a context where, as the report underlines below, the method of mutual recognition is central to the legal strategies that are aimed at both the completion of the internal market and the establishment of a European area of freedom, security and justice, which in return presupposes mutual trust between the national governments, the reasoning that served to found the adoption of a secondary Community law instrument on Article 95 EC (then Article 100 A of the EC Treaty) may justify the connection between the setting up of the Fundamental Rights Agency and the objective of creating a common market, as Article 2 EC stipulates. *The Agency constitutes a means to ensure that the need to protect the fundamental rights in each Member State does not lead to the creation of new obstacles to the internal*

⁴⁸ See for example ECJ, 26 April 1988, *Bond van Adverteerders et al. v. the Netherlands*, 352/85, ECR, p. 2085; ECJ, 25 July 1991, *Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media*, C-288/89, ECR, p. I-4007; ECJ, 25 July 1991, *Commission of the E.C. v. the Netherlands*, C-353/89, ECR, p. I-4069; ECJ, 3 February 1993, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, C-23/93, ECR, p. I-4795; ECJ, 26 June 1997, *Vereinigde Familiapress Zeitungsverlags- und vertiebs GmbH v. Heinrich Bauer Verlag*, C-368/95, ECR, p. I-3689 (par. 18); ECJ, 12 June 2003, *Schmidberger*, C-112/00, ECR, p. I-5659; ECJ, 14 October 2004, *Omega Spielhallen- und Automatenaufstellungs-GmbH*, C-36/02, not yet published in ECR.

⁴⁹ OJ L 281 of 23.11.1995 p. 31.

market, through the coordination of this protection which the establishment of the Agency may facilitate.

Secondly, the Agency should equally be founded on Articles 30(1) and 31 EU, since it will facilitate operational cooperation between the competent national law enforcement authorities and between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions. *Police and judicial cooperation in criminal matters, conducted under Title VI of the Treaty on European Union, presupposes a high degree of mutual trust between the authorities of the Member States. The Agency can help to establish and strengthen this trust by helping to monitor the situation of fundamental rights in the Member States.*

Such a combined legal basis featuring the EC Treaty and the Treaty on European Union is all the more justified with respect to the adoption of two institutional instruments (a Regulation and a Decision) since, according to Article 3 of the latter text, “The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*”. The employment of the proposed legal bases is founded on the idea that the main contribution of the Agency will consist in consolidating the mutual trust between Member States that will have to underlie the establishment of the internal market as well as of a common area of freedom, security and justice. The choice of those legal bases does not foresee the answer that will be given to the question as to whether the Agency should play a part, and if so, which part, in the implementation of Article 7 EU (as reproduced, with modifications, in Article I-59 of the European Constitution).

2.2. The implementation of Article 7 EU (Article I-59 of the European Constitution)

Since the entry into force of the Nice Treaty on 1 February 2003,⁵⁰ Article 7 EU gives the Council the possibility to determine that there exists a clear risk of a serious breach by a Member State of the common values on which the Union is based. This preventive mechanism, provided for in Article 7(1) EU, now complements the possibility of adopting sanctions against a State which, according to the determination made by the Council, has seriously and persistently breached the principles mentioned in Article 6(1) EU.⁵¹ The question whether some assessment of the situation of fundamental rights in the Member States should take place on a systematic or regular basis in the context of this provision, presenting the qualities of non-selectivity between the Member States, objectivity and impartiality, should be distinguished from the question whether this assessment should be done, in part or in whole, by the Agency.

It is clear that – whether in order to address recommendations to the Member State where there exists a clear risk of a serious breach of the values on which the Union is founded, including fundamental rights, or in order to suspend certain rights of that State where it is found to have persistently committed serious breaches of those values – it will be useful for the European Commission, the European Parliament and the Council, when exercising their constitutional functions under Article 7 EU or Article I-59 of the Constitution, to base themselves on assessments made by a body monitoring all the Member States according to the same standards, and whose composition and working methods guarantee the objectivity and impartiality of such an assessment. In the Communication which it presented to the Council and the European Parliament on Article 7 EU “Respect for and promotion of the values on which the Union is based”⁵², the Commission therefore noted that, by its reports, the Network

⁵⁰ OJ C 180, of 10.3.2001.

⁵¹ Article 7(2) to (4) EU (Article I-59 of the Treaty establishing a Constitution for Europe) (“Suspension of certain rights resulting from Union membership”) and, for the implementation of these sanctions in the framework of the EC Treaty, Article 309 EC.

⁵² COM (2003) 606 final, of 15.10.2003.

of independent experts in fundamental rights may help to “detect fundamental rights anomalies or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty”; and that it may “help in finding solutions to remedy confirmed anomalies or to prevent potential breaches”.

In the view of the author of this report, it is crucial that this systematic monitoring continues. When the Commission shall propose, in the Spring of 2005 as it currently intends, a regulation establishing the Agency, it may decide either that such the Agency shall have a role to play as an early warning mechanism under Article 7 EU, or that this would go beyond the appropriate remit of an Agency or the intention expressed by the European Council when it mentions in its conclusions that the Agency should primarily ensure coherence and consistency in the fundamental rights policies of the Union. If the mandate of the Agency does comprise a role under Article 7 EU, it is crucial that the structure of the Agency comprises a group of independent experts, covering all the 25 Member States of the Union to which they should apply the same standards in accordance with the principle of non-selectivity, which will be entrusted with such a monitoring. A specific chapter or provision of the regulation establishing the Agency should define the composition of such a group, how its members shall be nominated, and what its functions will be. It is entirely inappropriate for such a monitoring to be performed on the basis of a contractual relationship with the European Commission, as it currently is on an experimental basis with the EU Network of independent experts on fundamental rights. Alternatively, if the mandate of the Agency does not comprise a role under Article 7 EU, it is essential that this Network be established on an adequate legal basis as a permanent group, in order to ensure that the monitoring it currently performs will not cease to exist.

Indeed, by creating the Agency with a mandate centred on improving the coherence and the consistency of the EU’s fundamental rights policies or on data collection and analysis but without being endowed with a monitoring function – or, even if endowed with such a function, without the capacity to fulfil it in a credible fashion by being assisted with such a group of independent experts –, while not ensuring that the monitoring function currently performed by the Network of independent experts can continue on a permanent basis, the Union would be acting like the United Nations would have acted if, when establishing the UN High Commissioner for Human Rights, it had decided to suspend the monitoring by the expert bodies created under the UN treaties. The establishment of the Human Rights Agency should not lead to weaken the mechanisms which exist currently to monitor fundamental rights within the Union; it should instead strengthen them, especially by improving the follow-up of the findings from such mechanisms, and address in this regard the appropriate recommendations to the Member States and the institutions of the Union⁵³.

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

The question of the relationship of the Agency to the situation of fundamental rights in the Member States should not be reduced to the kind of monitoring Article 7 EU calls for. This provision, as its very wording suggests, only shall enter into play where a breach of the values on which the Union is built is or could become “serious”; it is conceived to be used only in exceptional circumstances. But a monitoring of the situation of fundamental rights in the Member States of the Union is justified for at least three other reasons, which correspond to the three moments of the adoption, the implementation and the application of European legislation:

- First, *the monitoring of the situation of fundamental rights in the Member States is indispensable for an informed exercise by the Union of its competences in the field of*

⁵³ For further developments, see EU Network of independent experts, Position paper on the Human Rights Agency, 16 December 2004 (ref. CFR-CDF.Agency16.12.04.doc).

fundamental rights, in conformity with the principle of subsidiarity. A number of competences have been conferred upon the Union which make it possible for the Union to develop a fundamental rights policy. Although there is no authoritatively agreed list of such competences, almost all of them fall under the residual category⁵⁴ of competences shared between the Member States and the Union. Examples include, in the Treaty establishing a Constitution for Europe, Article III-124 which provides that the Council acting unanimously may adopt a European law or framework law in order to establish the measures needed to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, and that it may, acting by qualified majority, establish basic principles for Union incentive measures and define such incentive measures, and support action taken by Member States in order to contribute to combating discrimination⁵⁵. Article III-125 of the Treaty establishing a Constitution for Europe provides that European laws or framework laws may be adopted in order to facilitate the exercise of the right of every citizen of the Union to move and reside freely and the Constitution. It is on the basis of Article 18 EC, which has inspired Article III-125 of the Constitutional Treaty, that the European Parliament and the Council adopted Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States⁵⁶. Articles III-266 and III-267 provide, respectively, for the development by the Union of a common policy on asylum, subsidiary protection and temporary protection, and for the development of a common immigration policy⁵⁷. It is on these bases that the Council adopted Directive 2003/86/EC of 22 September 2003 on the right to family reunification⁵⁸ and Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers⁵⁹. Article III-270(2) of the Treaty establishing a Constitution for Europe provides that, to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, European framework laws may establish minimum rules which may concern, inter alia, the mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, or the rights of victims of crime. It is on the basis of Article 31 EU, from which Article III-270 is inspired, that the European Commission recently proposed the adoption of a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union⁶⁰.

The competences thus conferred upon the Union may only be exercised in conformity with the principles of subsidiarity and proportionality. But in order to identify in which fields the unilateral action of the Member States would fail to achieve the objective of an area of freedom, security and justice in which human rights are fully respected, and in which an initiative of the Union could better achieve that objective, there is a need to monitor the developments of fundamental rights within the Member States. The exercise by the Union of the competences it shares with the Member States in order to fulfil human rights requires to be guided by information on developments within the Member States, concerning the laws and practices of the Member States and whether such developments risk leading to the

⁵⁴ See Article I-14 of the Treaty establishing a Constitution for Europe.

⁵⁵ This provision corresponds to Article 13 EC, as revised by the Treaty of Nice. It is on the basis of this article that the Council has adopted 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) and 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).

⁵⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77.

⁵⁷ The first of these provisions restates Articles 63, al. 1 and 2, EC, and 64(2) EC; the second provision is a reformulation of Article 63, al. 3 and 4, EC.

⁵⁸ OJ L 251 of 3/10/2003, p. 12.

⁵⁹ OJ L 31 of 6/2/2003, p. 18.

⁶⁰ COM(2004) 328 final, 28.4.2004.

emergence of diverging standards within the Union, which would call for a better coordination.

- Second, *a monitoring of the situation of fundamental rights in the Member States is required at the stage of implementation of European legislation.* When a State implements Union law, it must do so in compliance with the rights codified in the Charter of Fundamental Rights and with the rights recognized as general principles of law, as derived by the European Court of Justice from the European Convention on Human Rights or from the common constitutional traditions of the Member States. Although of course, as the guardian of the obligations of the Member States under the EC Treaty, it is for the European Commission to monitor the implementation of European legislation in national law, it can be assisted in that task by a monitoring focusing principally on the human rights dimension of that implementation, or on the implementation of instruments which are specifically adopted in order to promote fundamental rights. Indeed, as highlighted by the 2004 Report, it is in the implementation by the Member States of European legislation, and especially in the use the Member States can make of certain exceptions provided for in such legislative instruments especially where they establish minimum standards to be respected, that the risks of fundamental rights being violated is highest. This dimension is explained further under section 2 of this Introduction, where the significance of Article III-260 of the Constitution is examined.

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

These are essential functions an adequate monitoring of the situation of fundamental rights in the Member States may serve to fulfil. Although the two latter functions, at the levels of the implementation and application of European legislation, may be performed by the Network of independent experts on fundamental rights in any revised form it will be given after 2006 – or, indeed, by a group of independent experts established within the broader structure of the Agency –, the first function calls for a close cooperation between the body entrusted with monitoring the situation of fundamental rights and identifying the issues on which an initiative of the Union would be opportune and justified under the principle of subsidiarity, and the body entrusted with addressing recommendations to the institutions of the Union on the basis of the findings made in the course of the monitoring. In the view of the author of this Report, it is here that the cooperation between a Network of independent experts on fundamental rights, covering all the Member States and seeking to identify developments on the basis of commonly agreed criteria based on the Charter of Fundamental Rights, on the one hand, and an Agency which would make recommendations based on those comparisons and

on the identification of the best practices in the field, as well as on the consultation of the stakeholders involved, on the other hand, would be most fruitful and welcome.

2.4. *Mainstreaming human rights in the law- and policy-making of the Union*

Although much of the public debate on the Agency will unavoidably focus on its relationship to the Member States, the monitoring of which might be justified either under Article 7 EU or – more routinely – under the three needs identified in the preceding paragraph, the most important added value of the Agency will be in promoting and protecting fundamental rights within the institutions of the Union. At present, the integration of fundamental rights in the law- and policymaking of the Union remains inadequate. Of course, the acts of the institutions of the Union, in most cases, may be the subject of judicial review before the Court of First Instance or the European Court of Justice, which seek to ensure that they do not infringe upon fundamental rights, which are part of the general principles of Union law. However, this remains an exclusively *post hoc* form of control. It is reactive and remedial in nature rather than proactive and preventive. Its effectiveness depends on the use which is made of the remedies available before the European courts, which in certain respects remains insufficient today, and will continue to present lacunae after the adoption of the European Constitution⁶¹.

Moreover, although acts adopted by the institutions of the Union may be found invalid or annulled where they violate fundamental rights, the judicial protection of fundamental rights does not adequately ensure that the institutions will be alerted where a failure to take action entails risks for the level of protection of fundamental rights. As emphasized in the 2004 Report, this problem is especially present in areas such as the protection of certain fundamental social rights of workers⁶² or certain aspects of asylum⁶³, where only instruments establishing minimum requirements may be adopted at the level of the Union. In this case, the failure to opt for a high level of protection of fundamental rights in the definition of the instrument adopted at the level of the Union leaves open the risk of a drive to the bottom in the implementing measures adopted by the Member States, a tendency against which it would be necessary, for an adequate protection of fundamental rights in the Union, to react⁶⁴.

A certain form of integration of a concern for fundamental rights *ex ante* has been emerging recently, as a consequence of the adoption of the EU Charter of Fundamental Rights. Since March 2001, the services of the European Commission are required to accompany all their legislative proposals which could have an impact on fundamental rights with an indication that these proposals are compatible with the requirements of the Charter.⁶⁵ At present, an evaluation of the impact on fundamental rights is part of the general impact assessment imposed for all major initiatives adopted by the Commission, i.e., those which are presented either in the Annual Policy Strategy of the Commission or those which are included in the Work Programme of the Commission⁶⁶; a review of the fundamental rights impact assessment methods is currently being made. On certain occasions, the EU Network of independent experts on fundamental rights has been requested to formulate an opinion as to the impact on the fundamental rights recognized in the Charter of certain legislative proposals envisaged by the European Commission.

⁶¹ See this report, commentary of Article 47 of the Charter.

⁶² See Art. 137(2) al. 1, b), EC, as amended by the Treaty of Nice, defining the nature of the directives which may be adopted in the areas identified in Article 137(1), a) to i), EC.

⁶³ Art. 63(1), b) to d) and (2), a), EC.

⁶⁴ See, in the present report, the commentaries under Article 31 of the Charter (Fair and just working conditions) and Article 18 of the Charter (Right to asylum).

⁶⁵ Memorandum of M. Vitorino and the Presidency: Application of the Charter of Fundamental Rights, SEC(2001) 380/3 (“any proposal for legislation and any draft instrument to be adopted by the Commission will (...), as part of the normal decision-making procedures, first be scrutinised for compatibility with the Charter”).

⁶⁶ Communication from the Commission, « Impact Assessment », COM(2002) 276 final of 5.6.2002.

These initiatives remain unsystematic, and their results unsatisfactory. The impact assessments prepared alongside the proposals of the Commission are performed by each service of the Commission responsible for the proposal, rather than centrally, by an expert body specialized in the area of fundamental rights, and capable of developing in time an adequate understanding of the requirements of the Charter of Fundamental Rights. Although this could be defended as a means to ensure that all the services of the Commission take into account fundamental rights and include them within their administrative culture, this produces five negative consequences which seem to call for a serious revision of the current mode of mainstreaming fundamental rights:

- First, certain impacts on fundamental rights of proposals made remain unseen or insufficiently explored. It requires expertise in fundamental rights to identify in the first place which problems might be created by any policy initiative or legislative proposal. Leaving it to each service responsible to determine which problems might emerge creates the risk that certain impacts on fundamental rights will simply not be identified, let alone lead to the revision of the policy or proposal or to the adoption of mitigating measures. It is astonishing, for example, that in the Extended impact assessment of the proposal for a Directive on services in the internal market⁶⁷, nothing is said on the impact the adoption of such a proposal could have on the capacity for the Member States to adequately protect the health of their populations in an environment where health care providers will benefit from the country of origin principle if they provide services in Member States other than their state of origin, and will establish themselves more easily in other Member States thanks to a more hospitable legal environment. Neither does the extended impact assessment of this proposal examine the risks entailed for the protection of the rights of workers of the country of origin principle in the context of a provision of services from one State to another implying a posting of workers. But serious and well-documented critiques have been addressed to the proposal for a Directive on services in the internal market on both grounds. A searching examination of the impact of the proposal on Articles 31 (Fair and just working conditions) and 35 (Protection of health) of the Charter of Fundamental Rights could have been expected, although neither of these provisions are even cited, let alone discussed, either in the Extended impact assessment or in the Preamble of the proposal. An examination of these dimensions of the proposal would have significantly contributed to the public debate launched by its presentation.

- Second, by integrating a fundamental rights impact assessment within the practice of impact assessments in general rather than keeping the verification of compatibility with the Charter a separate exercise, confusion is made between the assessment of the impact on fundamental rights of certain proposals and the verification of the compatibility with fundamental rights of these proposals. But these are two very different exercises. Where a proposal impacts negatively on certain fundamental rights, this may or may not imply a violation of these rights, depending on the justifications which may be put forward in favour of the proposal despite this impact. It may occur that the negative impact on a fundamental right is largely compensated, in the view of the policy-maker putting forward a proposal, by the advantages presented by the proposal, although in fact, the proposal actually does lead to that right being violated. Conversely, despite the fact that they would not lead to violations of fundamental rights, certain proposals may gain by being revised in order to minimize the negative consequences they produce on the enjoyment of certain rights by the individuals or on the capacity for the public authorities, especially the national administrations of the Member States, to realize them. These are two distinct examinations. Neither may be seen as the substitute for the other. It is highly desirable that the fundamental rights impact assessments as currently practiced continue to take place, as they may lead to the adoption of proposals more fully informed of all their potential impacts. It would be regrettable however if this were to be seen to dispense from an examination of the compatibility with the Charter of Fundamental Rights of the proposal, according to procedures adequate for that purpose.

⁶⁷ SEC(2004) 21, 13.1.2004.

- Third, in a fundamental rights impact analysis performed by each individual service which is the author of the proposal concerned, coordination problems on cross-sectoral issues may be insufficiently addressed, if even they are seen at all. It cannot be presumed that each service will be able to anticipate all the issues potentially raised by any single proposal, when these exceed its field of expertise. But in order to evaluate the impact of any proposal on fundamental rights, the full range of consequences must be well identified, including those which are dealt with mainly by other departments. For instance, measures relating to the establishment of the internal market may profoundly impact the integration of persons with disabilities, the protection of health, or the protection of the environment, all dimensions which should lead to an analysis under the angle of the fundamental rights of the Charter.
- Fourth, an examination of the impact on fundamental rights of a policy initiative or a legislative proposal prepared within a particular service of the Commission by that service may lead to a biased examination of such initiative or proposal. In effect, the author of the proposal is asked to self-examine that proposal. But quite naturally, he or she will be reluctant to dramatically change its course, or even remove the proposal from the agenda, even where serious difficulties appear to exist with respect to the compatibility with fundamental rights of the proposal. Rather, the tendency will be to defend that proposal, by relativizing the strength of the possible objections, or to reformulate such objections so that they may be more easily circumvented. Thus, when considered for their fundamental rights component, impact assessments appear to the observer as mostly self-justificatory, and far removed from a well reasoned refutation of fully elaborated arguments. This serves neither the quality of law-making nor, especially, the protection of fundamental rights. This should not be read as a critique of the services involved in preparing proposals within the Commission, nor of course of any service in particular. It is simply a sociological fact that the verification of the compatibility of any proposal with the requirements of fundamental rights will be more thorough if done externally, by another body than the service responsible for the proposal, than within that very service.
- Fifth, verifying the compatibility with the Charter of Fundamental Rights of any proposal requires an interpretation of the Charter. The articles of the Charter are not self-explanatory. Instead, their full implications require knowledge of the sources they draw upon, which include not only primary and secondary Union law, but also international and European human rights instruments and the case-law of the bodies interpreting them. The current attempts seeking to improve the practice of fundamental rights impact assessments are welcome and, indeed, necessary; they should not lead to underestimate the imperative of understanding the requirements of the Charter of Fundamental Rights by taking into account the important *acquis* of fundamental rights in the Union, which developments in the international and European legal environment require to constantly update and refine.

It is to be hoped that the establishment of a Human Rights Agency for the Union shall be seen also as an opportunity both to improve the current process of fundamental rights impact assessment, and to redefine the distinction between this process and the *ex ante* examination of the compatibility with the requirements of the Charter of the policy and legislative proposals put forward by the Commission. The Agency can make an important contribution to the quality of fundamental rights impact assessments by drawing the attention of the services of the Commission to certain aspects of their proposals they may have ignored or the importance of which they may have underestimated, by encouraging a more transversal approach reducing the risk of coordination problems, and by identifying the relevant stakeholders in the human rights community, where it appears that external consultations

should take place in the context of the extended impact assessment⁶⁸. As to the evaluation of the compatibility of any proposal with the requirements of the Charter, it is a task which requires a legal expertise, performed by a body sufficiently independent from the policy-makers to offer an objective and impartial evaluation of its proposals, and the establishment of which can offer a major contribution to the quality of the policy- and lawmaking within the Union. Whether this evaluation should take place within the structure of the Agency, for instance by the establishment within the Agency of a committee of independent experts on fundamental rights, or remain outside that structure, still remains to be seen. But if the requirement is to be taken seriously that “any proposal for legislation and any draft instrument to be adopted by the Commission (...) first be scrutinised for compatibility with the Charter”, as announced in the Communication of 13 March 2001, this must be given a concrete institutional translation which, for the moment, still is lacking. In fact, a number of difficulties the initiatives of the institutions of the Union examined in this Report appear to create for the protection of fundamental rights could have been easily avoided by a better monitoring *ex ante* on the basis of the Charter, through the consultation of a body of legal experts equipped to offer an evaluation of the compatibility with the Charter of these initiatives, and whose appreciations could have led to the presentation of improved proposals, much less vulnerable to criticism for their alleged impact on the rights protected by the Charter. This would have represented a gain both from the point of view of fundamental rights, and from the point of view of legal certainty.

II. MUTUAL EVALUATION AS A COMPLEMENT TO MUTUAL CONFIDENCE

This report has recalled that, in an enlarged and more diverse Union, mutual recognition was becoming an essential tool both for the progressive establishment of an area of freedom, security and justice, and for the completion of the internal market. It insisted however that the mutual confidence which such mutual recognition presupposes should be complemented by safeguard clauses, and that such clauses should be based on adequate mechanisms of mutual evaluation.

1. Mutual evaluation in the Area of Freedom, Security and Justice

This development is most visible in the construction of the area of freedom, security and justice. When the Treaty establishing a Constitution for Europe will enter into force, it will contain a clause systematizing current evaluation mechanisms laid down in discrete instruments.⁶⁹ According to Article III-260 of the Constitution:

the Council may, on a proposal from the Commission, adopt European regulations or decisions laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the

⁶⁸ Communication from the Commission, « Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission », COM(2002) 704 final, of 11.12.2002.

⁶⁹ 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 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.

implementation of the Union policies referred to in this Chapter [Chapter IV, Area of Freedom, Security and Justice, in Part III of the Constitution] by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

Insofar as possible, such a mechanism ensuring the "impartial and objective" character of the evaluation should present the following characteristics:

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

Finally, despite the apparently more restrictive wording of Article III-260 of the Constitution, such evaluation should concern not only the "implementation of the Union policies" referred to in Chapter IV (Area of Freedom, Security and Justice) of Part III of the Constitution, but should also concern the general context in which those policies – and the legislative instruments which these policies lead to – are to be applied. For example, although the Union has adopted no specific instrument on the measures to be taken by the Member States to combat delays in judicial proceedings, it is clear that in certain Member States, the situation can become such as to question the mutual trust on which judicial cooperation is based, either in civil or in criminal matters. Similarly, even in the absence of any instrument of the Union relating to the situation in prisons, for example in order to combat prison overpopulation or to improve unacceptable conditions of detention, it is useful to monitor these situations in the Member States, for instance because the full implementation of the European arrest warrant cannot ignore the justifiable reluctance certain Member States may have to cooperate with other States where these situations are not being remedied in conformity with the requirements of the European Convention on Human Rights and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatments or Punishments.

For this reason, it may be justified to consider combining the setting up of an evaluation mechanism as envisaged under Article III-260 of the Constitution in the context of the establishment of an Area of Freedom, Security and Justice with the improvement of the mechanism provided for under Article 7 EU, which is retained in slightly revised form in Article I-59 of the Constitution (Suspension of certain rights resulting from Union membership).

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"⁷⁰ notes that, by its reports, the Network of independent experts in fundamental rights may help to "detect fundamental rights anomalies

⁷⁰ COM (2003) 606 final, of 15.10.2003.

or situations where there might be breaches or the risk of breaches of these rights falling within Article 7 of the Union Treaty”; and that it may “help in finding solutions to remedy confirmed anomalies or to prevent potential breaches”. Consideration should be given to the possibility of building on the current organisation of the Network of independent experts on fundamental rights in order both to implement Article III-260 of the Constitution, and to encourage a non-selective, objective and impartial evaluation of the situation of fundamental rights in the Member States of the Union in order to facilitate the exercise by the institutions of the Union of the functions assigned to them by Article I-59 of the Constitution. Indeed, this is already the direction indicated by the proposal of the Commission for a Framework decision on certain procedural rights in criminal proceedings throughout the European Union, which could signal the beginning of a systematization of this form of monitoring. In the extended Impact Assessment of the proposal of the Commission on this instrument, the Commission calls for

a regular monitoring exercise on compliance. This should be on the basis of Member States themselves submitting data or statistics compiled by their national authorities and submitted to be collated and analysed by the Commission. The Commission could use the services of independent experts to analyse the data and assist with the drawing up of reports. One possible team of independent experts is the EU Network of Independent Experts on Fundamental Rights.⁷¹

Such a monitoring could lead either to informal consultations between the Member States, or to recommendations being addressed to the Member State where certain difficulties have been identified which could threaten mutual confidence, or even, in most extreme cases, to the application of certain safeguard clauses such as those provided with respect to the new Member States until 1 May 2007 by Article 39 of the Act annexed to the Treaty between the Member States of the European Union and the new Member States providing for their accession to the European Union⁷² or by specific clauses in different instruments adopted for the establishment of an area of justice, freedom and security. For example, it can be inferred from Article 1(3) of the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States⁷³ that the surrender of a person cannot take place if this person runs a serious and proven risk of being subjected to inhuman or degrading treatment or punishment in the Member State issuing the warrant⁷⁴. The application of this safeguard clause by the Member States – the role of which was highlighted by the 2004 Report – could be facilitated, and the risks of instrumentalization reduced, by setting up an objective and impartial monitoring system of the situation of fundamental rights in the Member States of the Union, which could identify where such risks may be arguably said to exist, and where, therefore, the refusal to execute the European arrest warrant would be justified.

2. Mutual evaluation in the establishment of an internal market

Articles 47(2) EC and 55 EC allow the Council to adopt directives for the coordination of the

⁷¹ SEC(2004) 491, of 28.4.2004, p. 22.

⁷² The Act of Accession of the new Member States to the Union, signed in Athens on 16 April 2003, contains a safeguard clause in the areas of justice and home affairs (Article 39). This clause provides that the Commission may – until 1 May 2007 – take “appropriate measures”, including in particular temporary suspension of the application of provisions and decisions organising the mutual recognition in the criminal field (Title VI EU) or in the civil field (Title IV of the 3d part of the EC Treaty), where “there are serious shortcomings or any imminent risks of such shortcomings in the transposition, state of implementation, or the application of the framework decisions or any other relevant commitments, instruments of cooperation and decisions” in those fields. The Commission may act upon its own motion, or upon motivation request of a Member State. Before acting, the Commission consults the Member States. The measures are maintained only as long as the shortcomings persist, but where they are not remedied, they may continue beyond the 1 May 2007.

⁷³ 2002/584/JAH, OJ L 190 of 18.7.2002.

⁷⁴ See also recitals 12 and 13 of the Preamble.

provisions laid down by law, regulation or administrative action in the Member States concerning the taking up and pursuit of activities as self-employed persons, including in the area of services. The European Commission proposed on that legal basis⁷⁵ the adoption of a directive concerning services in the internal market, aimed at clarifying the legal framework governing the establishment of service providers and the free movement of services, namely the cross-border provision of services⁷⁶. This proposal essentially sets out to establish in a legislative instrument the case law of the Court of Justice regarding the extent of those freedoms and the limitations which the Member States may impose on them. At the same time, it aims to speed up the completion of the internal market of services by employing a variety of techniques. With respect to the free establishment of service providers, the proposed directive would require the Member States not only to abolish certain requirements restricting the free establishment of service providers that are incompatible with the rules of the Treaty of Rome, but also to evaluate certain requirements in order to verify whether they are compatible with the criteria set forth by the Court; with respect to the free movement of services, the directive sets out to establish the principle of “country of origin”, according to which the Member States acknowledge that service providers are subject only to the national regulations of their Member State of origin concerning the taking up and pursuit of service activities, although a set of exceptions to the principle in question are provided.

The proposal for a directive on services in the internal market provided the opportunity for a major debate within the Union on the compatibility with certain values recognized by the Charter of Fundamental Rights of the establishment of the internal market according to the techniques set forth in the proposal for a directive. It will therefore, in the context of the present report, call for specific observations that will be made under the relevant provisions of the Charter of Fundamental Rights. We will examine under Article 31 of the Charter (Fair and just working conditions) the connection between the proposed directive and the posting of workers from one Member State to another in the framework of the provision of services, which has already been addressed by Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996⁷⁷. The question of access to health care – hospital and non-hospital – offered in another Member State than that of the patient, and the conditions to which the Member State of residence may subject the reimbursement of health care provided in another country will be examined under Article 35 of the Charter (Health care), although it may also be justified to examine this issue from the angle of Article 34 (Social security and social assistance). The impact which the proposed directive may have on the possibility for Member States to organize, regulate or finance services of general economic interest on their territory will be examined under Article 36 of the Charter (Access to services of general economic interest). Finally, the report looks at the possible impact of the directive concerning services in the internal market on consumer protection under Article 38 of the Charter, which addresses this issue. In the introduction to the present report, we will restrict ourselves to general observations that do not address those more specific questions which the debates in 2004 put in the spotlight.

2.1. The place of fundamental rights in the construction of the internal market

A first observation concerns the status of the fundamental rights recognized in the legal order of the European Union and the resulting consequences for the free provision of services. The fundamental rights featured among the general principles of Union law⁷⁸ not only constitute restrictions on the freedom which Member States have in the implementation of Union law.

⁷⁵ As well as on the basis of Articles 71 and 80(2) EC in the transport sector.

⁷⁶ Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM(2004) 2 final, of 13.1.2004.

⁷⁷ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18 of 21.1.1997, p. 1.

⁷⁸ These are not limited to the rights set out in the partial codification thereof by the Charter of Fundamental Rights, as has been underlined above.

The Court of Justice also acknowledges that they may serve to justify certain restrictions on the so-called “fundamental” freedoms of movement that are recognized by the Treaty of Rome where such restrictions may be justified by the concern of Member States to ensure their protection and to promote them. This concerns in particular the permissible restrictions on the free movement of goods⁷⁹ and on the free provision of services⁸⁰. The *2004 Report* insisted in this regard on the significance of the *Schmidberger* judgment of 12 June 2003, in which the European Court of Justice was led to balance the fundamental rights of expression and assembly, as recognized in Articles 10 and 11 of the European Convention on Human Rights, with the fundamental freedom of movement of goods under Articles 28 and 29 of the EC Treaty⁸¹. In the year under scrutiny, the judgment delivered by the European Court of Justice in the case of *Omega* perfectly illustrates this position fundamental rights occupy in the legal order of the Union⁸².

In *Omega*, the *Bundesverwaltungsgericht* (German Federal Administrative Court) requested from the Court an interpretation of Articles 49 to 55 EC on the freedom to provide services and Articles 28 to 30 EC on the free movement of goods⁸³. In the case pending before the German jurisdictions which led to the referral, *Omega* challenged a prohibition order issued against it by the Bonn police authority forbidding it from allowing in its « laserdrome » games with the object of firing on human targets using a laser beam or other technical devices. Although the prohibition order was based on the asserted need to protect the public order and, according to the *Bundesverwaltungsgericht*, could be justified by the need to protect human dignity, a concept established in Paragraph 1(1) of the German Basic (Constitutional) Law, *Omega* considered that it resulted in a violation of the free provision of services and the free movement of goods guaranteed under the EC Treaty, as the equipment it used was supplied by the British company Pulsar International Ltd. The Court reasoned however that the need to protect human dignity could be considered to justify a restriction to the freedom to provide services, under Article 46 EC in combination with Article 55 EC⁸⁴. It recalled that « the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right » (para. 34). Citing *Schmidberger*, it noted in para. 35:

Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services.

For the protection of a fundamental right to justify a restriction on the freedom to provide services, two conditions are to be satisfied. First, it is required that the fundamental right is not solely a creation of national law, whether constitutional or legislative, but is recognized as a general principle of Union law. In order to identify such rights figuring among the general

⁷⁹ See ECJ, 26 June 1997, *Familiapress*, C-368/95, *ECR*, p. I-3689 (par. 24).

⁸⁰ See ECJ, 25 July 1991, *Commission v. the Netherlands*, 353/89, *ECR*, p. 4089 (par. 30); ECJ, 25 July 1991, *Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media*, 148/91, *ECR*, p. 513 (par. 9 and 10).

⁸¹ ECJ, 12 June 2003, *Schmidberger*, C-112/00, *ECR* I-5659.

⁸² Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH*, nyr (judgment of 14 October 2004).

⁸³ Although the request for a preliminary ruling referred to both of these fundamental freedoms recognized under the EC Treaty, the European Court of Justice considered, in accordance with its settled case-law, to examine the compatibility of the restriction imposed by a national measure only with respect to the freedom to provide services, as the free movement of goods was clearly secondary in the circumstances of the case (see, for a similar reasoning in another important judgment decided during the year under scrutiny, Case C-71/02, *Karner*[2004] *ECR* I-0000, paragraph 46).

⁸⁴ Article 46 EC, which applies to the provision of services by virtue of Article 55 EC, allows restrictions justified for reasons of public policy, public security or public health.

principles of Union law, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. Although, according to the settled case-law of the Court, the European Convention on Human Rights and Fundamental Freedoms has special significance in that respect, the Court may take into account other international instruments than the Convention ; moreover, as already emphasized in this report, although the Charter of Fundamental Rights constitutes a clear indication that the rights formulated therein have the status of rights recognized as general principles of Union law, the Charter does not limit the possibility of identifying through the case-law other rights with similar status. Finally, although the fundamental right invoked by the national authorities in order to justify a restriction being imposed to a fundamental freedom guaranteed by the EC Treaty must be recognized as belonging to the general principles of Union law, it is « not indispensable (...) for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected » (para. 37). For instance, the German authorities in *Omega* could rely on their own understanding of the requirements of human dignity, even though this understanding may not be shared by the United Kingdom or even by any other Member State⁸⁵.

Second, under the judgment delivered on 14 October 2004 in the case of *Omega*, « measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures » (para. 36). This formulation may appear more restrictive than the formulation adopted a year earlier in *Schmidberger*, where the Court instead balanced the need for the Austrian authorities to protect freedom of expression and of assembly as guaranteed under Article 10 and 11 ECHR against the free movement of goods guaranteed under the EC Treaty, without presenting the former as the exception, justifying a narrow interpretation of the margin of appreciation left to the Member States, to the rule laid down by the EC Treaty. It is doubtful whether this difference in both approaches is deliberate: rather, it appears to result from the fact that, in *Omega*, the need to allow the German authorities to protect human dignity was based on Article 46 EC made applicable to the freedom to provide services by Article 55 EC, which places that authorisation in the technical position of an exception. But such detour by these provisions of the EC Treaty is not necessary where the Member State seeks to justify restrictions to the free provision of services by the need to protect fundamental rights. As general principles of law the respect for which is ensured by the European Court of Justice, fundamental rights occupy the same rank in the Union legal order as the fundamental freedoms of movement recognized by the Treaty, a situation which will only be confirmed, and not modified, by the integration of the Charter in the Constitution.⁸⁶

The relationship of this case-law to the proposal for a Directive on the services in the internal

⁸⁵ Once the Constitution has come into force, account will have to be taken in this process of the Charter of Fundamental Rights, which specifies in this connection, “Insofar as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions”. According to the explanations relating to the Charter of Fundamental rights, “rather than following a rigid approach of ‘a lowest common denominator’, the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions”.

⁸⁶ In her opinion preceding the *Omega* judgment, Advocate-General Stix-Hackl notes that the fundamental rights recognized in the legal order of the Union “are to be considered part of its primary legislation and therefore rank in hierarchy at the same level as other primary legislation, particularly fundamental freedoms [of movement]” (paragraph 49 of the Opinion delivered on 18 March 2004). This is also a necessary implication of the *Schmidberger* judgment of 12 June 2003, in which the Court referred to “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” (par. 77).

market should be clear. With respect to the free movement of services, the main provision of the proposed text is the « country of origin principle » according to which « Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field » (Article 16 § 1). The reasoning behind the affirmation of this principle is that, in order to ensure that no unjustified barriers will affect the freedom to provide services, « the Member States should refrain from applying their own rules and regulations to incoming services from other Member States and from supervising and controlling them. Instead they should rely on control by the authorities in the country of origin of the service provider »⁸⁷. However, among the derogations provided from the country of origin principle by Article 17 of the proposal, are « services which, in the Member State to which the provider moves in order to provide his service, are prohibited when this prohibition is justified by reasons relating to public policy, public security or public health ».⁸⁸ This stipulation⁸⁹ implies that the proposed Directive will not limit the margin of appreciation currently recognized to the Member States under Article 46 § 1 EC, as made applicable to the provision of services by Article 55 EC.

It is important to emphasize that, under the case-law of the European Court of Justice, the need to protect fundamental rights recognized under the general principles of Union law constitutes a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, in the formulation used by the Court in *Omega*. At the very least, the Recital of the Preamble corresponding to this derogation to the country of origin principle should restate so clearly, without limiting itself to the protection of human dignity, but instead by referring to the all the rights recognized under the Charter of Fundamental Rights or otherwise considered as general principles of Union law by the European Court of Justice.⁹⁰ This would avoid any risk that the specific mention of the protection of human dignity in the Preamble of the Directive corresponding to this (16th) derogation from the country of origin principle will be read *a contrario*, as restricting the admissible restrictions to the free movement of services which, under the current case-law of the European Court of Justice, could be justified as necessary for the protection of fundamental rights recognized as general principles of law. It would be preferable however, again for the sake of clarity, and without this constituting a modification of the content of the proposed Directive, to indicate in Article 17 that the country of origin principle shall not apply to services which, in the Member State to which the provider moves in order to provide his service, are prohibited when this prohibition is justified by the need to protect fundamental rights recognized in the Charter of Fundamental Rights or recognized as general principles of law in the Union legal order.

⁸⁷ Commission Staff Working Paper, Extended Impact Assessment of Proposal for a Directive on Services in the Internal Market, SEC(2004) 21, 13.1.2004, at pp. 24-25.

⁸⁸ In the text of the proposed Directive as reformulated and clarified by the Dutch Presidency of the Council for the Working Party on competitiveness and growth (services), Working document n°1 for the meeting of 16 November 2004 (General Secretariat of the Council, DG C I), 15 November 2004).

⁸⁹ Another derogation from the country of origin principle concerns « specific requirements of the Member State to which the provider moves, that are directly linked to the particular characteristics of the place where the service is provided, or to the particular risk created by the service at the place where the service is provided, and with which compliance is indispensable for reasons of public policy or public security or for the protection of public health or the environment ». This derogation has a more limited potential scope of application and will therefore not be addressed in this report.

⁹⁰ As reformulated, Recital 43 of the Preamble to the Directive would state that this clause seeks to provide for « derogation from the country of origin principle in the case of services which are prohibited in the Member State to which a provider has moved, if that prohibition is objectively justified by reasons relating to public policy, public security or public health, *including for reasons relating to the protection of human dignity*. This derogation also covers cases where services are prohibited but are allowed under certain specific circumstances (...) ». The passage highlighted in this Recital should be replaced by a broader expression, such as « including for reasons relating to the protection of fundamental rights recognized as a general principle of law in accordance with the case-law of the European Court of Justice » in order to conform fully with this case-law.

2.2. Measures accompanying mutual confidence

As clearly recognized by the Extended Impact Assessment which was prepared on the proposal for a Directive on services in the internal market, the country of origin principle which shall govern, under the Directive, the free provision of services across Member States, implies « that Member States must have trust and confidence in each other's legal systems and control measures »⁹¹. Therefore the proposed Directive includes certain measures the purpose of which is to reinforce mutual trust by ensuring to the Member State where the service is provided that the country of origin, where the service provider is established, will adequately supervise the provider and the quality of his service.⁹²

Although the measures seeking specifically to protect consumers shall be examined in this report under Article 38 of the Charter, it is useful here to comment on the modalities of the cooperation between the country of origin of the service provision and the Member State where the service is provided, as well as on the mutual evaluation contained in the proposed Directive.

As organized by chapter V of the proposed Directive (Supervision), the administrative cooperation between the state of origin of the service provider and the state where the service is provided serves a dual function. It not only seeks to ensure that, by an adequate and more rational division of tasks between the national authorities concerned, duplication of controls will be avoided, and the legal framework be clarified for the service provided. It also should ensure that the control on the service provider will be more effective, and that he will not benefit from the lack of communication or cooperation between the national authorities of the states concerned.

In order to establish effective administrative cooperation between the state of origin and the state of destination, the proposed directive provides that each state shall designate one or more points of contact, and shall provide themselves mutual assistance. In particular, the state of origin shall supply the information requested by a Member State or the Commission within the shortest possible period of time, especially information confirming that a service provider is established in its territory and exercising his activities in a lawful manner ; and, upon getting knowledge of any unlawful conduct by a provider who is likely to provide services in other Member States, or of specific acts, that could cause serious damage to the health or safety of persons, Member States shall inform all other Member States and the Commission within the shortest possible period of time (Article 35). The Member State where services are provided in turn shall inform the state of origin upon getting knowledge of any unlawful conduct by a provider, or of specific acts, that are likely to cause serious damage in a Member State (Article 35 § 3, al. 2); and its national authorities shall carry out any checks, inspections and investigations necessary for ensuring effective supervision by the Member State of origin (Article 36 § 2). Specific obligations of mutual assistance are provided where the State of destination intends to rely on Article 19 of the proposed Directive in order to impose a case-to-case derogation from the country of origin principle in specific situations (Article 37).

The proposal for a Directive contains a Chapter VI on the "Convergence programme" that should accompany the assertion of the country of origin principle in the free movement of services. This programme encourages the adoption of codes of conduct at Community level in order to foster the convergence of rules of professional ethics governing the practice of regulated professions as well as the content of and detailed rules for commercial

⁹¹ Commission Staff Working Paper, Extended Impact Assessment of Proposal for a Directive on Services in the Internal Market, SEC(2004) 21, 13.1.2004, at pp. 24-25.

⁹² Thus, Article 34 of the proposed Directive mentions that, with regard to the items covered by the country of origin principle, « Member States shall ensure that the powers of monitoring and supervision provided for in national law in respect of the provider and the activities concerned are also exercised where a service is provided in another Member State ».

communications, and the conditions governing the activities of estate agents. Member States must encourage the implementation at national level of the codes of conduct adopted at Community level (Article 39). It also provides for the possibility of additional harmonization, involving assessment by the Commission of the need to take certain initiatives or to propose certain instruments where this proves necessary to ensure the proper functioning of the internal market (Articles 40 to 43). Such a need shall be identified on the basis of an examination of four series of matters: matters which, having been the subject of case-by-case derogations, have indicated the need for harmonization at Community level; matters relating to the rules of professional ethics governing regulated professions that have not been settled in a satisfactory manner by the adoption of codes of conduct at Community level; matters identified through a mutual evaluation procedure, involving the presentation of reports by Member States on certain aspects of the implementation of the Directive, more particularly on the results of the evaluation of certain requirements restricting the freedom of establishment of service providers, those reports giving rise to observations from other Member States and to a summary report prepared by the Commission (assisted by a committee consisting of representatives of the Member States) which may contain additional proposals; finally, matters concerning consumer protection and cross-border contracts. Article 43 provides that every three years following the presentation of the first summary report on 31 December 2008, the Commission shall present “a report on the application of the (...) Directive, accompanied, where appropriate, by proposals for its amendment”.

This convergence programme, which comprises a mechanism for mutual evaluation and for the examination of the matters requiring an additional harmonization of certain aspects of the free establishment of service providers and the free movement of services, is a key element in the search for an appropriate balance between the free provision of services in the Union and the respect for fundamental rights. In particular, in the absence of a “convergence programme” as initially proposed by the Commission, the restrictions imposed by Member States on the free provision of services from another Member State, even where they are based on the need to ensure the protection of fundamental rights in the Member State of destination according to its own conception of those rights, would be interpreted as exceptions to the country of origin principle, which would only be admitted in strict conditions under the control of the Court of Justice. Moreover, in such a system we would remain dependent on how each Member State claims to define the requirements resulting from the fundamental rights on its territory. This would not only entail a risk that the fundamental rights will be instrumentalized for protectionist purposes that are unacceptable under the rules of the internal market. It would conversely also entail the risk that the States will be gradually induced to restrict the progress being made in the realization of the fundamental rights on their territory, while being unable to prove the necessity and the proportionality of the restrictions that this may justify on the free provision of services from another Member State. It should be emphasized that the fundamental rights are not only limits which the State must observe, and of which the substance has been defined once and for all. The fundamental rights are also values which the State must progressively realize in a dynamic perspective. In the absence of a dynamic convergence programme, the progress made in the area of fundamental rights runs the risk of being slowed down in the Member States of the Union, and any unilateral initiative they might wish to take in this respect in non-harmonized areas would at once seem suspect in regard to the free establishment of a service provider and the country of origin principle in connection with the free movement of services.

On the contrary, the system being proposed implies that an additional harmonization, the necessity of which will have been revealed by the process of mutual evaluation suggested by the Commission in its proposal, could lead the Commission to propose instruments aimed at fostering a high level of protection of fundamental rights in the internal market. This is essential, given the justified fears that have been expressed in connection with the proposal for a directive concerning services in the internal market. There is a risk that the adoption of this directive will encourage Member States to be drawn into a spiral of competitive

deregulation in the area of services, bearing in mind the fact that their national regulatory systems will be placed in direct competition as the directive seeks to achieve. From this point of view, the convergence programme provided for by Chapter VI of the proposal for a directive concerning services in the internal market is an essential tool to preserve a high level of protection of fundamental rights.

III. A FUNDAMENTAL RIGHTS POLICY FOR THE EUROPEAN UNION

Since its first report on the situation of fundamental rights in the European Union, the EU Network of Independent Experts on Fundamental Rights insists on the need to evolve from a purely reactive and *ad hoc* approach to the promotion and protection of fundamental rights to a more proactive and systematic approach, aimed at identifying the initiatives that are needed to effectively realize fundamental rights in the Union. Fundamental rights are at present adequately protected in the Union: this protection will be strengthened with the adoption of the European Constitution, not only because its second part incorporates the Charter of Fundamental Rights, but also because the competences of the Court of Justice and consequently its capacity to ensure an effective judicial protection have been extended. What we still lack, however, is a policy on fundamental rights. Contrary to what is sometimes claimed, the difficulty does not lie in the absence of European Union competences in this area. Although neither the current treaties nor the Treaty establishing a Constitution for Europe contain a general clause on the adoption of instruments aimed at promoting fundamental rights, the Member States have conferred upon the Union a substantial set of specific competences which it may exercise in order to help realize fundamental rights at European Union level. The difficulty lies in directing the exercise of those competences so that they are used in such a way as to achieve that objective.

Of course, the establishment of a Fundamental Rights Agency can contribute to the formulation of such a policy. The future role of this Agency needs to be formulated, like the future role of the EU Network of Independent Experts on Fundamental Rights or a similar group with the same characteristics of independence and expertise, and decentralized in the Member States, based on the objective of helping to define a policy on fundamental rights in the European Union.

Those instruments should ensure a form of mutual observation of Member States through a mechanism offering guarantees of objectivity and impartiality which only a rigorously maintained independence in terms of institutional organization can provide. In the same way that the construction of the European area of freedom, security and justice borrowed from internal market law the concept of mutual recognition, so the extension of this concept in the pursuit of the establishment of the internal market in the area of services should be inspired by the mechanisms of mutual evaluation which the Member States feel the need to create between them in order to encourage cooperation in the area of freedom, security and justice, and which are confirmed by Article III-260 of the European Constitution. Without mutual evaluation, which is capable of leading to a complementary harmonization or of encouraging the convergence of legislations where this proves necessary, mutual recognition is but a blind mechanism, deprived of the mutual trust on which it is based. It not only weakens mutual recognition itself, since without an adequate mechanism to ensure mutual evaluation Member States and their authorities may be led to mistrust the standards defined by other Member States and the practices for implementing those standards, and to take advantage of exception clauses that allow derogation from mutual recognition. It also weakens fundamental rights in the area which the Member States share, since, strictly defined as capable of justifying exceptions to the rule of mutual recognition, the protection which each State will ensure for fundamental rights on its territory will be limited to what is strictly necessary and proportionate to the objective pursued by such protection. Monitoring of the fundamental

rights situation in the Member States of the Union through an independent and impartial mechanism ensuring a non-selective assessment of all Member States and capable of allowing comparisons between Member States, is thus more essential than ever in the elaboration of a European fundamental rights policy.

*
* *

The introduction to this report calls for a final clarification. This report has deliberately emphasized certain specific themes that have emerged or have witnessed important developments in 2004. The report thus focuses on issues concerning the protection of personal data, developments in the areas of asylum and immigration, as well as on the impact that the proposal to accelerate the opening up of the internal market for services within the Union could have on certain fundamental rights recognized by the Charter (such as the guarantee of just and fair working conditions (Article 31) and the right to health care (Article 35)), by resorting to the technique based on the country of origin principle, which is inspired by the philosophy of mutual recognition. We chose to broach a smaller number of subjects than in the 2004 report, and instead to offer a more in-depth analysis of certain subjects that are particularly important for assessing the fundamental rights situation in the enlarged Union.

As a result of this choice of methodology, certain provisions of the Charter are not commented on in the present report. Nevertheless, the present rapporteur cannot fail to emphasize that, for several of the provisions in question, enjoyment of the guarantees offered therein cannot be achieved without stepping up the fight against social exclusion and, more particularly, taking into account the situation of the poorest members of our society. Article 7 of the Charter asserts the right of each individual to respect for family life. Yet family unity is threatened by abject poverty: in Europe in 2004, children are still being institutionalized because their parents lack the financial means and because they are presumed to be incapable of caring for them. Article 14 of the Charter recognizes the right to education. Yet children of very poor families, because of the poverty of their parents, are placed in a situation that puts them at a serious disadvantage in relation to other children, although they should be able to exercise their right to education under the same conditions. Article 15 recognizes the freedom to choose an occupation and the right to engage in work. However, this right cannot be effectively exercised by persons who, on account of their situation of poverty, cannot present themselves with dignity to an employer. Naturally the examples are legion. As is pointed out by the International Movement ATD Fourth World, one of the international non-governmental organizations that were consulted for the purposes of the present report, the situation of the poorest illustrates in an exemplary manner the interdependence of all the rights that are recognized by the Charter.

It is true that the Charter of Fundamental Rights of the European Union does not as such recognize the right to protection against poverty and social exclusion, as is guaranteed, for example, by Article 30 of the revised European Social Charter, nor does it guarantee the right to housing as is set forth in Article 31 of the revised European Social Charter. Naturally this does not mean that, in the exercise of the competences that are conferred upon them, the institutions of the Union can ignore those requirements. Article 21 of the Charter of Fundamental Rights prohibits all discrimination on grounds of property. In the gradual implementation of economic and social rights, this requirement of non-discrimination implies – as the European Committee of Social Rights rightly states – the elimination of “all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all”. Taking into account the requirements of fundamental rights in the systems of governance, more particularly by improving the impact assessment studies as was mentioned earlier, should allow the institutions of the Union to achieve “measurable progress and to an

extent consistent with the maximum use of available resources”; the institutions “must also be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for other persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings”⁹³. The major efforts that are being made nowadays for the integration of persons with disabilities, as well as those that will be accorded, as we can already expect, to minorities, in particular the Roma, should not lead us to overlook this essential requirement of the integration of the poorest persons, on the satisfaction of whose needs government policies should more than ever be focused.

In order to face the challenge of serious poverty, a dynamic perspective needs to be adopted on the division of competences between the Union and the Member States. For example, it is not a matter of knowing who – the Union or the Member States – is empowered to promote the right to housing or the fight against social exclusion, but how the Union and the Member States, in the exercise of their respective competences, can contribute to this. The legal bases exist. Among the tasks that Article 2 EC defines for the Community is that of promoting “the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States”. Article 308 EC provides that if “action by the Community should prove necessary to attain ... one of the objectives of the Community, and this Treaty has not provided the necessary powers”, the Council may, on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures. It is on the basis of this clause that several Community programmes for combating poverty may be adopted, despite the obstacle represented by the requirement of unanimity in the Council.⁹⁴ The potential, however, is nonetheless real, particularly as Article I-3(3) of the Treaty establishing a Constitution for Europe identifies the fight against social exclusion as one of the objectives of the Union, confirming what already emerges today from Article 136 EC. Moreover, in accordance with Article 137(2), (a) EC, the fight against social exclusion is one of the objectives to the achievement of which the Community contributes by resorting to the open method of coordination. Those competences must be exercised in such a way that access to all the rights in the Charter of Fundamental Rights is achieved.

Another section of the population that is in practice excluded from several rights in the Charter of Fundamental Rights is that of illegal residents. The objective of strengthening economic and social cohesion within the Union (Article I-3(3), (3) of the Treaty establishing a Constitution for Europe) should take into account the specific situation of this category. In certain economic sectors, the employment of illegal workers, a practice which the Member States are combating in dispersed order, is significant enough to suggest the risk of a distortion of competition between Member States in the absence of a more harmonized approach. So far, policies for the integration of third-country nationals – where substantial progress has been made recently – have been limited to legally residing third-country nationals. This approach is questionable. Illegally residing foreign nationals find themselves in a vulnerable position towards employers. They are subjected to economic exploitation which, in some cases, amounts to forced labour⁹⁵, contrary to Article 5(2) of the Charter, and which the Union should combat insofar as it has the necessary powers to do so. Once the issue

⁹³ European Committee of Social Rights, decision on the merits of complaint no. 13/2002, *Autism Europe against France*, of 4 November 2003.

⁹⁴ The “Poverty 4” programme, proposed by the Commission in September 1993, was abandoned by the Council in June 1995 because of the opposition from Germany and the United Kingdom on the grounds of the subsidiarity principle and of insufficient evidence of the programme’s effectiveness. While a European budget of 20 million ecus had already been voted by the European Parliament for 1995 for this programme, and the Commission had allocated subsidies to 86 projects for combating social exclusion, the United Kingdom, with the backing of Germany, Denmark and the Council, obtained the annulment of those decisions before the Court of Justice of the European Communities for lack of legal basis: ECJ, 12 May 1998, *United Kingdom v. Commission*, C-106/96, *ECR*, p. I-2729.

⁹⁵ See also the case currently pending before the European Court of Human Rights: *Siliadin v. France*, application no. 73316/01 (Togolese minor forced to work without payment and rest: application addressed to France in the light of Article 4 of the European Convention on Human Rights).

has been properly identified, including by associations being supported by the European Commission⁹⁶, the appropriate legal bases should be found to allow the adoption of initiatives that will provide satisfactory answers to a situation that constitutes a serious threat to the economic and social cohesion in the Member States. As was developed in the 2004 Report, the Charter of Fundamental Rights, where it prevents the adoption of measures by institutions of the Union that infringe the rights and freedoms which it guarantees, should also be interpreted as imposing on the institutions of the Union an obligation to act where they have the necessary powers to do so.

⁹⁶ Praise should go to the important work done on this issue by the Platform for International Cooperation on Undocumented Migrants (PICUM), which receives support from the European Commission, DG Employment and Social Affairs.

CHAPTER I: DIGNITY

Article 1. Human dignity

Already in the judgment of 9 October 2001 delivered in the case of *The Netherlands v. European Parliament and the Council*, the Court of Justice accepted that it is its task, “in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed”⁹⁷. In accordance with the conclusions of its Advocate General, Mrs C. Stix-Hackl, who refers to Article 1 of the Charter of Fundamental Rights without however relying on this provision, the Court of Justice confirmed in the *Omega* judgment of 14 October 2004 that the right to human dignity constitutes a general principle of law which it should recognize in this case in order to authorize Germany to impose restrictions on the free provision of services asserted by a company that claims to challenge on the basis of Community law a prohibition on the organization at its “laserdrome” of a game consisting of firing at human targets⁹⁸. Reference is made to the commentary that was made on this judgment in the introduction to the present report.

Article 2. Right to life

The integrated control of the external borders of the Union

The 2004 Report indicated that 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. The report then mentioned the plan of the European Commission 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 States⁹⁹. The Report insisted 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, drowning¹⁰⁰. It also emphasized that no person seeking to flee from persecution should be deprived from the right to claim asylum, and that this right should not be made dependent on the arrival at the national borders, but should be recognized to every individual coming under the jurisdiction of the authorities of the State where the claim to asylum is filed.

The developments anticipated in the previous report took shape during the year under scrutiny. Regulation 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network (ILO) of the Member States in third countries¹⁰¹ formalizes the cooperation that already existed between Member States on this issue. It provides a legal basis for the

⁹⁷ ECJ, 9 October 2001, *The Netherlands v. European Parliament and the Council*, C-377/98, ECR, p. I-7079 (action for annulment of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions).

⁹⁸ ECJ, 14 October 2004, *Omega Spielhallen- und Automatenaufstellungs-GmbH*, C-36/02, not yet published in the ECR.

⁹⁹ 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.

¹⁰⁰ See Eur. Ct. HR, *Xhavara and Others v. Albania and Italy*, Appl. N°39473/98 (inadmissibility decision of 11 January 2001). This case concerned the deaths of a number of Albanians seeking to enter Italy illegally by boat, after that boat was intercepted and sank.

¹⁰¹ OJ L 64 of 2.03.2004, p.1.

exchange of all sorts of information on illegal immigration into the Union and between Member States. In this connection, it should be noted that the immigration liaison officers “carry out their tasks within the framework of their responsibilities and in compliance with the provisions, including those on the protection of personal data, laid down in their national laws and in any agreements or arrangements concluded with host countries or international organisations”. Moreover, Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union¹⁰² sets out to coordinate the operational cooperation between Member States in the control and surveillance of external borders; to assist Member States in the training of national border guards; to carry out risk assessments to determine the risks posed by illegal immigration and the local particularities of certain parts of the external borders, or of particular trends in the modus operandi of illegal immigration; to follow up on the development of research relevant for the control and surveillance of external borders; to assist Member States confronted with circumstances requiring increased operational and technical assistance at the external borders¹⁰³.

Insofar as it will discourage and combat the trafficking of human beings, the improvement of the operational cooperation between the Member States in controlling illegal immigration must be approved in principle. The Parliamentary Assembly of the Council of Europe adopted a Resolution in January 2004 calling upon the Member States of the Council of Europe to “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”¹⁰⁴. However, initiatives adopted in this area must be carefully monitored, especially insofar as they should not lead to deprive potential asylum-seekers from having access to the procedure for the determination of their status as refugees.

Article 3. Right to the integrity of the person

Article 3 § 2 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 Europe¹⁰⁵. 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.

Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells¹⁰⁶ seeks to safeguard public health and to prevent the transmission of infectious diseases by these tissues and cells, by setting standards at the level of the Community ensuring that safety measures be taken during their donation, procurement, testing, processing, preservation, storage, distribution and use (Preamble, Recital 2). This instrument is based on Article 152(4) EC, which provides that the

¹⁰² OJ L 349 of 25.11.2004 p.1

¹⁰³ COM(2003) 687, Proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders.

¹⁰⁴ « Access to assistance and protection for asylum seekers at European seaports and coastal areas » (rapp. F. Danieli, Committee on Migration, Refugees and Population).

¹⁰⁵ 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.

¹⁰⁶ OJ L 102 , 07.04.2004, p. 48.

Council may contribute to the improvement of public health, the prevention of human illness and diseases, and obviating sources of danger to human health by complementing national policies, *inter alia*, by adopting « measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives », the adoption of which « shall not prevent any Member State from maintaining or introducing more stringent protective measures ».

The Directive provides for principles, minimum standards and obligatory procedures for the whole chain (donation, procurement, testing, processing, storage and distribution) of the use of tissues and cells of human origin used for application in the human body. It strengthens requirements related to the suitability of donors of tissues and cells and the screening of these donated substances of human origin in the European Union. It encourages the definition at Member State level of requirements for establishments involved in the procurement, testing, processing, storage, and distribution of tissues and cells of human origin, as well as national accreditation and monitoring and inspection structures, and lays down provisions at Community level for the formulation of a register of accredited establishments and for the formulation of a quality system for such establishments. It also contains provisions on the training of staff directly involved in the processing of tissues and cells of human origin. It establishes rules for ensuring the traceability of tissues and cells of human origin from donor to patient and vice versa, valid throughout the European Union. And it establishes a system for the regulation of imports of human tissues and cells from third countries that ensure equivalent standards of quality and safety. Such a unified framework should contribute to « reassure the public that human tissues and cells that are procured in another Member State, nonetheless carry the same guarantees as those in their own country » (Recital 4 of the Preamble)¹⁰⁷.

In the context of this Report, it will suffice to comment on four discrete aspects of this instrument.

A first observation concerns the need to read the competences conferred upon the Community by the Member States in accordance with the requirements of the Charter of Fundamental Rights, which may impose that, when they exist, these competences be exercised in order to effectively protect and promote the values of the Charter. While it seeks to protect public health by imposing minimum standards throughout the Union, the Directive in principle does not interfere with decisions which are of a more strictly ethical nature and on which the Member States may legitimately differ. For instance, the Directive does not interfere with the choices made by Member States concerning the use or non-use of any specific type of human cells, including germ cells and embryonic stem cells – although, of course, where any particular use of such cells is authorised in a Member State, the Directive requires the application of all provisions necessary to protect public health, given the specific risks of these cells based on the scientific knowledge and their particular nature. Similarly, the Directive does not interfere with provisions of Member States defining the legal term « person » or « individual » (Recital 12 of the Preamble).

In the course of the legislative process which was launched with a proposal of the Commission of June 2002¹⁰⁸, the European Parliament made a number of amendments, only some of which were initially taken into account. The Explanatory statement to the Recommendation for a second reading on the Council common position of 22 July 2003 presented to the Parliament stated in this regard that « The formal justification given by the Commission and Council for the rejection of most of the amendments is the lack of a legal

¹⁰⁷ See also Recital 15: « It is necessary to increase confidence among the Member States in the quality and safety of donated tissues and cells, in the health protection of living donors and respect for deceased donors and in the safety of the application process ».

¹⁰⁸ COM(2002) 319 final, of 19.6.2002.

basis and the fact that the amendments address so-called 'ethical issues' for which the EU has no regulatory competence. (...) The legal basis of the Directive is Article 152 of the EC Treaty, which deals with health matters, but all the 'ethical issues' addressed by Parliament are also linked to protecting the health of donors and recipients. Any donation made in dubious circumstances, e.g. in response to financial pressure, is also a danger for the recipient of cells and tissues. This view is also widely shared within the Council. In other words, while Parliament's amendments do touch on ethical issues, they are all linked to health protection and, consequently, a debate is possible on the basis of Article 152. Even if it is argued that the link between the conditions under which donations are made and the safety of recipients is scientifically controversial, it is surely possible to deal cautiously with the topic in keeping with the precautionary principle »¹⁰⁹. Indeed, one argument in favour of a more generous reading of the competences of the Community under Article 152 EC was based on Article 3(2) of the Charter of Fundamental Rights, implying that, where the Community has been attributed certain powers, it should exercise them in order to fulfil the rights of the Charter, rather than restrict itself to the most limited reading of these powers.

A second remark concerns the decisive question of the non-profitability of the donation of human tissues and cells, which derives from the prohibition on making the human body and its parts as such a source of financial gain, contained in Article 3(2) of the Charter of Fundamental Rights and in Article 21 of the Convention on Human Rights and Biomedicine. On this issue, the final text is the result of a compromise reached between the Parliament and the Council. It was agreed that tissues and cells should be donated on a voluntary basis without direct payment. It was also agreed that Member States should endeavour to ensure voluntary and unpaid donations of tissues and cells. Donors may receive compensation, but such compensation should be strictly limited to making good the expenses and inconveniences related to the donation. The procurement of tissues and cells as such is carried out on a non-profit basis. The Member States shall have to define the modalities through which the voluntary and non-remunerated character of the donations shall be preserved, and through which the donors may be compensated.

Recitals 18 and 19 of the Preamble of the Directive state in that regard:

(18) As a matter of principle, tissue and cell application programmes should be founded on the philosophy of voluntary and unpaid donation, anonymity of both donor and recipient, altruism of the donor and solidarity between donor and recipient. Member States are urged to take steps to encourage a strong public and non-profit sector involvement in the provision of tissue and cell application services and the related research and development.

(19) Voluntary and unpaid tissue and cell donations are a factor which may contribute to high safety standards for tissues and cells and therefore to the protection of human health.

Despite the absence of any express reference in the text of the Directive to the additional protocols to the Convention on Human Rights and Biomedicine¹¹⁰, the Member States should be encouraged to seek inspiration from Article 21 of the Additional Protocol to the Convention on Human Rights and Biomedicine, on Transplantation of Organs and Tissues of Human Origin¹¹¹ Article 21 of which clarifies the implications of the prohibition of financial gain on the human body or its parts, stating:

¹⁰⁹ Rapp. P. Liese (doc. EP A5-0387/2003, PE 331.685, 4.11.2003).

¹¹⁰ See Recital 22 of the Preamble of the Directive. The European Parliament would have preferred a reference also to the Additional Protocols to the European Convention on Human Rights and Biomedicine: see Rapp. P. Liese, EP Doc. A5-0387/2003, 331.685, 12 November 2003.

¹¹¹ Opened for signature in Strasbourg, on 24 January 2002 (E.T.S. n°186).

1 The human body and its parts shall not, as such, give rise to financial gain or comparable advantage.

The aforementioned provision shall not prevent payments which do not constitute a financial gain or a comparable advantage, in particular:

- compensation of living donors for loss of earnings and any other justifiable expenses caused by the removal or by the related medical examinations;
- payment of a justifiable fee for legitimate medical or related technical services rendered in connection with transplantation;
- compensation in case of undue damage resulting from the removal of organs or tissues from living persons.

2 Advertising the need for, or availability of, organs or tissues, with a view to offering or seeking financial gain or comparable advantage, shall be prohibited.

It will be recalled in that respect that the Directive does not prevent a Member State from « maintaining or introducing more stringent protective measures, provided that they comply with the provisions of the Treaty. In particular, a Member State may introduce requirements for voluntary unpaid donation, which include the prohibition or restriction of imports of human tissues and cells, to ensure a high level of health protection, provided that the conditions of the Treaty are met » (Article 4(2)).

Thirdly, it is worth noting that the European Parliament also advocated a new Recital in the proposed Directive, stating that

Member States should intensify their efforts to combat illegal trafficking in human tissues and cells and parts of the human body in general. Following adoption of this Directive and submission of a directive on the quality and safety of organs, the Council should adopt framework legislation based on Articles 29, 31(e) and 34(2)(b) of the EU Treaty addressing all those issues which could not be or were not resolved in the present Directive.¹¹²

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 will be recalled in that respect¹¹³. As described in further detail in the *2004 Report*, 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, 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). The recent proposal for a framework decision of the Council on combating organized crime¹¹⁴ is founded on the same legal bases. Although it is not concerned with trafficking in human organs and tissues in particular¹¹⁵, this recent proposal, which falls outside the scope of the present report, could ultimately make it pointless to propose a specific instrument on the prevention of trafficking in organs and tissues of human origin and on combating this phenomenon, since it would have but a limited added value.

¹¹² Amendment 15 proposed upon the 2nd reading of the draft Directive.

¹¹³ OJ C 100 of 26/4/2003, p. 27.

¹¹⁴ COM(2005)6 final of 19.1.2005.

¹¹⁵ An approach consisting in drawing up a list of offences connected with organized crime was considered less appropriate than an approach consisting in defining the seriousness of the offences concerned as offences liable to carry prison sentences of at least 4 years or more severe penalties.

A fourth remark related to Article 14 of the Directive, which relates to Data protection and confidentiality. After having stated the principle that « Member States shall take all necessary measures to ensure that all data, including genetic information, collated within the scope of this Directive and to which third parties have access, have been rendered anonymous so that neither donors nor recipients remain identifiable » (Article 14(1)), Article 14 of the Directive provides that « Member States shall take all necessary measures to ensure that the identity of the recipient(s) is not disclosed to the donor or his family and vice versa, without prejudice to legislation in force in Member States on the conditions for disclosure, notably in the case of gametes donation » (Article 14(3)). The European Parliament would have preferred a more explicit provision in this regard, according to which « In the case of gametes in particular, Member States may waive the anonymity requirement in order to respect the right of children to know their genetic parents »¹¹⁶. It shall be recalled in this regard that, in the cases respectively of *Gaskin* (1989) and of *Mikulic* (2002), the European Court of Human Rights has considered that respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality¹¹⁷. However, in the case of *Odièvre v. France*, where the applicant was an adopted child trying to trace another person, her natural mother, by whom she was abandoned at birth and who has expressly requested that information about the birth remain confidential, the Court noted expressly that the issue it was presented with in that case – the question of access to information about one's origins and the identity of one's natural parents – is not of the same nature as that of access to a case record concerning a child in care (as in *Gaskin*) or to evidence of alleged paternity (as in *Mikulic*)¹¹⁸. The European Court of Human Rights leaves a wide margin of appreciation to the States parties to the ECHR in this area, where a number of conflicting interests are to be weighed against one another and where no European consensus appears to have emerged yet.

Protection of subjects in biomedical research

The Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research, has been adopted within the Council of Europe on 25 January 2005. Although this Protocol will only be binding on the States parties to the Convention on Human Rights and Biomedicine which choose to ratify it, it should influence the interpretation of Article 3 of the Charter of Fundamental Rights, and restrictions to Article 13 of the Charter of Fundamental Rights should be considered as justified, to the extent that they seek to ensure that the guarantees of this Additional Protocol to the Convention on Human Rights and Biomedicine are fully respected.

Moreover, the Member States should be encouraged by the European Commission either to sign and ratify this Additional Protocol, or, if they are not parties to the Convention on Human Rights and Biomedicine, to implement the principles of the Protocol in their national law, by ensuring that research on human beings shall only be undertaken if there is no alternative of comparable effectiveness, if it does not involve risks and burdens to the human being disproportionate to its potential benefits, and only after approval by the competent body after independent examination of its scientific merit, including assessment of the importance of the aim of research, and multidisciplinary review of its ethical acceptability. The Member States should moreover set up ethics committees in order to ensure that every research project be subject to an independent examination of its ethical acceptability. Any person being asked to participate in a research project should be given adequate information in a comprehensible form, including an information about the rights and safeguards prescribed by law for their

¹¹⁶ Amendment 36 proposed upon the 2nd reading of the draft Directive.

¹¹⁷ See Eur. Ct. HR, *Gaskin v. the United Kingdom*, judgment of 7 July 1989, Series A no. 160, p. 16, § 39 ; Eur. Ct. HR (2nd sect.), *Mikulic v. Croatia* (Appl. N° 53176/99), judgment of 7 February 2002 (final), § 54.

¹¹⁸ Eur. Ct. HR (GC), *Odièvre v. France* (Appl. N° 42326/98), judgment of 13 February 2003, § 43.

protection, and specifically of their right to refuse consent or to withdraw consent at any time without being subject to any form of discrimination, in particular regarding the right to medical care.

Indeed, it should be noted that, under Article 29 of the Additional Protocol, “Sponsors or researchers within the jurisdiction of a Party to this Protocol that plan to undertake or direct a research project in a State not party to this Protocol shall ensure that, without prejudice to the provisions applicable in that State, the research project complies with the principles on which the provisions of this Protocol are based. Where necessary, the Party shall take appropriate measures to that end”. This provision was intended as an answer to the concerns which have been expressed “about the possibility of research that might be widely viewed as ethically unacceptable being carried out in another State where systems for the protection of research participants are less well established” (para. 137 of the Explanatory Report). In the context of the European Community where freedom of establishment is guaranteed, making it *de facto* possible in many cases for researchers or research institutions to establish themselves in the Member State offering the most favourable conditions, it is essential that all the EU Member States, even those with respect to which the Convention on Human Rights and Biomedicine is not in force, implement the principles of the Additional Protocol concerning Biomedical Research to the extent that the scope of application of this protocol is broader than that of Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use¹¹⁹. The European Community should refuse to fund research which would not comply with the requirements of the Additional Protocol, in order not to create an incentive for States not to ratify this Protocol or not to implement its principles. Of course, this should not constitute an obstacle to otherwise ethical biomedical research being performed in States where it is less expensive, insofar at least as monetary inducements to participate in such research do not violate the requirement that the consent of the individual participant must be free and informed.

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

Reference is made to the findings under Articles 18 and 19 of the Charter, which concern the right to asylum and the protection in the event of removal, expulsion or extradition. This provision of the Charter shall otherwise not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 5. Prohibition of slavery and forced labour

Combating human trafficking

During the period under scrutiny, Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, was formally adopted.¹²⁰ The 2004 Report had already underlined the contribution made by this instrument, on which a political agreement was reached within

¹¹⁹ OJ L 121 of 1.5.2001, p. 34.

¹²⁰ OJ L 261 of 6.08.2004, p. 19.

the Council in November 2003¹²¹. The purpose of the Directive is to allow non-Community nationals who have been the subject of an action to facilitate illegal immigration or victims of trafficking in human beings to be granted a short-term residence permit in return for their cooperation in combating those activities by testifying against the traffickers. It introduces a residence permit intended for victims of trafficking in human beings or – though only if a Member State decides to extend the scope of the present Directive, whereas the initial proposal included this extension *ipso jure* (Article 3(2)) – to third-country nationals who have been the subject of an action to facilitate illegal immigration, to whom the residence permit offers a sufficient incentive to cooperate with the competent authorities, while including certain conditions to safeguard against abuse¹²². The Directive applies to all victims of trafficking in human beings, although originally it appeared to apply principally to women and children.

The Directive thus realizes, five years later, paragraph 23 of the Conclusions of the Tampere European Council, which declares that it is “determined to tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants”, while underlining that the rights of the victims of such activities shall be secured “with special emphasis on the problems of women and children”. It finds itself in a favourable international context, since the fight against trafficking in human beings is a concern that is shared by the whole international community¹²³.

Although the text itself emphasizes the sole objective of combating illegal immigration by dismantling criminal networks¹²⁴, given that the Council preferred to allude to the Charter¹²⁵, this text marks an important step towards the protection of fundamental rights through Community law. All the Member States of the Union, except for the three Member States that requested a derogation, are witnessing the general implementation of a type of protection that had been to a large extent unknown in the national legislations, and which makes a welcome contribution to the realization of Article 5 of the Charter of Fundamental Rights.

The mechanism of the Directive provides that the potential beneficiaries of a provisional residence permit are informed of the possibility that is thus opened up to them. They are granted a “reflection period”, the duration of which is determined by each Member State concerned¹²⁶, allowing them “to recover and escape the influence of the perpetrators of the offences so that they can taken an informed decision as to whether to cooperate with the

¹²¹ 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.

¹²² Recital 6

¹²³ See also the adoption by the JHA Council of 25 and 26 November 2004 of a common position on the current negotiations in the Council of Europe concerning the fight against trafficking in human beings.

¹²⁴ In conjunction with Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence, and Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings; see the 2004 Report of the EU Network of Independent Experts on Fundamental Rights, p. 40.

¹²⁵ Recital 6 of the Preamble indicates that the text “respects fundamental rights and complies with the principles recognized for example by the Charter of Fundamental Rights of the European Union”. Recital 7 expresses the wish of the Council that the Member States give effect “to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation”.

¹²⁶ The European Commission, supported by the European Parliament throughout the proceedings, proposed to set the duration at thirty days. The Member States objected to this possibility, preferring instead to leave to each Member State the freedom to decide: “The duration and starting point of the period shall be determined according to national law” (Article 6(1(2))). Particular care should be taken that this discretion left to the Member States does not lead to too divergent situations from one Member State to another. The evaluation report on the application of the Directive, provided for in Article 16, should examine whether it may be appropriate to reconsider the absence of a harmonized definition of the duration of the reflection period allowed to the third-country nationals concerned by the Directive.

competent authorities” (Article 6(1)). During that period, they will have access to measures of protection and no expulsion order may be enforced against them while awaiting the decision of the competent authorities. The protective measures are intended to ensure that the third-country nationals concerned who do not have sufficient resources are granted “standards of living capable of ensuring their subsistence and access to emergency medical treatment”. Member States shall in addition “attend to the special needs of the most vulnerable, including, where appropriate and if provided by national law, psychological assistance” (Article 7(1)). Member States “shall take due account of the safety and protection needs of the third-country nationals concerned when applying this Directive, in accordance with national law” (Article 7(2)). They may provide translation and interpreting services as well as free legal aid, under the conditions set by national law, without this being an obligation (Article 7(3,4)).

During that same period, the investigating and prosecuting authority will determine whether the presence of the victim is useful to the investigations or to the institution of judicial proceedings against the suspected perpetrators. It will therefore have to consider the opportunity presented by prolonging the victim’s stay on the territory, whether he/she has shown a real intention to cooperate, and whether he/she has severed all relations with the suspected perpetrators (Article 8(1)). The victim’s cooperation may take various forms, from the simple provision of information or the filing of a complaint to giving evidence in court. If those three conditions are satisfied and if the victim poses no threat to public order and national security, a short-term residence permit will be issued that is valid for at least six months, and may be renewed if the conditions set out in Article 8(1) continue to be satisfied (Article 8(3) and, concerning non-renewal, Article 13(1)).

A provisional residence permit may grant access to the labour market, to vocational training and education, under the conditions defined by national law (Article 11).¹²⁷ The Directive also provides that Member States shall provide “necessary medical or other assistance to the third-country nationals concerned, who do not have sufficient resources and have special needs, such as pregnant women, the disabled or victims of sexual violence or other forms of violence” (Article 9(2)). Member States may let the persons concerned participate in a programme for integration in the Member State with a view to their establishment or their assisted return to their country of origin (Article 12). The residence permit is renewed under the same conditions as for its issue. It will not be renewed if a judicial decision has terminated the proceedings. At that moment, ordinary aliens’ law shall apply, and if the victim applies for another type of residence permit, the Member State shall take into account the victim’s cooperation in the criminal proceedings when examining this application¹²⁸.

Directive 2004/81/EC is founded on Article 63(3) EC, which provides for the adoption by the Council of measures on illegal immigration. It should be underlined that, in the implementation of this Directive, Member States are obliged to respect fundamental rights. Moreover, the Directive does not prevent Member States from adopting or maintaining more favourable provisions for the persons covered by the Directive (Article 4). This means that, where other international obligations are binding on a Member State, this State cannot rely upon the Directive to depart from those obligations. The initial proposal submitted by the Commission contained a provision (Article 4 of the proposal) stipulating that the Directive “shall be without prejudice to the protection extended to refugees, to beneficiaries of subsidiary protection and persons seeking international protection under international refugee law and without prejudice to other human rights instruments”. This provision is directed in particular at persons seeking international protection who cross frontiers with the help of networks of traffickers or smugglers. It also covers situations where victims want to apply for international protection in view of the dangers of reprisals which they run after having cooperated with the authorities against traffickers or smugglers. This safeguard clause has

¹²⁷ Article 11

¹²⁸ Chapter IV

disappeared from the text adopted by the Council. This cannot be interpreted as releasing the Member States from the obligations imposed on them by the Geneva Convention of 28 July 1951 relating to the status of refugees and the other international instruments on the protection of human rights. It would be desirable for the evaluation report on the application of the Directive which the Commission has to prepare in 2008 on the basis of the information supplied by the Member States to devote a chapter to the question of compliance by the Member States with those international obligations in the transposition of the Directive and in the application of national implementation measures. If this evaluation reveals shortcomings in the fulfilment of those international obligations, a review of the Directive may have to be proposed in order to incorporate those requirements.

Protection of children from sexual exploitation and child pornography

The Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography¹²⁹ represents an important contribution to the protection of the child. This Framework Decision complements Joint Action 97/154/JHA of the Council of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children,¹³⁰ which it abolishes, and Council Decision 2000/375/JHA of 29 May 2000 to combat child pornography on the Internet,¹³¹ by defining the sexual exploitation of children, including coercing or recruiting a child into prostitution, and child pornography as serious criminal offences the constituent elements of which in the criminal law of all Member States shall be harmonized through the Framework Decision, which shall also oblige States to provide for effective, proportionate and dissuasive sanctions.

The Member States should be encouraged to implement fully this Framework Decision at the earliest possible time. The Framework Decision makes it possible for each State not to establish its jurisdiction over the offences of sexual exploitation of children and child pornography, including the instigation of, or aiding or abetting of these offences, where the offence has not been committed on its territory, even if it is committed by one of its nationals or for the benefit of a legal person established in the territory of that Member State (Article 8(2)). However, the adoption of extra-territorial legislation by all Member States should be encouraged: according to the Committee on the Rights of the Child, the States parties to the 1989 Convention on the Rights of the Child should make their citizens liable to criminal prosecution for child abuse committed abroad.¹³²

With respect to the dissemination of child pornography through a computer system, the effectiveness of the national measures implementing the Framework Decision 2004/68/JHA would be enhanced by an adequate implementation of Article 19 of Title 4 of the Cybercrime Convention of the Council of Europe, which relates to the search and seizure of stored computer data. The Member States should therefore be encouraged to ratify this Convention and to take it into account in the implementation of the Framework Decision.

The Member States should adopt the implementation measures of this Framework Decision before 20 January 2006. They should also consider adopting a national action plan targeting the sexual exploitation of children, including coercing or recruiting a child into prostitution, and child pornography, which the European Committee of Social Rights has considered to derive from the undertakings of the States which have accepted to be bound by Article 7(10) of the European Social Charter or the Revised European Social Charter. Such a national action plan could facilitate addressing issues such as, for instance, the means service

¹²⁹ OJ L 13, 20.1.2004, p. 44.

¹³⁰ OJ L 63, 4.3.1997, p. 2.

¹³¹ OJ L 138, 9.6.2000, p. 1.

¹³² Committee on the Rights of the Child, 35th session, Consideration of reports submitted by State parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child: Slovenia), CRC/C/15/Add.230.

providers have at their disposal in order to control the material they host, the identification of the circumstances which lead to child prostitution in order to combat the phenomenon at its roots, or the cultural attitude towards the availability of child pornography on the internet.

CHAPTER II: FREEDOMS

Article 6. Right to liberty and security

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

It is not necessary in this Report to comment in detail on the fundamental rights dimension of the Framework Decision of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States¹³³. Indeed, this instrument has already been extensively discussed in previous documents of the Network of independent experts.¹³⁴ One remark however may be made, which concerns the consequence of the applicability of Article 5 of the European Convention on Human Rights to the detention of a person in order to surrender him or her to another Member State. This applicability as such is undisputed. All persons, including those against whom an arrest warrant has been delivered or who are facing extradition, must benefit from the guarantees of this provision. Therefore, a person being arrested in execution 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. To this end, Article 14 of the Framework Decision must be interpreted in accordance with Article 5 § 4 of the European Convention on Human Rights¹³⁵. If the person concerned lodges an appeal against the decision to deprive him of his liberty, that person 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 pointless¹³⁶. This must be considered as constituting an acceptable justification to the exceeding of the deadlines prescribed in Article 17 of the Framework Decision for the execution of the European arrest warrant. The statement of the Commission, according to which “the exercise of internal judicial remedies does not as such constitute an exceptional circumstance” explaining that a Member State cannot respect the deadlines prescribed for the execution of the warrant (Article 17(7))¹³⁷, must be understood as meaning that the Member States must organize the remedies available against the deprivation of liberty, and equip their jurisdictions, in order to comply with these deadlines. It may not be understood as authorizing the Member States to disregard their obligation to comply with the requirements of fundamental rights in the execution of the European arrest warrant, as Article 1 § 3 of the Framework Decision of 13 June 2002 confirms. Where the compliance of the Member States with the obligations imposed under the Framework Decision will be

¹³³ 2002/584/JHA, OJ L 190 of 18/7/2002.

¹³⁴ Thematic Comment n°1: The Balance between Freedom and Security in the Response by the European Union and Its Member States to the Terrorist Threats, pp. 16-18; Report on the situation of fundamental rights in the Union in 2003, pp. 45-51. The Member States had to ensure the transposition of this Framework Decision in their internal law by 31 December 2004. At the time of conclusion of this report (1.1.2005), all Member States, except Italy, had fulfilled this obligation, albeit sometimes with considerable delay.

¹³⁵ 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.

¹³⁶ See Eur. Ct. H.R. (3rd section), *Conka v. Belgium*, judgment of 5 February 2002, application n° 51564/99, §§ 44-45.

¹³⁷ Report of the Commission on the basis of Article 34 of the Framework Decision of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2004) XXX, February 2005, p. 6.

evaluated, it should be taken into account that, as the Commission itself has noted, “deadlines in relation to court proceedings are difficult to legislate for”¹³⁸.

It is important to avoid 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 imperative¹³⁹.

Article 7. Respect for private and family life

The right to family reunification, as a dimension of the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, is examined under Article 45 of the Charter, which concerns more specifically freedom of movement.

The protection of foreign nationals from removal from the territory of a Member State, where this risks leading to a violation of the right to respect for private and family life of the returnee, is examined under Article 19 of the Charter.

Article 8. Protection of personal data

In the European Union, the protection of personal data with respect to their processing 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 data¹⁴⁰, extended in 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”¹⁴¹, and of which Regulation (EC) 45/2001 of 18 December 2000 on the

¹³⁸ Commission Staff Working Document, Annex to the Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 14.1.2005, p. 21.

¹³⁹ 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 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).

¹⁴⁰ 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 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).

¹⁴¹ 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

protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data¹⁴² 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 the *Report on the situation of fundamental rights in the European Union in 2003*¹⁴³, the matter of the communication of PNR (Passenger Names Records) data on passengers on transatlantic flights to the American Bureau of Customs and Border Protection was concluded with several recommendations, endorsing those formulated by the Working Party set up by Article 29 of Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹⁴⁴ in its Opinion no. 4/2003 of 13 June 2003¹⁴⁵. The adoption of Council Decision 2004/496 of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection¹⁴⁶ did not put an end to the debate that was started by the joint statement of 18 February 2003, in which the European Commission and the competent authorities of the United States announced that they endeavoured to find a solution to allow the transmission of personal data of passengers by airline companies operating transatlantic flights, using the APIS system (Advance Passenger Information System).

Following the terrorist attacks of 11 September 2001, the United States on 19 November 2001 passed an Act on aviation and transportation security (*Aviation and Transportation Security Act*), followed on 9 May 2002 by an act on border security and visa reform (*Enhanced Border Security and Visa Entry Reform Act*). These two instruments henceforth, on pain of sanctions, required airline companies operating flights to, from and across the territory of the United States to transmit personal data on passengers to the American customs and immigration authorities. Under this new legislation, the American authorities demanded that European airline companies allow them electronic access from US territory to PNR data stored in the electronic reservation systems of the companies in question. The European airline companies operating flights to the United States were therefore led to question the compatibility of such an obligation with Community law on data protection¹⁴⁷, at the risk of either infringing national and Community legislation on data protection or US legislation and, in both cases, at the risk of incurring sanctions, in particular financial penalties imposed by the American authorities, and even being prohibited from landing on United States territory.

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.

¹⁴² OJ L 8 of 12/1/2001, p. 1.

¹⁴³ See pages 56-59.

¹⁴⁴ OJ L 281 of 23.11.1995, p. 31.

¹⁴⁵ 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).

¹⁴⁶ Council Decision 2004/496 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, OJ L 183 of 20.05.2004, p. 83.

¹⁴⁷ It should be remembered that Article 6(d) of Regulation no. 2299/89 (Council Regulation (EEC) no. 2299/89 of 24 July 1989 on a code of conduct for computerized reservation systems, OJ L 220 of 29.7.1989, p. 1, last amended by Council Regulation no. 323/1999 of 8 February 1999, OJ L 40 of 13.2.1999, p. 1) provides that "personal information concerning a consumer and generated by a travel agent shall be made available to others not involved in the transaction only with the consent of the consumer".

Directive 95/46/EC of 24 October 1995 sets forth specific rules concerning the transmission of personal data to third countries¹⁴⁸. Such transfer is in principle only authorized if the third country in question ensures an “adequate” level of protection. The “adequacy” of the level of protection must be assessed “in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations”. Article 25 of the Directive authorizes the Commission to enter into negotiations with countries that in its opinion do not ensure an adequate level of protection, preventing the transfer of personal data to those countries, in order to arrive at a satisfactory solution from the point of view of respect for the fundamental rights of the individual. Article 26 provides for a number of derogations from the principle of prohibiting the transfer of data to a country that fails to ensure an adequate level of protection¹⁴⁹.

A certain number of precautions to be taken were expressly pointed out in Opinion 4/2003 delivered by the Article 29 Data Protection Working Party on 13 June 2003¹⁵⁰: the transitional nature of an adequacy finding by the Commission, proportionality with regard to the categories of transferable data (giving a far shorter list than what the US authorities have in mind, excluding non-essential information and, in any case, sensitive data), the time of data transfer (no earlier than 48 hours prior to departure) and data retention time (data should only be retained for a short period that should not exceed some weeks or even months following entry to the US, rather than the 7-8 years demanded by the United States). Special attention should be paid to the method of transfer: the only data transfer mechanism whose implementation does not raise any major problems is the “push” one – whereby the data are selected and transferred by airline companies to US authorities – rather than the “pull” one – whereby US authorities have direct online access to airline and reservation systems databases. This solution should be substituted as soon as possible for the present mechanism. Finally, the purposes of such data transfers are limited: they should be limited to fighting acts of terrorism without expanding their scope to other unspecified “serious criminal offences”.

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”¹⁵¹ adopts an intermediate approach. The Commission announces in that Communication that it 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). This adequacy decision subsequently allowed a bilateral agreement to be concluded between the European Union and the United States to complement its finding that an adequate level of protection is ensured. This agreement covers such aspects as non-discrimination, reciprocity and direct access by the US Bureau of Customs and Border Protection to the databases of airline companies as long as the EU does not operate this kind of data transfer system, as well as the adoption in European legislation of the US requirement imposed on airline companies to supply PNR data. 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,

¹⁴⁸ On this issue, too, Convention no. 108 of 28 January 1981 concluded in the Council of Europe was completed by the Additional Protocol of 8 November 2001 to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows, which is directly inspired by Directive 95/46/EC.

¹⁴⁹ Those provisions gave rise on 24 July 1998 to the adoption of a position by the Data Protection Working Party established under Article 29 of Directive 95/46/EC: Article 29 Working Party, Working Document *Transfers of Personal Data to Third Countries: Applying Articles 25 and 26 of the EU Data Protection Directive*, 24th July 24 1998, WP 12.

¹⁵⁰ Opinion 4/2003 on the level of protection ensured in the United States for the transfer of passengers’ data, adopted by the Working Party on 13 June 2003, available at: http://europa.eu.int/comm/internal_market/privacy/docs/wpdocs/2003/wp78_fr.pdf.

¹⁵¹ Transfer of Air Passenger Name Record (PNR) Data: A Global EU Approach, COM(2003) 826 final, 16/12/2003.

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 Article 29 Working Party once again underlined in its Opinion 2/2004 of 29 January 2004¹⁵² the absolute need to establish a “clear legal framework”, while pointing out that “the progress made does not allow a favourable adequacy finding to be achieved”. The opinion sets forth, “The case of private data collected for commercial purposes and contained in the databases of airlines offering flight from the EU to or through USA and the associated reservations systems, to be communicated to a public authority by providing access to such systems constitutes an exception to the data protection fundamental principle of purpose specification, taking into account the number and sensitivity of data involved and the number of passengers affected by the US request - amounting to at least 10-11 million individuals per annum”. The Working Party insists on the need to guarantee the quality of the data and the proportionality of their transmission and retention. It rules out the transmission of sensitive data and suggests in this connection the use of a system of filters in order to avoid the solution of removing those data after they have been received by the US authorities. It also excludes the use of PNR data that have been transmitted, even as a test, under the CAPPS II system. The Working Party also reasserts the need to better guarantee the rights of information and rectification for the individuals concerned and to make the undertakings of the United States legally binding. The Working Party also points to the fragility of the undertakings given by the United States, since under the terms of the agreement those undertakings “will not be legally binding on the US side”¹⁵³. It deduces from this that “the level of commitments on the US side cannot be considered as meeting the requirements laid down in its Opinion 4/2003 and considers that this matter is an essential condition which should in any case be addressed before any arrangements are formalised”. Above all, on the essential issue of the proportionality of the processing of PNR data, the Working Party considers that the results of the negotiations with the United States are insufficient: although the transferable data elements have been reduced from 38 to 34, the 4 elements that have been deleted are data concerning which the Working Party had no objection in its Opinion 4/2003, whereas on the other hand the 20 data elements have been retained, the transmission of which the Working Party considered disproportionate and problematic. The Working Party stresses that “no evidence or explanation has been provided about how their processing could be deemed to be necessary, proportionate and not excessive in a democratic society for combating terrorism”. The conclusion which the Working Party arrived at is the following:

¹⁵² Opinion 2/2004 on the Adequate Protection of Personal Data Contained in the PNR of Air Passengers to be Transferred to the United States’ Bureau of Customs and Border Protection (US CBP), adopted by the Working Party on 29 January 2004, available at: http://europa.eu.int/comm/internal_market/privacy/docs/wpdocs/2004/wp87_fr.pdf.

¹⁵³ The Article 29 Working Party points out in its Opinion 2/2004 (par. 4) that the newly added paragraph 47 at the end of the undertakings explicitly provides that they “do not create or confer any right or benefit on any person or party, private or public”.

The progress made does not allow a favourable adequacy finding to be achieved. The Working Party believes that any solution should at least respect the following data protection principles:

- Data quality:

- o the purposes of the data transfer should be limited to fighting acts of terrorism and specific terrorism-related crimes to be defined;
- o the list of data elements to be transferred should be proportionate and not excessive;
- o data matching against suspects should be performed according to high quality standards with a view to certainty of the results;
- o the data retention periods should be short and proportionate;
- o passengers' data should not be used for implementing and/or testing CAPPS II or similar systems.

- Sensitive data should not be transmitted.

- Data subjects' rights:

- o Clear, timely and comprehensive information should be provided to the passengers;
- o rights of access and rectification should be guaranteed on a non-discriminatory basis;
- o there should be sufficient guarantee that passengers would have access to a truly independent redress mechanism.

- Level of commitments by US authorities:

- o the US commitments should be fully legally binding on the US side;
- o the scope and legal basis and value of a possible "light international agreement" should be clarified.

- Onward transfers of passenger PNR data to other governments or foreign authorities should be strictly limited.

- Method of transfer: a "push" method of transfer – whereby the data are selected and transferred directly by airlines to US authorities – should be put in place.

Although confronted with those objections, the Council chose on 2 February 2004 to give the Commission a mandate to negotiate with the United States. Taking note of the undertakings given by the United States of America following the negotiations conducted by the European Commission, the latter adopted a decision¹⁵⁴ valid for an initial period of three-and-a-half years, declaring that "For the purposes of Article 25(2) of Directive 95/46/EC, the United States' Bureau of Customs and Border Protection (hereinafter referred to as CBP) is considered to ensure an adequate level of protection for PNR data transferred from the Community concerning flights to or from the United States, in accordance with the Undertakings [of the United States' Bureau of Customs and Border Protection] set out in the Annex." At the same time, on the proposal of the Commission¹⁵⁵, the Council decided to conclude an agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the Bureau of Customs and Border Protection of the US Department of Homeland Security. This agreement was signed on 28 May 2004. Based on Article 300(2) EC, the agreement enables the US Bureau of Customs and Border Protection to electronically access PNR data generated by reservation and departure control systems of air carriers based on the territory of European Community Member States until a satisfactory system has been put in place to allow the transmission of those data by the air carriers. Through such an agreement, the transfer of transatlantic flight passenger data by European operators is to be presented as "necessary for compliance with a legal obligation to which the controller is subject", within the meaning of Article 7(c) of Directive 95/46/EC, thus ensuring the legitimization of the processing.

¹⁵⁴ Commission Decision of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States' Bureau of Customs and Border Protection, OJ L235 of 6.7.2004, p. 11.

¹⁵⁵ Proposal for a Council Decision on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection (COM(2004)190 final - CNS 2004/0064, of 17 March 2004).

In several resolutions of 13 March 2003, 9 October 2003 and 31 March 2004, the European Parliament seriously called into question the entire process as well as the compatibility of its outcome with fundamental rights¹⁵⁶. Exercising the competences conferred upon it by the Treaty of Nice under Article 230(2) EC, it filed two actions for annulment with the Court of Justice to settle the problem of compatibility of this draft international agreement with the fundamental right to data protection guaranteed by the Union, while the Commission was asked to withdraw its adequacy decision. To support those actions¹⁵⁷, the European Parliament puts forward that the “adequacy decision” adopted by virtue of Article 25(6) of Directive 95/46/EC is an implementing act of the basic Directive and that it must consequently comply with the principles established in the Directive, failing which it carries out an implicit form of review thereof. Where a Community act prescribes a protection system, the essential elements of this system must necessarily be protected by the implementing acts, as would be the case here. If the adequacy decision disproportionately contravenes the criteria of Directive 95/46/EC, it cannot be validly adopted without the co-decision of the Parliament¹⁵⁸.

In its Opinion 6/2004 of 22 June 2004, the Article 29 Data Protection Working Party “noted” that the Commission “has only partially taken into account the demands made” in its previous opinions and that the Court of Justice has been called upon¹⁵⁹. In order to “keep encroachments on passengers’ rights as minimal as possible”, it formulates the following recommendations:

1. Airlines should replace the ‘pull’ method of transferring data with the ‘push’ method as soon as possible. It is a matter of general data-protection principle that recipients should only be given the data they actually need. In the ‘pull’ method used until now, recipients are given all data. It is then their duty to filter out and use only the data for which they have authorisation under an agreement. Since all parties agree on the change of method, it is now a matter of making the changeover as quickly as possible. The Commission is called upon to influence the airlines to this effect. The filtering software to be used by the air carriers has to sort out data fields which do not figure in the positive list defined by the international agreement as well as those data of a sensitive nature which are stored in fields contained in the positive list as far as they can be identified by means of a computer program.
2. Air passengers must be adequately informed of the data transfer. Here too, all parties are in agreement. For reasons of clarity it is essential that air passengers always receive the same information regardless of which airline they use and where they acquire the plane ticket, including through travel agents. The data protection supervisory authorities have made proposals on this topic. The Working Party calls on the Commission to complete its discussions with the American government and the air carriers as soon as possible, so that a suitable, uniform system of air passenger information can be implemented.
3. The Working Party is pleased that the agreed data transfers relate only to air passenger data recorded and saved by the airlines, travel agents and other sales

¹⁵⁶ See the report prepared in the Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs of the European Parliament by J. L. A. Boogerd-Quaak, on 7 April 2004 (doc. PE A5-0271/2004).

¹⁵⁷ The Court of Justice has nevertheless rejected the demand that the action for annulment be heard in accelerated proceedings, as provided for by Article 62 of the Rules of Procedure, ECJ (pres.), order of 21 September 2004, *Parliament v. Council* and *Parliament v. Commission*, C-317/04 and C-318/04, not yet published. The European Parliament has not requested a suspension of implementation of the challenged acts, which is regrettable.

¹⁵⁸ See, *mutatis mutandis*, ECJ, 18 June 1996, *Parliament v. Council*, C-303/94, *ECR*, p. I-2943.

¹⁵⁹ Opinion 6/2004 on the implementation of the Commission decision of 14-V-2004 on the adequate protection of personal data contained in the Passenger Name Records of air passengers transferred to the United States’ Bureau of Customs and Border Protection, and of the Agreement between the European Community and the United States of America on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection.

points for the purposes of processing tickets. The agreement does not obligate or authorise airlines to record other data.

4. The agreements between the Community and the United States provide for regular checks that the data protection rules which have been drawn up as a basis for recognition of the level of data protection are being complied with¹⁶⁰. The Working Party considers these checks to be particularly important. They are essential to analyse the practical consequences of the data transfers and thus to evaluate the extent of any encroachment on data protection. The Working Party is therefore very interested in the design, implementation and evaluation of the checks, and would appreciate to work together with the Commission in this respect.

5. In order to gain a clear and detailed insight into the practical steps involved in flight data transfers, the data protection supervisory authorities are planning to hold a joint event with the airlines (...) in the near future.

In a new Opinion (8/2004)¹⁶¹ of 30 September 2004, the Working Party adopted two information notices that “should serve as guidance as regards the information that should be provided to passengers on transatlantic flights, and should be used as broadly as possible by air carriers, travel agents and Computer Reservation Systems taking part in the booking process”. As Article 2 of the adequacy decision adopted by the Commission on 14 May 2004 confirms, this decision “does not affect other conditions or restrictions implementing other provisions of that Directive that pertain to the processing of personal data within the Member States. One of them is the obligation by data controllers to inform data subjects about the main elements of the data processing. Therefore, data controllers carrying out processing of PNR data subject to national laws of EU Member States adopted pursuant to Directive 95/46/EC are obliged to provide passengers with complete and accurate information on the transfer of PNR data to CBP, in accordance with those national laws adopted pursuant to Articles 10 and 11 of the Directive”.

The concern expressed by the Article 29 Data Protection Working Party regarding the transfer of PNR data of passengers on transatlantic flights is shared by the national supervisory authorities in certain Member States, such as Belgium¹⁶² and France¹⁶³, as well as by certain national parliaments¹⁶⁴ and by other observers¹⁶⁵. The Report on the situation of fundamental rights in the European Union in 2003 points out, with reference to Opinion 4/2003 delivered on 13 June 2003 by the Article 29 Working Party, that it is

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.

¹⁶⁰ For a description of the system of “audits” provided for in this connection, see paragraph 43 of the declaration of undertakings of the United States and the comment given on this by the Article 29 Working Party in its Opinion 2/2004 (par. 5, K.).

¹⁶¹ Opinion 8/2004 on the information for passengers concerning the transfer of PNR data on flights between the European Union and the United States of America.

¹⁶² See Opinion 48/2003 of 18 December 2003 of the Belgian Commission for the Protection of Privacy.

¹⁶³ The French Data Protection Authority (CNIL) opened a special page on this case. Users may download it. See <http://www.cnil.fr/index.php?id=1015&print=1>

¹⁶⁴ See for example the proposal to set up a commission of inquiry of the French Senate into the infringements of freedoms resulting from the agreement, Doc. No. 399, 1 July 2004.

¹⁶⁵ For a negative study of this agreement by the association Privacy International, *Transferring Privacy: The Transfer of Passenger Records and the Abdication of Privacy Protection*, Février 2004 (<http://www.privacyinternational.org/issues/terrorism/rpt/transferringprivacy.pdf>)

The adequacy decision of 14 May 2004 contains the safety clause referred to in this passage. Article 3 provides:

1. Without prejudice to their powers to take action to ensure compliance with national provisions adopted pursuant to provisions other than Article 25 of Directive 95/46/EC, the competent authorities in Member States may exercise their existing powers to suspend data flows to CBP in order to protect individuals with regard to the processing of their personal data in the following cases:
 - (a) where a competent United States authority has determined that CBP is in breach of the applicable standards of protection; or
 - (b) where there is a substantial likelihood that the standards of protection set out in the Annex are being infringed, there are reasonable grounds for believing that CBP is not taking or will not take adequate and timely steps to settle the case at issue, the continuing transfer would create an imminent risk of grave harm to data subjects, and the competent authorities in the Member State have made reasonable efforts in the circumstances to provide CBP with notice and an opportunity to respond.
2. Suspension shall cease as soon as the standards of protection are assured and the competent authorities of the Member States concerned are notified thereof.

In order for such a safety clause to actually urge the United States to fully respect the undertakings given during the negotiations with the European Commission, it is essential not only that the committee of representatives of the Member States set up by Article 31 of Directive 95/46/EC carries out fully the monitoring function that has been entrusted to it by Article 5 of the adequacy decision, but also that the mechanism of so-called audits – consisting of a “review” (examination), at least once a year, of the undertakings of the US authorities, conducted jointly by the US Bureau of Customs and Border Protection (CBP) and the European Commission, which may be assisted by experts – has the required authority and credibility. It is essential in this respect that representatives of independent supervisory authorities set up in the Member States in accordance with Directive 95/46/EC take part in this annual review of the compliance by the US authorities with their undertakings. It should be noted in this connection that despite the criticisms that they have levelled at the adequacy decision of the Commission and at the agreement signed with the United States, “the [Article 29 Data Protection] Working Party’s members undertake to co-operate to the extent that they are asked to participate in any such review and to observe the rules regarding confidentiality agreed by the two sides”¹⁶⁶.

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 conclusion 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 purposes¹⁶⁷. A similar question was raised in the *Report on the situation of fundamental rights in the Union in 2003*¹⁶⁸ with respect to the proposal made by Spain early in 2003 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. This proposal has led to the adoption of the Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers

¹⁶⁶ Opinion 2/2004, p. 12.

¹⁶⁷ 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.

¹⁶⁸ See pp. 59-60 of the report.

to communicate passenger data¹⁶⁹. The directive is based on 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.

In its initial version, the proposed directive sought 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 would define the minimum levels. While the initial version of the proposal for a Directive was only aimed at air carriers, later versions extended its scope to include all carriers. One provision of the proposal (Article 3 § 1, b), of the version of 12 November 2003) also provided that the carriers should notify the competent national authorities within forty-eight 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.

The Council deemed it necessary, in February 2004, to “update” the Spanish proposal by proposing an amended draft Directive setting out essentially to emphasize the aspect of “combating illegal immigration” in the initial draft and to extend the range of data to be transmitted to the monitoring authorities by air carriers alone, before transporting third-country nationals to the territory of the Union. The data in question include not only the identity of the persons transported, the serial number and type of travel document, nationality, name and date of birth, but also the border crossing point for entry into the Union, the times of departure and arrival of the transport and initial boarding point of all persons transported. The transmission of those data is subject to compliance with Directive 95/46/EC. Having had this proposal submitted to it, the European Parliament expressed its agreement in principle with the objective. Nevertheless, it rejected the methods chosen, in particular with regard to the resulting mixture of types for the air carriers, the resulting discrimination in relation to other modes of transport, and the risks to data protection entailed by the proposal¹⁷⁰. In April 2004, the Council communicated an amended proposal, extending the scope of application of the text to all persons and focusing on the fight against illegal immigration. It situates the use of those data in the context of the fight against illegal immigration and border checks. The Council points out that it would be legitimate to use those data as “evidence” when implementing procedures to enforce the laws and regulations on entry and immigration, more particularly the provisions on the maintenance of public order and national security. In this context, the data may be retained for a longer period of time than the 24 hours initially put forward, more specifically with a view to their use by law enforcement authorities of Member States. Nevertheless, it is pointed out that any other use would run counter to the spirit of Directive 95/46/EC, and it is provided that the transmission of data on persons to be transported takes place before the booking procedure has been completed.

Two circumstances appear to have accelerated the adoption of the Directive. First, the European Council of 25 and 26 March 2004 adopted a declaration on the fight against terrorism, point 6 of which underlines the need to accelerate the consideration of the measures to be adopted in this regard, including 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. Second, Article 67(2), al. 1, EC, implies that if that instrument was not adopted before 1 May 2004, the Council would have to launch a new process for the adoption of that proposal, which could not be made after that date on the initiative of a Member State. Therefore, circumventing the opinion of the European

¹⁶⁹ OJ L 261 of 6.8.2004, p. 24.

¹⁷⁰ Report by Ingo-Schmitt, 19 March 2004, A5-0211/2004. See also House of Lords, “Fighting illegal immigration: should carriers carry the burden?” HL Paper 29, 12.02.2004.

Parliament¹⁷¹, and despite the declaration of the Commission that it would have « preferred » a larger legislative framework which the Commission suggested it could propose « instead of examining on a case to case basis the questions related to such measures » – a position the Council « noted » –, the Council put the text among the « point A » questions on the agenda of the JHA Council of 29 April 2004.

Article 6 of the initial proposal for a Directive concerned the protection of personal data. It provided that data processed by carriers and transmitted to the competent authorities (authorities in charge of carrying out checks at the external borders or, where these data concern the interruption by a third country national of his journey or his failure to use his return ticket, combating illegal immigration) 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 would ensure that the data are destroyed 24 hours after arrival. A right of information, access and rectification of data was 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).

In its version adopted on 29 April 2004, Article 6 of Directive 2004/82/EC provides that:

1. The personal data referred to in Article 3(1) shall be communicated to the authorities responsible for carrying out checks on persons at external borders through which the passenger will enter the territory of a Member State, for the purpose of facilitating the performance of such checks with the objective of combating illegal immigration more effectively.

Member States shall ensure that these data are collected by the carriers and transmitted electronically or, in case of failure, by any other appropriate means to the authorities responsible for carrying out border checks at the authorised border crossing point through which the passenger will enter the territory of a Member State. The authorities responsible for carrying out checks on persons at external borders shall save the data in a temporary file.

After passengers have entered, these authorities shall delete the data, within 24 hours after transmission, unless the data are needed later for the purposes of exercising the statutory functions of the authorities responsible for carrying out checks on persons at external borders in accordance with national law and subject to data protection provisions under Directive 95/46/EC.

Member States shall take the necessary measures to oblige carriers to delete, within 24 hours of the arrival of the means of transportation pursuant to Article 3(1), the personal data they have collected and transmitted to the border authorities for the purposes of this Directive. In accordance with their national law and subject to data protection provisions under Directive 95/46/EC, *Member States may also use the personal data referred to in Article 3(1) for law enforcement purposes.*

2. Member States shall take the necessary measures to oblige the carriers to inform the passengers in accordance with the provisions laid down in Directive 95/46/EC. This shall also comprise the information referred to in Article 10(c) and Article 11(1)(c) of Directive 95/46/EC.

As the Preamble of Directive 2004/82/EC expressly recalls, « whereas it would be legitimate to process the passenger data transmitted for the performance of border checks also *for the purposes of allowing their use as evidence in proceedings aiming at the enforcement of the laws and regulations on entry and immigration*, including their provisions on the protection of

¹⁷¹ Report Hernandez Mollar, 7 April 2004, A5-0266/2004. Recitals 3 to 6 of the Preamble of the Directive state in this regard: « It is important to avoid a vacuum in the Community's action in combating illegal immigration. As from 1 May 2004 the Council can no longer act on an initiative of a Member State. The Council has exhausted all possibilities to obtain in time the opinion of the European Parliament. Under these exceptional circumstances the Directive should be adopted without the opinion of the European Parliament ».

public policy (ordre public) and national security, *any further processing in a way incompatible with those purposes would run counter to the principle set out in Article 6(1)(b) of Directive 95/46/EC* » (12th Recital). As has been recalled, Article 6(1)(b) of Directive 95/46/EC states that personal data may only be « collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes ». However, Article 13(1) of Directive 95/46/EC provides an exception to that principle, stating that the Member States may adopt legislative measures to restrict that principle and the corresponding rights when such a restriction constitutes a necessary measure to safeguard, *inter alia*, national security, defence, public security, or the prevention, investigation, detection and prosecution of criminal offences. The possibility created by Directive 2004/82/EC of the Council of 29 April 2004 on the obligation of carriers to communicate passenger data although, initially meant to be transmitted to the immigration services, these data may be used by the law enforcement agencies, therefore seems compatible with Directive 95/46/EC. However, collected with the initial objective of combating illegal immigration, the communication of such data to the public authorities serves the objective of prevention, investigation, detection and prosecution of criminal offences. This constitutes an exception to the principle of finality contained in Article 6(1)(b) of Directive 95/46/EC. Such a restriction is only admissible insofar as it complies with the requirement of necessity stipulated by Article 13 of Directive 95/46/EC.

The retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks

On 28 April 2004, a draft framework decision on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences, including terrorism¹⁷² was submitted jointly by France, Sweden, Ireland and the United Kingdom. This proposal is closely linked to the conclusions of the European Council of 25 March 2004 on combating terrorism. It concerns only traffic data, i.e. electronic data generated by a communication and not the actual content of the information communicated. It is concerned with the retention of data with a view to tracking the source of illegal materials, such as those connected with paedophilia, racism and xenophobia, as well as the source of computer hacking, and identifying the individuals who use electronic communications networks in order to perpetrate acts of organized crime and terrorism. To this end, it proposes to retain *a priori* certain types of data that are already processed and stored for billing, commercial or any other lawful purposes, for a longer period of time in expectation of the fact that those data might prove necessary in the future for investigation or prosecution purposes.

In *Thematic Observation no. 1* of March 2003 which it devoted to the balance between freedom and security in the context of measures for combating terrorism¹⁷³, the Network of independent experts on fundamental rights had already expressed its viewpoint concerning the reliance upon Article 15(1) of 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 sector¹⁷⁴. This clause provides that Member States may “adopt legislative measures providing for the retention of data for a limited period where this is justified” by the necessity of safeguarding national security, defence and public security, or for the prosecution of criminal offences or of unauthorized use of the electronic communication system. Under this provision, those restrictions on privacy may, however,

¹⁷² Doc. 8958/04 of 28.04.2004, CRIMORG 36, TELECOM 82. See also the explanatory note on this initiative, Doc. 8958/04 ADD 1 of 20.12.2004, CRIMORG 36, TELECOM 82.

¹⁷³ See section IV.3 of this Thematic Observation, pp. 26-28.

¹⁷⁴ 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 L201 of 31.07.2002, p. 37

only be imposed within the limits set by the respect for fundamental rights, and more particularly that of privacy as guaranteed by Directive 95/46/EC. The European Data Protection Commissioners expressed their concern with respect to the time limits suggested for the retention of traffic data in a proposal for a framework decision presented in 2002 when this was made public¹⁷⁵.

The Data Protection Working Party « Article 29 » expressed a similar concern in its Opinion n° 5/2002 of 11 October 2002.¹⁷⁶ In its Thematic Comment n°1, the Network of Independent Experts noted the important disparity of approaches in the attitudes adopted by the Member States on the question of the retention of data. This is also the finding on which the proposal for a Framework Decision is based (8th Recital of the Preamble). The differences which remain between the legislations of the Member States

are prejudicial to co-operation between the competent authorities in the prevention, investigation, detection and prosecution of crime and criminal offences. To ensure effective police and judicial co-operation in criminal matters, it is therefore necessary to ensure that all Member States take the necessary steps to retain certain types of data for a length of time within set parameters for the purposes of preventing, investigating, detecting and prosecuting crime and criminal offences including terrorism. Such data should be available to other member states in accordance with the instruments on judicial cooperation in criminal matters adopted under Title VI of the Treaty on European Union. This should also include instruments which were not adopted under this Title but which has been acceded to by the member states and to which reference are made in the instruments on judicial co-operation in criminal matters adopted under Title VI of the Treaty on European Union.¹⁷⁷

The link between the differences in protection from Member State to Member State and the efficacy of the fight against organized crime, including terrorism, is explained in the explanatory memorandum of 20 December 2004 attached to the proposal transmitted to the Secretary General of the Council of the Union:

It is clear that sophisticated international criminal and terrorist organisations, aware of the variations in legislative requirements between different Member States with regard to data retention regulations, will inevitably gravitate to Member States which allow communication service providers to operate networks with shorter data retention periods. Clearly this would be done in order to take advantage of the anonymity this will afford and so frustrate the efforts of any investigators attempting to follow their communication "footprints" either in order to place them at the scene of the crime or identify all associates and co-conspirators. Approximation of retention rules will both diminish the risk of the creation of these 'data havens' within the Europe Union and perhaps more importantly ensure that evidence in the form of communications data will be available to facilitate judicial co-operation between law enforcement authorities.

In actual fact, it is not the differences as such that exist between the legislative regulations of Member States in the area of data retention that constitute an obstacle to effectively combating organized crime or terrorism; the obstacle rather lies in the fact that certain Member States define data retention periods that are considered too short for criminal investigation purposes. However, the shortening of data retention periods is inspired by commercial profitability concerns, as service providers do not wish to keep data beyond the

¹⁷⁵ Statement of the European Data Protection Commissioners on mandatory systematic retention of telecommunication traffic data, adopted at the International Conference in Cardiff (9-11 September 2002).

¹⁷⁶ Opinion 5/2002 on the Statement of the European Data Protection Commissioners at the International Conference in Cardiff (9-11 September 2002) on mandatory systematic retention of telecommunication traffic data.

¹⁷⁷ Preamble, 9th Recital.

time that is strictly necessary from a commercial point of view, and competition between service providers is intense. It is against this tendency to shorten retention times that the proposal for a framework decision sets out to react.

Traffic data are personal data, within the meaning of Article 2(a) of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, opened for signature in the Council of Europe on 28 January 1981, and to which all Member States of the European Union are parties¹⁷⁸. Processing of those data is only acceptable if the data being processed are adequate, relevant and not excessive in relation to the purposes for which they are stored. This requirement of proportionality also follows from Article 8(2) of the European Convention on Human Rights. The storing of traffic data constitutes an interference with the right to respect for private life guaranteed by Article 8 ECHR.¹⁷⁹ Insofar as the service providers are required by the public authorities to retain certain data which they may seek to use at a later time in the course of a criminal investigation, it would not be acceptable to argue that these authorities are not responsible for the resulting interference with the right to respect for private life. Quite apart from the elementary fact that public authorities must protect private persons from interferences committed by other private persons – let alone not impose on private persons to violate the privacy rights of others –, the European Court of Human Rights has answered in a different, yet comparable, context that « to accept such an argument would be tantamount to allowing investigating authorities to evade their responsibilities under the Convention by the use of private agents »¹⁸⁰.

The requirement of proportionality may be considered from the viewpoint of the volume of data collected and the period of retention of those data. As regards the volume of data collected, it is clear that a selective system based on the retention of data on specific individuals would constitute less of an invasion of privacy than a non-selective system consisting in a general storage in a data retention system, without distinction between the individuals concerned. In its Opinion 5/2002, the Article 29 Data Protection Working Party therefore expressed its preference for the former system. It is true that a system based on the retention of communication data concerning specifically identified individuals may seem less effective from the point of view of criminal investigation, since it excludes by definition the identification of individuals not yet suspected of illegal activities. However, on the one hand, it is not enough that a measure imposing restrictions on the right to respect for privacy is considered to comply with the requirements of Article 8 of the European Convention on Human Rights for it to be appropriate to the achievement of certain legitimate objectives, such as the prevention and prosecution of criminal offences. It must also be proportionate, given the resulting invasion of privacy: the balance between the requirements of privacy and those of the fight against crime is upset from the moment the additional infringement of privacy resulting from the choice of a particular method of investigation into the perpetrators of offences is not justified by a commensurate gain in effectiveness of the investigation. On the other hand, the police services have so far failed to furnish proof of the need for a strictly proactive general retention of traffic data for all electronic communications. The Data Protection Working Party « Article 29 » notes in this regard in its Opinion n°9/2004 of 9 November 2004 :¹⁸¹

¹⁷⁸ ETS no. 108.

¹⁷⁹ See ECHR, *Rotaru v. Romania* (Appl.n° 28341/95) judgment of 4 May 2000, § 46 : « ...both the storing by a public authority of information relating to an individual's private life and the use of it and the refusal to allow an opportunity for it to be refuted amount to interference with the right to respect for private life secured in Article 8 § 1 of the Convention ».

¹⁸⁰ ECHR (2nd sect.), *M.M. v. The Netherlands* (Appl. N° 39339/98) judgment of 8 April 2003 (final), § 40.

¹⁸¹ Opinion 9/2004 on a draft Framework Decision on the storage of data processed and retained for the purpose of providing electronic public communications services or data available in public communications networks with a view to the prevention, investigation, detection and prosecution of criminal acts, including terrorism. [Proposal presented by France, Ireland, Sweden and Great Britain (Document of the Council 8958/04 of 28 April 2004)], 11885/04/EN, WP 99, 9 November 2004.

The routine, comprehensive storage of all traffic data, user and participant data proposed in the draft decision would make surveillance that is authorised in exceptional circumstances the rule. This would clearly be disproportionate. The draft framework would apply, not only to some people who would be monitored in application with specific laws, but to all natural persons who use electronic communications. Additionally all the communications sent or received would be covered. Not everything that might prove to be useful for law enforcement is desirable or can be considered as a necessary measure in a democratic society, particularly if this leads to the systematic recording of all electronic communications. The framework decision has not provided any persuasive arguments that retention of traffic data to such a large-scale extent is the only feasible option for combating crime or protecting national security. The requirement for operators to retain traffic data which they don't need for their own purposes would constitute a derogation without precedent from the finality/purpose principle.

As regards the period of retention of traffic data, Article 4 of the proposal for a framework decision provides that the national legislation of each Member State on the retention of communication data should provide for a period of at least twelve months and of thirty-six months at the most. This is a longer period than that which the Article 29 Data Protection Working Party considers acceptable from the point of view of the proportionality principle, in both its Opinions 5/2002 and 9/2004.

It is remarkable also that the Convention on cybercrime opened to signature in the framework of the Council of Europe in 2001¹⁸² does not provide for the possibility of a generalized retention of data. Article 20 of that convention provides for the possibility of real-time collection of traffic data, which only concerns the collection and recording of traffic data, in real-time, « associated with *specified* communications in its territory transmitted by means of a computer system » (emphasis added). Indeed, the Explanatory Report to this convention states that under this article, « the traffic data concerned must be associated with specified communications in the territory of the Party. (...) The communications in respect of which the traffic data may be collected or recorded, however, must be specified. Thus, the Convention does not require or authorise the general or indiscriminate surveillance and collection of large amounts of traffic data. It does not authorise the situation of 'fishing expeditions' where criminal activities are hopefully sought to be discovered, as opposed to specific instances of criminality being investigated. The judicial or other order authorising the collection must specify the communications to which the collection of traffic data relates »¹⁸³.

It is surprising that the need for a systematic and generalized system of retention of traffic data has appeared now, before any insufficiencies of the Convention on Cybercrime have been identified and in the absence of any study on the need to expand the possibilities the law enforcement authorities already have at their disposal with the current periods during which the concerned data are preserved.

Article 6 of the proposed Framework Decision relates to data protection:

Each Member State shall ensure that data retained under this Framework Decision shall be subject, as a minimum, to the following data protection principles and shall establish judicial remedies in line with the provisions of Chapter III on 'Judicial remedies, liability and sanctions' of Directive 95/46/EC:

(a) data shall be accessed for specified, explicit and legitimate purposes by competent authorities on a case by case basis in accordance with national law and not further processed in a way incompatible with those purposes;

¹⁸² Opened for signature in Budapest on 23 November 2001 (CETS no. 185).

¹⁸³ Explanatory Report to the Convention on Cybercrime, at para. 219.

- (b) the data shall be adequate, relevant and not excessive in relation to the purposes for which they are accessed. Data shall be processed fairly and lawfully;
- (c) data accessed by competent authorities shall be kept in a form which permits identification of data subjects for no longer than is necessary for the purpose for which the data were collected or for which they are further processed;
- (d) the confidentiality and integrity of the data shall be ensured.
- (e) data accessed shall be accurate and, every reasonable step must be taken to ensure that personal data which are inaccurate, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified.

This provision is of course welcome, as it ensures that the principles of Convention n°108 of the Council of Europe shall be made applicable to the use of the traffic and location data retained under the Framework Decision by public authorities, for the purposes of prevention, investigation, detection and prosecution of crime or criminal offences including terrorism. It should be emphasized, however, that the retention of data processed and stored by service providers, *as such* – and even before such data are accessed by public authorities –, constitutes an interference with the right to respect for private life, to which both Convention n°108 of the Council of Europe and Directive 95/46/EC apply. Although this provision is drafted as if only the access by public authorities to the data retained could pose a potential threat to the right to respect for private life, thus betraying what may be a misunderstanding as to the requirements of private life, the requirements listed – and borrowed from Directive 95/46/EC – should in fact apply also to the storing of the data by service providers.

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

The Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, including in particular the right to family reunification as organized under that instrument, is commented upon under Article 45 of the Charter. Article 9 of the Charter shall otherwise not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 10. Freedom of thought, conscience and religion

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004. Reference is made also to the Thematic Comment n°3 of the Network of Independent Experts on Fundamental Rights which concerns the rights of minorities in the European Union.

Article 11. Freedom of expression and of information

Pluralism of the media

Article 11 § 2 of the Charter of Fundamental Rights of the European Union states that “the freedom and pluralism of the media shall be respected”. For the moment, the responsibility of ensuring pluralism in the media remains with the Member States. Certain calls have been made in favour of a European initiative in this area. Indeed, the Network of independent

experts had noted that 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 activities¹⁸⁴, subsequently amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997¹⁸⁵, could be amended in order to fulfil the requirement of Article 11(2) of the Charter.

In its White Paper of May 2004 on services of general interest¹⁸⁶, however, the European Commission concludes:

Concerning media pluralism, the public consultation [developed on the basis of the Green Paper on services of general interest of 21 May 2003¹⁸⁷] highlighted that, in the light of the differences that exist across the Member States, the issue should be left to the Member States at this point in time. The Commission concurs and concludes that at present it would not be appropriate to submit a Community initiative on pluralism. At the same time, the Commission will continue to closely monitor the situation.

However, Council Directive 89/552/EEC shall be subject to an evaluation in 2005. Although the Preamble of the directive mentions 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 does not contain any provision aimed precisely at requiring that the Member States 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). It may be recommended in the course of such an evaluation to give special consideration to the added value which a specification at Community level of the requirements of pluralism in the media would present, in particular in order to clarify the legal framework applicable to such initiatives adopted by the Member States. The Member States should not be chilled from adopting certain regulations in this regard which could be seen as violating the freedom to provide audio-visual services or the freedom of expression of audio-visual service providers.

Article 12. Freedom of assembly and of association

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 13. Freedom of the arts and sciences

Reference is made to the commentary in this report under Article 3 of the Charter of Fundamental Rights. In the view of this rapporteur, the adoption on 25 January 2005 of the Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research, should imply that restrictions to freedom of scientific research should be considered as justified, to the extent that these restrictions seek to ensure that the

¹⁸⁴ OJ L 298 of 17/10/1989, p. 23.

¹⁸⁵ 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.

¹⁸⁶ COM(2004) 374 final of 12.5.2004, par. 4.6.

¹⁸⁷ COM(2003) 270 final of 21.5.2003

guarantees of this Additional Protocol to the Convention on Human Rights and Biomedicine are fully respected.

Article 14. Right to education

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

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

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 16. Freedom to conduct a business

Public procurement policies

The Member States should be encouraged to include a concern for the promotion of fundamental rights in their public procurement policies. In accordance in that respect with the case-law of the European Court of Justice¹⁸⁸, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts¹⁸⁹ provides that contract performance conditions may seek to favour the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment, or that they may include a requirement, for instance, that the contractors comply with the basic conventions concluded within the International Labour Organisation (ILO), to the extent that these conventions are not implemented in national legislation (Article 26 and Recital 33 of the Preamble). Recital 33 of the Preamble states that

Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the requirements - applicable during performance of the contract - to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.

¹⁸⁸ ECJ, 26 September 2000, Commission v. France, Case C-225/98 [2000] ECR I-7445 ; ECJ, 17 September 2002, Concordia Bus Finland Oy Ab, Case C-513/99.

¹⁸⁹ OJ L 134 , 30.4.2004, p. 114. This Directive revises Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public services contracts (OJ L 209, p.1).

These possibilities are important and should be relied upon by the Member States. They are limited, however, to the definition of the contract performance conditions; they do not extend to the identification of the natural or legal persons eligible for the award of public contracts. As a result, the directive does not authorize the Member States to decide to award their public contracts only to economic operators which either undertake to respect, ensure the respect of, and protect human rights in their spheres of activity and influence, and who effectively agree to submit to monitoring procedures which ensure that this undertaking is complied with¹⁹⁰, or which have been convicted by a judgment having the force of *res judicata* for certain violations of human rights law, for instance for the violation of national rules implementing the fundamental rights of workers identified in the 1998 Declaration of the International Labour Conference on Fundamental Rights and Principles at Work. No obstacle of principle, however, seems to exist to the adoption of such a condition of selection. Directive 2004/18/EC already provides that economic operators should be excluded if they have participated in a criminal organisation or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering may be excluded from public contracts (Article 45 (1)), and that they may be excluded where they have been found in violation of national legislation implementing Directives 2000/78/EC or 76/207/EEC (Article 45(2), c) and d)). Recital 43 of the Preamble provides in this respect that:

The award of public contracts to economic operators who have participated in a criminal organisation or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering should be avoided. (...) The exclusion of such economic operators should take place as soon as the contracting authority has knowledge of a judgment concerning such offences rendered in accordance with national law that has the force of *res judicata*. If national law contains provisions to this effect, non-compliance with environmental legislation or legislation on unlawful agreements in public contracts which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

This Recital adds that may be considered an offence concerning the professional conduct of the economic operator or a form of grave misconduct the violation of the national rules implementing Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation¹⁹¹ or 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 conditions¹⁹².

Although Directive 2004/18/EC represents a clear improvement in the responsibility of businesses with regard to human rights, the provisions it contains in order to ensure this responsibility remain relatively modest. In particular, it is surprising that Directive 2000/43/EC is not treated the way Directives 2000/78/EC and 76/207/EEC are treated, and that the member States are not authorized under the Directive to include in the selection of candidates or tenderers mechanisms which seek to impose a better respect for human rights, even where such mechanisms would fully comply with the principles of non-discrimination and transparency.

¹⁹⁰ For instance, the Member States could be authorized to require that economic operators wishing to compete for the award of public contracts agree to abide by the Guidelines for Multinational Enterprises set up by the Organisation for Economic Co-operation and Development, and to comply with any procedure initiated within those Guidelines.

¹⁹¹ OJ L 303, 2.12.2000, p. 16.

¹⁹² OJ L 39, 14.2.1976, p. 40. Directive amended by Directive 2002/73/EC of the European Parliament and of the Council (OJ L 269, 5.10.2002, p. 15).

Article 17. Right to property

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 18. Right to asylum

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

Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted was formally adopted by the Council before the start of the required five-year period following the entry into force of the Treaty of Amsterdam¹⁹³. This Directive is the outcome of a Commission proposal initially presented in September 2001¹⁹⁴. It establishes the minimum standards for persons to qualify for refugee status or for subsidiary international protection, leaving Member States free in principle to retain or introduce more favourable standards for the persons concerned (Article 3). This is in line with Article 63(1)(c) and (2)(a) EC, which constitutes its legal basis. Attention should be drawn, however, to the ambiguity of this reference to the adoption by the Council of “minimum” standards in a context where the conferment to the Union of asylum issues, subsequently enshrined in the EC Treaty, is justified by the concern to avoid an erosion of the right to asylum, given the diversity of asylum procedures in the various Member States, with Member States that are the most generous in granting refugee status running the risk of attracting a greater number of asylum-seekers. The very reasoning that originally justified the Europeanization of asylum policy implies that Member States will be tempted, following the adoption of Directive 2004/83/EC, to align their national legislation with the minimum levels of protection defined in the Directive. Any attempt to extend the conditions for granting refugee status in fact creates the risk of increasing the pressure on systems for granting refugee status which, at the end of the 1990s in particular, were put to the test. It would be regrettable, albeit foreseeable, that the transposition of the Directive would in certain Member States provide a pretext for reducing the levels of protection already offered in their national legislation to persons claiming refugee status or any other form of international protection.

From the viewpoint of Article 18 of the Charter of Fundamental Rights, Directive 2004/83/EC of 29 April 2004 calls for the following comments.

I° Formal recognition of subsidiary protection. The adoption of Directive 2004/83/EC may be welcomed as a step forward for the right to asylum in European law, despite this basic reservation¹⁹⁵. The first merit of the Directive lies in the formal recognition in Community law of the status of subsidiary protection, which Article 2(e) grants to:

A third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 [namely (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country

¹⁹³ OJ L 304 of 30.09.2004, p.12.

¹⁹⁴ COM(2001)510 of 12 September 2001.

¹⁹⁵ See for example ECRE, Information Note on Directive 2004/83, IN1/10/2004

of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict], and to whom Article 17(1) and (2) [providing for exclusion from refugee status] do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

Community law thus imposes an obligation of international protection that is subsidiary to the protection due to refugees under the Geneva Convention of 28 July 1951. Nevertheless, the Directive provides for the possibility of a cessation of such status “when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required”, where Member States shall have regard to “whether the change of circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm” (Article 16). On the other hand, an applicant for international protection is excluded from being eligible for international protection “where there are serious reasons for considering that: (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he or she has committed a serious crime; (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations; (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present”, or has participated in such acts (Article 17). This exclusion clause is naturally inspired by the similar clause contained, for persons claiming refugee status, in Article 1(F) of the Geneva Convention. Nevertheless, as a result of the application of this clause to persons who cannot be returned to their country of origin or to a safe third country, those persons will remain on the territory of the host State without having a specific status, and potentially without the State in question acknowledging having the slightest obligation towards those persons.

Although the introduction of a specific status for persons who are recognized as qualifying for international protection would be welcome, the conditions in which this status is introduced in Community law raises two reservations:

- Firstly, it should be underlined that this status remains *subsidiary* to the status of refugee as defined by the Geneva Convention of 28 July 1951. The existence of a status of subsidiary protection cannot exempt the Member States from recognizing persons corresponding to this definition as refugees, unless the persons concerned explicitly express the wish not to be granted this status. Any request for international protection should first be examined against the definition of refugee given by the Geneva Convention, and international protection status should only be granted if the person seeking protection does not correspond to this definition or has clearly expressed the wish not to be recognized as refugee.
- Furthermore, we may regret the differentiation made by the Directive between the two statuses thus established by Community law, that of refugee under the Geneva Convention and that of refugee under subsidiary protection. Both in terms of access to employment (immediately for the former category and conditionally for the latter in accordance with Article 26(3)) and length of stay (renewable term of three years as opposed to one year under Article 24), there is no rational justification for this differentiation other than political. Besides, it is refuted by certain Member States such as Sweden or Finland, which grant equal rights in this area.

2° *Conditions for granting refugee status.* Articles 5 to 10 of Directive 2004/83/EC define the conditions under which a person claiming refugee status may be granted such status. Those provisions in actual fact constitute an interpretation of Article 1(A)(2) of the Geneva Convention of 28 July 1951 on the status of refugees, with which the Member States of the

European Union agree to align themselves. The risk of such a codification is that this interpretation becomes set, whereas by its very nature it should evolve and be capable of adapting to the emergence of new threats of persecution, and of aligning itself with the recommendations of the United Nations High Commissioner for Refugees, upon whom Article 35 of the Geneva Convention has conferred the role of supervising the implementation of this Convention. This is the meaning of the comments which UNHCR has formulated on Directive 2004/83/EC, where he notes that the Geneva Convention on the status of refugees “is a multilateral instrument with universal application. To maintain the Convention’s international character, UNHCR calls on EU Member States to take into consideration common understandings achieved in international fora, especially the UNHCR Executive Committee, and the development of State practice outside the EU when interpreting the Convention”¹⁹⁶. Although this may be inferred from Recitals 15 and 16 of the Preamble of the Directive, it would have been desirable if a clause had been incorporated in the Directive providing that the provisions thereof are without prejudice to the more important obligations that may ensue for Member States from the Geneva Convention on the status of refugees and from the interpretation thereof¹⁹⁷.

Furthermore, it is regrettable that, confirming on this point the approach adopted by the Member States of the European Union since the adoption of the Protocol on asylum for nationals of Member States of the European Union, annexed to the EC Treaty by the Treaty of Amsterdam, the term “refugee” should be reserved for third-country nationals or for stateless persons, and therefore does not extend to nationals of Member States of the European Union (Article 2(c) of the Directive). The mutual trust which Member States give each other cannot justify that in this way they limit the scope of the international obligations they have assumed by acceding to the Geneva Convention.

On the basis of Articles 5 to 10 of Directive 2004/83/EC, attention should be drawn to the following clauses:

- Although in principle the Directive acknowledges that a well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin (Article 5(1)), Article 5(3) provides that “Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin”. This clause should be interpreted in the light of the freedoms of expression and of peaceful assembly recognized by Articles 11 and 12 of the Charter of Fundamental Rights of the European Union. This implies that it should not be possible to refuse refugee status to a person claiming such status when the fear of persecution that justifies his application is the result of the fact that he has exercised those freedoms on the territory of his country of origin. More generally, we can only agree with the assessment made of this clause of the Directive by UNHCR, who offers the following observation:

There is no logical or empirical connection between the well-foundedness of the fear of being persecuted or of suffering serious harm, and the fact that the person may have acted in a manner designed to create a refugee claim. The 1951 Convention does not, either explicitly or implicitly, contain a provision according to which its protection cannot be afforded to persons whose claims for asylum are the result of actions abroad.

¹⁹⁶ UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted, January 2005.

¹⁹⁷ In his commentary on Directive 2004/83/EC, UNHCR recommends that the national transposition laws explicitly refer to the need to take into account, in the interpretation thereof, the recommendations he has made on the basis of the Geneva Convention.

The phrase “without prejudice to the Geneva Convention” in Article 5(3) would therefore require such an approach.

- Article 6 of Directive 2004/83/EC provides that actors of persecution or serious infringements of human rights, the risk of which justifies the granting of refugee status, may also include non-State actors. This is a welcome specification, since it goes further than the more restrictive interpretation in terms of the identity of perpetrators of persecution which some Member States have given so far of the Geneva Convention. Nevertheless, this extension is only allowed if the State, or parties or organizations controlling the State or a substantial part of the territory of the State, including international organizations, “are unable or unwilling to provide protection against persecution or serious harm (...)”.

Although, like the State, parties or organizations, including international organizations, are only considered capable of offering adequate protection against the risk of persecution insofar as those actors “take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection” (Article 7(2)), it is only partly justifiable to equate non-State actors (parties or organizations, including international organizations) with the State in terms of ability to offer the same kind of protection as that which the State should in principle be able to provide. Situations where, in the absence of an organized State, for instance following an armed conflict, international organizations take over part of the functions of the State illustrate how incapable they very often are of really offering such effective protection, given that they do not have all the attributes of State sovereignty on the territory that is partly under their control. UNHCR thus considers it “inappropriate to equate national protection provided by States, with the exercise of a certain administrative authority and control over territory by international organisations on a transitional or temporary basis. Under international law, international organisations do not have the attributes of a State. In practice, this has also meant that their ability to enforce the rule of law is often very problematic. Determining the availability of protection requires an assessment of the accessibility and effectiveness of protection to prevent persecution in the individual case and not a general reference to either the possible guarantors of such protection or the existence of a legal system in a given country”¹⁹⁸. The guidance provided by the Council, which according to Article 7(3) of the Directive should help Member States to assess “whether an international organization controls a State or a substantial part of its territory and provides adequate protection”¹⁹⁹, need to take account of this fundamental difference.

Although it remains dependent on their capacity to provide protection that is thought sufficient on a substantial part of the national territory of the country of origin, equating the State with non-State actors (parties or organizations, including international organizations) that are considered capable of providing the same kind of protection as that which the State should in principle be able to offer is all the more problematic if we link it to Article 8(1) of the Directive, which raises the internal flight alternative in the following terms:

¹⁹⁸ UNHCR, Note on key issues of concern on the draft Qualification directive. See also: Comments from the European Council on Refugees and Exiles on the Proposal for a Council Directive on minimum standards for the qualification and status of thirds country nationals and stateless persons as refugees or as persons who otherwise need international protection, p. 6.; Memorandum by Guy S. Goodwin-Gill, Professor of International Refugee Law, University of Oxford, and Agnès Hurwitz, Refugee Studies Centre, University of Oxford.

§ 12, in House of Lords, Select Committee on the European Union, Defining Refugee Status and Those in Need of International Protection, 28th report, session 2001-2002

¹⁹⁹ The Council issued along with its decision a statement attached to the Council minutes of 29 April, specifying that “for the purpose of applying Article 7, the Council, considering information from relevant international organisations, will endeavour to provide guidance on the question of whether an international organisation is actually in control of a State or a substantial part of its territory and whether this international organisation provides protection from persecution or suffering of serious harm, based on an assessment of the situation in the State or territory concerned.” (Doc. 8990/04, ADD 1 REV 1 COR 1, 29.05.2004).

As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.

If this is the case, the person seeking international protection may be expelled “notwithstanding technical obstacles to return to the country of origin” (Article 8(3)). This means that refugee status should not be granted to a person who, although he may have reason to fear persecution on one of the grounds stated in Article 1(A)(2) of the Geneva Convention if he returns to his country of origin, can nevertheless return to certain areas in that country where stability will be ensured by the presence of an international organization, even if there are technical obstacles to internal relocation. Under the Geneva Convention, however, the internal flight alternative can only exclude a person from being granted refugee status if this alternative is practicable. As the European Council on Refugees and Exiles (ECRE) points out, “an assessment of whether internal protection exists necessarily involves an assessment of whether the proposed area is physically, safely and legally accessible by the applicant. If access is impossible in practice then an internal protection alternative does not exist”²⁰⁰. The national laws ensuring the transposition of the Directive should specify that the internal flight alternative in the country of origin can only justify refusal of refugee status if, on the one hand, such internal relocation constitutes a realistic alternative, which presupposes that both legal and practical conditions are fulfilled, and if, on the other hand, it does not entail any disproportionate negative consequences for the asylum-seeker concerned.

- The Geneva Convention provides that fear of persecution on grounds of membership of a social group justifies the granting of refugee status. Article 10(d) of Directive 2004/83/EC says:

a group shall be considered to form a particular social group where in particular:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

The usual interpretation of the Geneva Convention is less restrictive, since it considers that those two conditions are not cumulative as the Directive shows them to be, but alternative. UNHCR proposed the following definition of “social group” as referred to in Article 1(A)(2) of the Geneva Convention: “A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights”²⁰¹.

3° *Exclusion from refugee status.* Article 12(2) of Directive 2004/83/EC provides:

A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

²⁰⁰ Comments from the European Council on Refugees and Exiles on the Proposal for a Council 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, IN1/10/2004, p. 8.

²⁰¹ UNHCR, Guidelines on International Protection, « **Membership of a particular social group** » within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees », HCR/GIP/02/02, 7 May 2002, § 11.

- (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; *which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;*
- (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

The passages marked in italics serve to extend the grounds for exclusion from refugee status in relation to the, in principle restrictively interpreted, exception contained in Article 1(F) of the Geneva Convention of 28 July 1951. The term “particularly cruel actions”, although it sets out to exclude the possibility of persons guilty of terrorist acts claiming refugee status, is particularly vague. Care should be taken that this term cannot be used wrongly in order to refuse refugee status to persons who fear persecution for their political opinions, having expressed those opinions through acts that are prosecuted as non-political crimes in their country of origin. Recalling his earlier positions on this matter²⁰², UNHCR notes, in his comments on Directive 2004/83/EC:

An interpretation of the language of Article 1F(c) to include acts of ‘terrorism’ without proper qualification may lead to an overly extensive application of this particular exclusion clause, especially in view of the fact that ‘terrorism’ is without a clear or universally agreed definition. For the purposes of interpreting and applying Article 1F(c), only those acts within the scope of United Nations Resolutions relating to measures combating terrorism which impinge upon the international plane in terms of their gravity, international impact, and implications for international peace and security, should give rise to exclusion under this provision.²⁰³

4° Revocation of refugee status. Article 14(4) of Directive 2004/83/EC provides for the possibility of revoking refugee status “(a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present; (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State”. Although it is up to the State to prove that the circumstances allowing the revocation of refugee status are fulfilled (Article 14(2)), this in fact constitutes an extension of the clauses for exclusion from refugee status which are defined restrictively in Article 1(F) of the Geneva Convention. Insofar as, by doing so, Member States do not default on their international obligations – more particularly those ensuing from Articles 2 and 3 of the European Convention on Human Rights –, they may expel persons from whom refugee status has been withdrawn in accordance with Article 14(4) of the Directive. Nevertheless, they are obliged to observe the guarantees which the Geneva Convention gives to refugees against whom an expulsion decision has been taken on grounds of national security or public order, more particularly the procedural guarantees set out in Article 32(2) of the Geneva Convention (Article 14(6) of Directive 2004/83/EC).

The present wording of Article 14(4) of the Directive confuses *revocation* of refugee status, which the Geneva Convention allows in circumstances that are restrictively defined in Article 1(F) in order to prevent that the international protection for which refugees qualify should

²⁰² UNHCR, “Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees”, 4 September 2003, paragraphs 46–49.

²⁰³ UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted, **January 2005**.

benefit persons who are guilty of crimes under international law or impede prosecution for serious crimes, with the possibility, under certain conditions, of *refoulement*, where this is justified by the need to protect the community of the host State (Article 33(2) of the Geneva Convention). In fact, the Directive extends the possible circumstances for revocation of refugee status by equating them with the circumstances where the Geneva Convention allows only one exception to the principle of *non-refoulement* set forth in Article 33. An interpretation of the Directive in accordance with the Geneva Convention leads us to consider that a refugee whose status has been “revoked” because, under Article 14(4) of the Directive, there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present, or because he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State, should continue to enjoy all the rights that are granted to refugees as long as he or she is on the territory of the host State. This “revocation” should be taken to mean a refusal to grant asylum rather than a challenging of the status of refugee within the meaning of Article 1(A)(2) of the Geneva Convention.

5° *The right to subsidiary protection and the indiscriminate risk of serious infringements of human rights.* According to Article 15(c) of Directive 2004/83/EC, serious infringements of human rights justifying the granting of subsidiary protection also include “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”. The English version of the Directive is more restrictive, since it appears to restrict the cases where indiscriminate violence may justify the granting of subsidiary protection to situations of international or internal armed conflict. The French version, on the other hand, also allows for other situations of indiscriminate violence, for example in case of ethnic conflicts that do not take the form of an internal armed conflict, but rather of riots or acts of violence committed by one population group against another. In the implementation of this Directive, the latter version should be taken into account, since it is more in keeping with the objective that consists in translating, through the concept of subsidiary protection, the obligations incumbent upon States under Articles 2 and 3 of the European Convention on Human Rights. The case law of the European Court of Human Rights confirms that, under those provisions of the European Convention on Human Rights, subsidiary protection should be granted to persons who fear execution, torture or inhuman or degrading treatment, whether in situations of armed conflict or not²⁰⁴. It is also this interpretation which the Committee of Ministers of the Council of Europe has recommended to the Member States. Its Recommendation (2001)18 of 27 November 2001 on subsidiary protection mentions « reasons of indiscriminate violence, arising from situations such as armed conflict », but not limited to situations where such a conflict exists²⁰⁵. For the same reasons, the term “individual threat” should be interpreted as formulating the requirement that the person who requests subsidiary protection runs a real risk of actually suffering the serious harm which he claims to fear, without including a requirement of *individualization*, in other words, without it being necessary that the person requesting subsidiary protection is distinguished by his particular situation from all the other members of

²⁰⁴ See Eur. Ct. HR, *H.L.R. v. France*, judgment of 29 April 1997.

²⁰⁵ See paragraph 1 of the Recommendation Rec (2001)18 of the Committee of Ministers to member states on subsidiary protection, adopted by the Committee of Ministers on 27 November 2001 at the 774th meeting of the Ministers’ Deputies : « Subsidiary protection should be granted by member states to a person who, on the basis of a decision taken individually by the competent authorities, does not fulfil the criteria for refugee status under the 1951 Convention and its 1967 Protocol but is found to be in need of international protection:
 – because that person faces a risk of torture or inhuman or degrading treatment or punishment in his/her country of origin; or
 – because that person has been forced to flee or remain outside his/her country of origin as a result of a threat to his/her life, security or liberty, for reasons of indiscriminate violence, arising from situations such as armed conflict; or
 – for other reasons recognised by the legislation or practice of the member state and therefore cannot be returned to the country of origin ».

a particular category of the population²⁰⁶. This is not contradicted by Recital 26 of the Preamble. By stating that “risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm”, it merely sets forth a rule concerning the burden of proof, without this necessarily affecting the extent of the protection offered. The fact that general risks are not enough to establish the existence of individual threats does not mean that the individual requesting international protection has to prove that he is threatened in a different way from any other member of the group to which he belongs, but merely that it is up to him to establish that he himself is actually threatened, where appropriate in the same way as any other member of this group. This point of view is shared by UNHCR in his comments on Directive 2004/83/EC, where he observes that, in accordance with the intention that guided the initial proposal presented by the Commission on this matter²⁰⁷, Recital 26 of the Preamble

must be interpreted in light of the drafters’ explicit intention to provide protection under this Directive going beyond Article 1 of the 1951 Convention. Article 15(c) provides the legal basis for granting subsidiary/complementary protection to persons fleeing from a serious and individual threat to their lives or persons by reasons of indiscriminate violence in situations of armed conflict. An interpretation which would not extend protection to persons in danger of serious and individualized threats if they form part of a larger segment of the population affected by the same risks would be in contradiction both to the clear wording as well as the spirit of Article 15(c). Moreover, such an interpretation could result in an unacceptable protection gap, at variance with international refugee law and human rights law.²⁰⁸

6° *Conclusion.* Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted implements but a very partial harmonization of the criteria for granting refugee status. On the one hand, it only sets minimum standards. Member States remain free to introduce or retain more favourable standards for persons requesting international protection. On the other hand, the Directive leaves it up to Member States to define the nature of their obligations by “examining” whether a situation is “sufficiently significant”²⁰⁹ or “considering it expedient” or “appropriate” to grant a right²¹⁰.

It appears to be utterly essential that, in following through the transposition measures of the Directive, special attention should be given to the compatibility of those measures with the obligations deriving from the Geneva Convention and other international human rights

²⁰⁶ Eur. Ct. HR, *Vilvarajah et al. v. United Kingdom*, par. 111: “The evidence before the Court concerning the background of the applicants, as well as the general situation, does not establish that their personal position was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country. Since the situation was still unsettled there existed the possibility that they might be detained and ill-treated as appears to have occurred previously in the cases of some of the applicants (see paragraphs 10, 22 and 33 above). A mere possibility of ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to a breach of Article 3 (art. 3)”; Eur. Ct. HR, judgment of 29 April 1997, *HLR v. France*, par. 41: “Like the Commission, the Court can but note the general situation of violence existing in the country of destination. It considers, however, that this circumstance would not in itself entail, in the event of deportation, a violation of Article 3 (art. 3)”.

²⁰⁷ See also the Explanatory Memorandum to proposed article 11(c), from the Explanatory Memorandum presented by the European Commission on the Proposal for a Council 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 (COM(2001)510 final, 12.9.2001), page 20.

²⁰⁸ UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted, **January 2005**.

²⁰⁹ Article 11(2) for the impact of changed circumstances on the cessation of protection.

²¹⁰ Article 33(2) on access to integration programmes for beneficiaries of subsidiary protection status.

protection instruments. The option that is left to Member States of adopting more favourable provisions than the minimum standards established by the Directive constitutes, by virtue of Union law itself, an obligation since it ensues from the fundamental rights recognized in the legal order of the Union, and more particularly the right to asylum that is enshrined in Article 18 of the Charter of Fundamental Rights, as well as the right to respect for private and family life that is recognized by Article 7 of the Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights²¹¹, or the right to non-discrimination, more particularly between refugees and beneficiaries of subsidiary protection²¹². Article 63 EC presupposes that the measures adopted by the Council under this clause will comply with the Geneva Convention. The necessary result is that Community law prevents Member States, in implementing those measures, from defaulting on their obligations under this Convention. In the report which it is due to present on 10 April 2008 to the European Parliament and the Council on the application of the Directive (Article 37), the Commission will have to pay special attention to the matter of the compatibility of the transposition measures with the international obligations of Member States, taking into account in this respect the comments of the United Nations High Commissioner for Refugees and, where appropriate, the comments of international supervisory bodies. A separate section of this report will have to be devoted specifically to this dimension. Amendments should be made to the Directive if it should emerge from the examination that the Member States' obligations have been set at an insufficiently high level, encouraging Member States to evade their international obligations.

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

The Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status²¹³ could not be formally adopted before 1 May 2004, although a political agreement was reached in the Council on 29 April 2004 on the general principles of the text²¹⁴. There remained a total deadlock on the concept and especially on the minimum common EU "list" of third countries recognized as safe countries of origin. On 9 November 2004, the Council therefore decided to postpone the establishment of such a list until after the adoption of the Directive²¹⁵. This list will have to be adopted by the Council by a qualified majority of Member States, on the proposal of the Commission and after consultation of the European Parliament. Given that fundamental changes have been made to the version that was initially submitted to the European Parliament, the Council will have to consult the latter again on the new version before the Directive can be formally adopted. The text of the Directive elicits the following comments²¹⁶.

1° Scope of application of the proposed directive. The proposed directive is applicable to the access to procedures for the determination of all asylum claims presented on the territory of the Member States. This includes the applications for asylum made at the border, or in the transit zones of the Member States (Article 3(1)), although the Member States have preserved the possibility of processing such claims without even the elementary safeguards prescribed in

²¹¹ The term "family members" used in Article 23 of Directive 2004/83/EC is too restrictive in relation to the concept of "family life" that is protected under Article 8 of the European Convention on Human Rights, in the interpretation given by the European Court of Human Rights. The national measures for the transposition of the Directive should be aligned with the stricter standard of the European Convention on Human Rights and should not be confined to the more restrictive concept of "family" used in the Directive.

²¹² For instance, it is not known for what reasons the conditions for access to employed or self-employed activities should be different according to whether the person concerned is a refugee or a beneficiary of subsidiary protection, whereas Article 26 of Directive 2004/83/EC establishes the principle of such differentiation.

²¹³ For the initial Commission proposals, see COM(2000)578 of 20.9.2000 (OJ C 62, 27.2.01, p. 231) and COM(2002)326 final of 18.6.2002 (OJ C 291, 26.11.02, p. 143). For the opinion of the European Parliament, see OJ C 77 of 28.3.02, p. 94.

²¹⁴ Doc 8771/04 ASILE 33.

²¹⁵ Doc 14383/04 ASILE 65, of 9 November 2004.

²¹⁶ These comments are based on the text of the proposed Directive as annexed to Doc. 14203/04 ASILE 64 of 9 November 2004.

Chapter II (article 35(2))²¹⁷. The text however shall apply neither in cases of requests for diplomatic or territorial asylum submitted to representations of Member States (Article 3(2)), nor another form of international protection (subsidiary protection) is requested. Member States may however decide to apply this Directive in procedures for deciding on applications for any kind of international protection (Article 3(4)). Moreover, for the purposes of the proposed Directive, the « refugee » is defined as « a third country national or a stateless person who fulfils the requirements of Article 1 of the Geneva Convention as set out in Council Directive 2004/83/EC » (Article 2, f)). Like in this last instrument, this approach confirms the restriction to the Geneva Convention of 28 July 1951 and to the New York Protocol of 31 January 1967, since the adoption of the Protocol on the right to asylum for the nationals of the Member States of the European Union annexed to the EC Treaty by the Treaty of Amsterdam.

2° *Purpose of the Directive: establishment of minimum standards.* The Directive in preparation was presented to the United Nations High Commissioner for Refugees as the outcome of a search for the “lowest common denominator”, reduced to a “compilation of optional provisions that accommodate the existing and planned practices of EU Member States, including those most seriously at variance with international protection standards, and provides for minimal harmonization”²¹⁸. It is true that the Directive only establishes minimum standards, with Member States being given the option of introducing or maintaining more favourable standards on procedures for granting and withdrawing refugee status (Article 4). Nevertheless, since the very objective of the Directive is to avoid so-called “secondary” movements of asylum-seekers, given the differences in standards between Member States, one cannot from the outset rule out the risk that the Directive might on the whole have a negative impact by leading to a reduction in the average level of procedural guarantees given to asylum-seekers in the processing of their application.

3° *Detention of asylum-seekers.* Article 17(1) states that Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum. This guarantee is formulated in a particularly loose way, although this clarification forms a useful complement to the rules enunciated in 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.²¹⁹ According to this provision, “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).

Article 17 of the Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status and 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 should be read in accordance with Recommendation (2003)5 adopted on 16 April 2003 by the Committee of Ministers of the Member States of the Council of Europe on measures for the detention of asylum-seekers²²⁰. The recommendation concerns the detention

²¹⁷ According to Article 35(2) of the proposed Directive, « Member States may maintain, subject to the provisions of this Article and in accordance with the laws or regulations in force at the time of the adoption of this Directive, procedures derogating from the basic principles and guarantees described in Chapter II, in order to decide, at the border or in transit zones, on the permission to enter their territory of applicants for asylum who have arrived and made an application for asylum at such locations ».

²¹⁸ UNHCR, Aide Mémoire on the Procedures Directive, 18 November 2003.

²¹⁹ OJ L 31 of 6/2/2003, p. 18.

²²⁰ 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).

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 texts²²¹ and the case law of the European Court of Human Rights²²², the Recommendation emphasizes that the aim of detention is not to penalize asylum-seekers. Article 31 of the Geneva Convention of 28 July 1951 on the status of refugees already implies that the asylum-seeker cannot be considered to have committed a criminal offence on account of his unauthorized entry into the territory, and that restrictions on his freedom of movement should 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.

Under Article 17(2) of the Directive: « Where an applicant for asylum is held in detention, Member States shall ensure that there is the possibility of speedy judicial review ». This requirement must be read in accordance with Article 5(4) of the European Convention on Human Rights, which requires that a person arrested and/or detained for the purposes of preventing his/her unauthorised entry on the national territory shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and, subject to any appeal, he/she shall be released immediately if the detention is not lawful. Such a remedy must be accessible and effective. This implies that information on the available remedies should be provided to the asylum-seekers in a language that they understand, that they are able to contact a lawyer, and that, if they do not have sufficient means to pay for legal assistance, that they be granted free legal assistance²²³. These requirements go beyond the minimal standards set by the directive. Although Articles 9 (guarantees for applicants for asylum) and 13 and 14 (right to legal assistance and to representation and scope of those rights) provide for certain guarantees to be recognized to the asylum seeker, these guarantees only relate to certain aspects of the procedure of determination of the status of refugee proper, and not to the deprivation of liberty of the asylum seeker.

4° Guarantees given to asylum-seekers during the examination of their application. The guarantees for asylum-seekers are meticulously set forth in the Directive²²⁴. Those guarantees, however, only apply for the stage of first instance. Member States must ensure that all applicants for asylum are “informed in a language which they may reasonably be supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities” (Article 9(1)). They must be informed about the time-frame, as well as the means at their disposal to fulfil the obligation to submit the elements required for claiming refugee status. The information must be given in time to enable them to exercise

²²¹ 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.

²²² Eur. Ct. H.R., *Amuur v. France*, judgment of 25 June 1996, §§ 43 et seq.

²²³ Eur. Ct. HR (3d sect.), *Conka v. Belgium* judgment of 5 February 2002, Appl. No. 51564/99, para. 44-45.

²²⁴ Additional guarantees are given to unaccompanied minors: see Article 15.

their rights and to comply with their obligations. They must receive the services of an interpreter for submitting their case to the competent authorities, “at least when the determining authority calls upon the applicant to be interviewed and appropriate communication cannot be ensured without such services”²²⁵. They must also have the opportunity (under strictly defined conditions) to communicate with the UNHCR²²⁶ or any other organization working on behalf of the UNHCR in the territory of the Member State. They must be given notice in a reasonable time of the decision by the determining authority on their application for asylum. Finally, they have the right to legal assistance and representation, although such right may be restricted in certain cases²²⁷.

5° *Possibility of accelerated procedures.* The proposed Directive provides for the possibility of accelerated procedures for the determination of asylum claims. According to Article 23(3), « Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter II including where the application is likely to be well-founded or where the applicant has special needs ». Article 23(4) adds that

Moreover, Member States may lay down that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritised or accelerated if:

- (a) the applicant in submitting his/her application and presenting the fact, has only raised issues that are not relevant or of minimal relevance to the examination of whether he/she qualifies as a refugee by virtue of Council Directive 2004/83/EC ; or
- (b) the applicant clearly does not qualify as a refugee or for refugee status in a Member State under Council Directive 2004/83/EC; or
- (c) the application for asylum is considered to be unfounded:
 - because the applicant is from a safe country of origin within the meaning of Articles 30, 30A and 30B of this Directive, or
 - because the country which is not a Member State is considered to be a safe third country for the applicant, without prejudice to Article 29(1); or
- (d) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision; or
- (e) the applicant has filed another application for asylum stating other personal data; or
- (f) the applicant has not produced information to establish with a reasonable degree of certainty his/her identity or nationality, or, it is likely that, in bad faith, he/she has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality; or

²²⁵ The authorities are not obliged to give such a personal interview. In accordance with Article 10 of the proposed Directive, “Before a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview. Member States may also give the opportunity of a personal interview to each adult among the dependants referred to in Article 5(3). Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview. 2. The personal interview may be omitted where: (a) the determining authority is able to take a positive decision on the basis of evidence available; or (b) the competent authority has already had a meeting with the applicant for the purpose of assisting him/her with filling his/her application and submitting the essential information regarding the application; or (c) the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application as unfounded in the cases where the circumstances mentioned in Article 23(4)(a), (c), (g), (h) and (j) apply.”

²²⁶ Whose specific role is recognized by Article 21

²²⁷ See for example Article 14: “Member States may make an exception where disclosure of information or sources would jeopardise national security, the security of the organisations or persons providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States or the international relations of the Member States would be compromised. In these cases, access to the information or sources in question must be available to the authorities referred to in Chapter V, except where such access is precluded in national security cases”. Restrictions for reasons of public order may also be imposed on access by counsellors to the transit zones.

- (g) the applicant has made inconsistent, contradictory, unlikely or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having being the object of persecution under Council Directive 2004/83/EC; or
- (h) the applicant has submitted a subsequent application raising no relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin; or
- (i) the applicant has failed without reasonable cause to make his/her application earlier, having had opportunity to do so; or
- (j) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal; or
- (k) the applicant failed without good reasons to comply with obligations referred to in Articles 4(1) and (2) of Council Directive 2004/83/EC or in Articles 9A(2)(a) and (b) and 20(1) of this Directive; or
- (l) the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible given the circumstances of his/her entry; or
- (m) the applicant is a danger to the national security or the public order of the Member State; or the applicant has been forcibly expelled for serious reasons of public security and public order under national law; or
- (n) the applicant refuses to comply with an obligation to have his/her fingerprints taken in accordance with relevant Community and/or national legislation; or
- (o) the application was made by an unmarried minor to whom Article 5(4)(c) applies after the application of the parents or parent responsible for the minor has been rejected by a decision and no relevant new elements were raised with respect to his/her particular circumstances or to the situation in his/her country of origin.

The extent of these derogations and the vague definition of certain situations where an application for asylum may be processed according to accelerated procedures – with Articles 23(4)(a) (“the applicant in submitting his/her application and presenting the fact, has only raised issues that are not relevant or of minimal relevance to the examination of whether he/she qualifies as a refugee...”) and (g) (“the applicant has made inconsistent, contradictory, unlikely or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having being the object of persecution”) using wording that entails the risk of arbitrariness in the application of these clauses – raises fears that recourse to those derogatory procedures will serve to regulate the flow in the processing of asylum applications that are filed in Member States, to the detriment of the guarantees that should accompany the processing of those applications. Although the very principle of an accelerated processing of certain categories of applications may be justified by concerns of efficiency, as UNHCR himself has acknowledged, the option of making use of such procedures should still be based on objective and pre-established criteria, which should not result in putting the most vulnerable asylum-seekers, whose traumatic experiences could explain the inconsistencies in their initial story, in the most unfavourable situation in terms of the guarantees surrounding the examination of their asylum application.

6° *Right to a suspensive remedy against the threat of removal.* According to the European Court of Human Rights, « Article 13 in conjunction with [a substantive provision of the ECHR, in particular with Article 2, Article 3, Article 8 or Article 4 of Protocol no. 4 ECHR] requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic

forum offering adequate guarantees of independence and impartiality»²²⁸. The refusal to recognize the asylum-seeker as a refugee may result in the concerned person being returned to his/her country of origin, with the irreversible consequences which may follow if he/she runs in that country the risk of being executed, or of being subjected to threats to his/her security, to torture or to inhuman or degrading treatments. The « effective » character of the remedy which the asylum-seeker must be granted against the decision exposing him to such removal requires that no deportation may take place until an authority presenting the required characteristics of independency and impartiality has been given an opportunity to examine the reality of the risk faced by the asylum seeker if the removal is indeed effectuated ; until such a decision has been made, the lodging of the remedy should have an automatic suspensive effect. This may be derived from Recommendation No. R(98)13 of the Committee of Ministers to member states on the right of 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 on the 641st meeting of the Ministers' Deputies. It is also a requirement under the case-law of the European Court of Human Rights. In the judgment of 5 February 2002 delivered in the case of *Conka v. Belgium*, the Court found that the Belgian legislation did not offer sufficient guarantees against the risk of a removal order being enforced before a judge or an authority presenting similar guarantees could adopt a decision on the risks which such removal would create for the person concerned. The violation of Article 13 of the Convention resulted, according to the Court, from the fact that the Executive was not under an obligation to wait until the competent judge decided whether or not to suspend the removal order before effectuating the removal²²⁹. In such instances, the remedy must therefore be recognized an automatically suspensive effect, at least until an authority presenting all guarantees of independency and impartiality required by Article 13 ECHR could adopt a decision.

The UNHCR therefore rightly insists on the need for the remedies prescribed in Chapter V of the proposed Directive to have a suspensive effect:

Given the potentially serious consequences of an erroneous determination at first instance, the remedy against a negative decision at first instance is ineffective if an applicant is not permitted to await the outcome of an appeal against such a decision in the territory of the Member State. Conclusion no. 30 of the Executive Committee, however, emphasizes that even in manifestly unfounded cases there should be some form of review of the decision. UNHCR would be likely to accept the proposal to limit the automatic suspensive effect of a remedy in the most manifestly unfounded cases if a judicial or other independent authority has first reviewed and confirmed denial of the suspensive effect, taking into account the chances of an appeal.²³⁰

²²⁸ Eur. Ct. HR, *Shebashov v. Latvia* (dec.), 9 November 2000, no. 50065/99, unreported; Eur. Ct. HR (4th sect.), *Al-Nashif v. Bulgaria* judgment of 20 June 2002 (Appl. No. 50963/99), para. 133.

²²⁹ See Eur. Ct. HR (3d sect.), *Conka v. Belgium* (Appl. N° 51564/99), judgment of 5 February 2002, para. 83: « ... it appears that the authorities are not required to defer execution of the deportation order while an application under the extremely urgent procedure is pending, not even for a minimum reasonable period to enable the Conseil d'Etat to decide the application. Furthermore, the onus is in practice on the Conseil d'Etat to ascertain the authorities' intentions regarding the proposed expulsions and to act accordingly, but there does not appear to be any obligation on it to do so. Lastly, it is merely on the basis of internal directions that the registrar of the Conseil d'Etat, acting on the instructions of a judge, contacts the authorities for that purpose, and there is no indication of what the consequences might be should he omit to do so. Ultimately, the alien has no guarantee that the Conseil d'Etat and the authorities will comply in every case with that practice, that the Conseil d'Etat will deliver its decision, or even hear the case, before his expulsion, or that the authorities will allow a minimum reasonable period of grace ».

²³⁰ For details, see "Note on key issues of concern to UNHCR on the draft Asylum Procedures Directive, 30 March 2004" Appeals (Article 39 in conjunction with Articles 25(2), 23(4), 29(1) and 33)

◆ Under the current draft Directive, the vast majority of rejected asylum seekers who lodge an appeal will not be permitted to remain in the European Union until their appeals are decided. Article 39 contains a list of wide-ranging exceptions to the principle of 'suspensive effect' which have no relation to the merits of a person's claim, but are based on technical or discretionary factors, or the claimant's behaviour. For example, persons may be

This same concern is expressed by a number of non-governmental organisations²³¹. However, the current text of the proposed Directive does not comply with the requirements of the European Convention on Human Rights which have been recalled. Although the Preamble recalls that « It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of a refugee status must be subject to an effective remedy before a court or tribunal in the meaning of Article 234 of the Treaty establishing the European Community », it immediately goes on to state that « The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole » (Recital 27). But the minimum standards provided in the proposed Directive concerning the organisation of an effective remedy against the refusals to recognize the status of refugee do not suffice to ensure the compatibility with Article 13 ECHR. Article 38(3) of the proposed Directive in particular states that

Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:

- (a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome; and
- (b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 [against, *inter alia*, a decision taken on the application for asylum or a decision for the withdrawal of the refugee status] does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. Member States may also provide for an ex officio remedy; and
- (c) the grounds of challenge to a decision under Article 25(2)(c) [inadmissibility of the application for asylum where a country which is not a Member State is considered as a safe third country for the applicant] in accordance with the methodology applied under Article 27(2)(b) and (c) [which provide that the national law contains rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant and rules allowing an individual examination of whether the third country concerned is safe for a particular applicant].

The provision seems to present as a faculty what, for the Member States, should instead be considered as an obligation derived from Article 13 ECHR read in combination with Articles 2 and 3 ECHR. These provisions not only require that the remedy which may be exercised against a decision taken on the application for asylum be lodged with a jurisdiction which has the power to order a suspension of the removal order, in the legal systems of the States where the refusal to recognize the asylum seeker as a refugee is not distinct from the decision to order that person to leave the national territory ; they also imply that, during the interval between the exercise of the remedy and the adoption of that judicial decision, the asylum

removed pending appeal simply because they have been detained, or because they failed to make an application earlier. Such rules can badly prejudice refugees who are traumatized, confused or simply not properly informed about the asylum process.

♦ In UNHCR's view, such a restrictive appeal provision undermines the right to, and utility of, an effective remedy and could compel many Member States to curtail fundamental procedural rights which are presently enshrined as central principles in their constitutions and justice systems. It would increase considerably the possibility of persons being returned to persecution in violation of the principle of *non-refoulement* contained in the 1951 Convention and international human rights law instruments. In this context, it is important to bear in mind that in some European countries negative decisions in 30 to 60% of the claims are overturned on appeal.

♦ In UNHCR's view, an exception to the general rule could be considered in strictly limited categories, namely 'manifestly unfounded' and 'clearly abusive' claims, which are defined in UNHCR's Executive Committee Conclusion No. 30. In such cases, however, there must still be access to the possibility of an independent review of the decision to remove the person pending appeal. Such a review could be simplified and fast, taking into account the chances of an appeal."

²³¹ ECRE, *Broken promises, Forgotten principles: an ECRE evaluation of the development of EU minimum standards for refugees protection*, June 2004; Amnesty International, *Union européenne, La protection des réfugiés menacée*, July 2004, p.12.

seeker may remain on the national territory, and that he/she is guaranteed against the enforcement of the removal order he/she may have been served with.

7° *Safe countries of origin.* The Member States could not agree on a common list of safe countries or origin, despite the identification of ten countries (Benin, Botswana, Cape Verde, Chile, Costa Rica, Ghana, Mali, Mauritius, Senegal, and Uruguay) which were anticipated to be put on such a list²³² – with a priority to be given to the seven countries situated in Africa –. Therefore it may be unnecessary to offer here an evaluation of this attempt, on the outcome of which the Report on the situation of fundamental rights in the Union in 2005 shall return. Certain principles should nevertheless be recalled.²³³

The principle of the proposed Directive is that « Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he/she presents serious counter-indications » (Preamble, Recital 17). Once the Member States will have agreed on a common list of safe countries of origin according to the procedure described in Article 30 of the proposed Directive, and on the basis of the criteria laid down in Annex B to Annex I of the proposed Directive²³⁴, « Member States should be obliged to consider applications of persons with the nationality of that country, or of stateless persons formerly habitually resident in that country, on the basis of the rebuttable presumption of the safety of that country » (Recital 19). It should be noted that the obligation thus imposed on the Member States goes beyond the definition by the Council of minimum requirements, and could be an obstacle to the full compliance by the Member States with their international obligations.

The presumption established in favour of the so-called “safe” countries of origin could not in any event be an absolute one, because as recognized by the Preamble of the Directive, the designation of a third country as a safe country of origin is necessarily based on an assessment which « can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned. For this reason, it is important that, where an applicant shows that there are serious reasons to consider the country not to be safe in his/her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her » (Recital 21).

²³² The choice of countries identified for inclusion in the initial list was based on a preliminary assessment as to : the experiences of Member States with regard to the national application of the safe country of origin principle and the application of the ‘ceased circumstances’ cessation clauses contained in Article 1 C (5) and (6) of the Geneva Convention relating to the Status of Refugees ; the fulfilment by these countries of the criteria in Annex II of the proposed Directive ; and the number of asylum applications lodged in the Member States by nationals of those countries. Doc. 14383/04, ASILE 65, 9 November 2004.

²³³ See already *Report on the situation of fundamental rights in the European Union and its Member States in 2002*, pp. 153-155; and *Report on the situation of fundamental rights in the European Union in 2003*, p. 80.

²³⁴ According to the rules relating to the designation of safe countries of origin laid down in the Annex : « A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Council Directive 2004/83/EC; no torture or inhuman or degrading treatment or punishment; and no threat by reason of indiscriminate violence in situations of international or internal armed conflict. In making this assessment, account shall be taken inter alia of the extent to which protection is provided against persecution or mistreatment through:

- (a) the relevant laws and regulations of the country and the manner in which they are applied;
- (b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;
- (c) respect of the non-refoulement principle according to the Geneva Convention;
- (d) provision for a system of effective remedies against violations of these rights and freedoms ».

Moreover, under Recital 20 of the Preamble of the proposed Directive, « It results from the status of Bulgaria and Romania as candidate countries for the accession to the European Union and the progress made by these countries for membership that they should be regarded as constituting safe countries of origin for the purposes of this Directive until the date of their accession to the European Union ».

The designation of certain countries as safe countries of origin would clearly be unacceptable if it led the Member States to refuse to assess the substance of the applications for asylum from nationals of countries thus identified or from stateless persons who are habitually resident in such countries. Even in the system of the proposed Directive where the presumption is only made at the general level and may be rebutted in individual cases, there is a risk that the definition of a list of safe countries of origin will be discriminatory, in the meaning either of the Geneva Convention of 28 July 1951 – Article 3 of which explicitly excludes any discrimination based on the country of origin of refugees – or of Article 26 of the International Covenant on Civil and Political Rights or Article 14 of the European Convention on Human Rights (to the extent that the rejection of the application for asylum could expose the applicant to a real risk of being executed or of being subjected to torture or to an inhuman or degrading treatment). Considering the seriousness of the potential consequences for the individual applicant for asylum, the strictest scrutiny should be applied to such differences of treatment based on the country of origin. It should be verified, in particular, whether, even if the difference in treatment is based on objective criteria, the measure is proportionate to the aim pursued, which is of administrative convenience and in order to alleviate the burden on asylum-processing systems of the Member States.

8° *Safe third countries*. The proposed Directive also includes the concept of safe third countries. Member States may not have to assess the substance of an asylum application where the applicant, due to a connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country, at least where the particular applicant would be safe in the third country concerned (Recital 23). Article 27 of the proposed Directive defines which guarantees the national law must contain in this regard. At the general level, Article 27(1) provides that

Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

- (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; and
- (b) the principle of non-refoulement in accordance with the Geneva Convention is respected; and
- (c) the prohibition on removal in breach of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law is respected; and
- (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

At the individual level, these guarantees include a requirement that the competent authorities may « satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant » (Article 27(2), b)) and that the applicant will be able « to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment » (Article 27(2), c)).

These guarantees, however welcome, may still be insufficient, even if it is considered, as it should, that the prohibition of removal in breach of the right to freedom from torture and cruel, inhuman or degrading treatment includes a prohibition of removal in exceptional circumstances where this would interrupt a life-saving medical treatment²³⁵ or would put a person at risk of being convicted to a sentence of life imprisonment without any possibility of early release.²³⁶ First, the

²³⁵ Eur. Ct. HR, *D. v. the United Kingdom* judgment of 2 May 1997 (Appl. No. 30240/90); *Bensaïd v. the United Kingdom* judgment of 6 February 2001 (Appl. no. 44599/98).

²³⁶ The European Court of Human Rights has not decided that expelling a person to a country where he/she runs the risk of being sentenced to life imprisonment without any possibility of early release constitute a violation of Article 3 ECHR. However, it found that such situation may raise an issue under that Article (Eur. Ct. HR, *Weeks*

identification of the conditions which the third country must fulfil in order to be considered « safe » is less requiring than the Recommendation adopted on the same subject by the Committee of Ministers of the Council of Europe in 1997, especially insofar as this Recommendation mentions the « observance by the third country of international human rights standards relevant to asylum as established in universal and regional instruments including compliance with the prohibition of torture, inhuman or degrading treatment or punishment »²³⁷. Second, the European Court of Human Rights has also considered that « it cannot be ruled out that an issue might exceptionally be raised under Article 6 of the Convention by [a decision to return a person] in circumstances where the [returnee] has suffered or risks suffering a flagrant denial of justice in the requesting country »²³⁸. There is no reason in principle to think that the prohibition which the ECHR imposed to indirect removals – i.e., removals to a country B from where the individual concerned may be removed to country C where he/she runs of real risk of a flagrant denial of his/her human rights –, which results from the inadmissibility decision of 7 March 2000 reached by the European Court of Human Rights in the case of *T.I. v. the United Kingdom*,²³⁹ should not apply also to such flagrant denials of justice.

9° European safe third countries. The proposed Directive moreover includes the notion that « with respect to certain European third countries, which observe particularly high human rights and refugee protection standards, Member States should be allowed to carry out no or no full examination of asylum applications regarding applicants who enter their territory from such European third countries » (Recital 24). It is clear that a non-rebuttable presumption that, due to the country from where they arrived, applicants for asylum should be returned to that country, is not acceptable. It would create the risk of the violation of the non-refoulement principle stated in Article 33 of the Geneva Convention on the Status of Refugees, as well as of the ECHR. It may also be seen as equivalent to a collective expulsion of foreigners, prohibited by Article 4 of Protocol n°4 to the ECHR, which requires that the expulsion of foreigner be based on a reasonable and objective examination of the particular case of each individual alien, rather than on such presumptions as derived from the country which they have been arriving from²⁴⁰.

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

Organization of joint flights for the removal of third-country nationals

Council Decision 2004/573 of 29 April 2004 on the organization of joint flights for removals, from the territory of two or more Member States, of third-country nationals who are subjects

v. the United Kingdom judgment of 2 March 1987, Series A no. 114; Eur. Ct. HR, *Nivette v. France* (dec.), no. 44190/98, 14 December 2000; Eur. Ct. HR, *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, 29 May 2001 (where, citing the case-law of the European Commission on Human Rights (*Weeks v. the United Kingdom*, no. 9787/82, Commission Report 12 December 1993, § 72, and *Kotalla v. the Netherlands*, application no. 7994/77, Commission decision of 6 May 1978, DR 14, p. 238), the Court notes that the Commission has expressed the view that “a life sentence without any possibility of release might raise issues of inhuman treatment”); Eur. Ct. HR, *S. Einhorn v. France*, dec. of 16 October 2001 (Appl. No. 71555/01), § 27).

²³⁷ Recommendation R(97)22 of the Committee of Ministers to the Member States, containing guidelines on the application of the safe third country concept, adopted by the Committee of Ministers on 25 November 1997, at their 609th meeting of Ministers' Deputies.

²³⁸ Eur. Ct. HR, *S. Einhorn v. France*, dec. of 16 October 2001 (Appl. No. 71555/01), § 32 (citing see judgment of the Court in *Soering v. the United Kingdom* of 7 July 1989, p. 45, § 113, and, *mutatis mutandis*, the *Drozd and Janousek v. France and Spain* judgment of 26 June 1992, Series A no. 240, p. 34, § 110).

²³⁹ See Eur. Ct. HR, *T.I. v. the United Kingdom* (Appl. No. 43844/98), where the Court considered that “The indirect removal [...] to an intermediate 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”.

²⁴⁰ On the interpretation by the European Court of Human Rights of Article 4 of Protocol n°4 to the ECHR, see the inadmissibility decision of 23 February 1999 in the case of *Andric v. Sweden* (Appl. No. 45917/99), unpublished, and Eur. Ct. HR (3d sect.), *Conka v. Belgium* judgment of 5 February 2002, Appl. No. 51564/99, para. 59.

of individual removal orders²⁴¹ is the outcome of an initiative taken by the Italian Presidency of the Council in September 2003, discussed in the *Report on the situation of fundamental rights in the European Union in 2003*²⁴². This initiative is part of the comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union, adopted on 28 February 2002, and based on the Commission communication of 15 November 2001 on a common policy on illegal immigration, which states that a readmission and return policy constitutes an integral part of the fight against illegal immigration. It is also founded on the Plan for the management of the external borders of 13 June 2002, which is in turn based on the Commission communication of 7 May 2002 on the integrated management of the external borders of the Member States of the European Union, which provides for “rational return operations”. However, it met with major objections from the European Parliament – which rejected the text that was submitted to it for consultation on 30 March 2004 – as well as from several non-governmental organizations for the defence of human rights.

It is hardly necessary to reiterate the concerns already expressed in the 2004 Report on this text. It is true that protection of fundamental rights is expressly referred to in Recital 8 of the Preamble²⁴³, and the Decision is presented as merely having the objective of “coordinating” the action of Member States for the optimal organization of removal operations.²⁴⁴ Moreover, the removal of foreign nationals by regular flights and by special flights each have their own advantages and drawbacks, including in terms of the respect for fundamental rights of the persons to be removed.

Scheduled flights may appear more transparent, as the escort and the returnee share the same physical space with regular passengers. This is sometimes seen as limiting the risk of abuse. In practice however, most of the difficulties which removals by air have led to in recent years were the result of the presence of regular passengers, whose opposition and protests may lead to interrupting the removal, or even on occasion to cancelling the flight, and the attention of whom the returnee may seek to attract by screaming or calling for help. The presence of regular passengers may thus exacerbate the relationship between the returnee and the escort, and may be a source of tension during the whole operation. And, as the return depends on a sufficient number of places (often at least three for an accompanied returnee), the length of the detention of the person detained with a view to ensuring his/her return may be extended by weeks. Indeed, the airline companies who agree to take on board returnees, either unaccompanied (deportee unaccompanied – DEPU) or accompanied (DEPA), operate with strict quotas, which may result important delays before a particular returnee may indeed be returned.

As to chartered flights, they present strong symbolic overtones, that of repatriation “en masse” of aliens often originating from a same country. This has led many organisations of the civil society to oppose them. Moreover, they are seen as lacking in transparency, insofar as the removal, with the constraint measures it may require, occurs in the absence of

²⁴¹ OJ L 261 of 6 August 2004, p. 28.

²⁴² On pp. 84-85.

²⁴³ “Member States are to implement this Decision with due respect for human rights and fundamental freedoms, and in particular for the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment of 10 December 1984, the Geneva Convention of 28 July 1951 and the New York Protocol thereto of 31 January 1967, relating to the status of refugees, the Convention on the rights of the child of 20 November 1989, and the Charter of fundamental rights of the European Union of 18 December 2000”.

²⁴⁴ On the issue of removal, we should also draw attention to the adoption in 2004 of Decision 2004/191 of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals, OJ L60 of 27.02.2004 p. 55.

witnesses.²⁴⁵ On the other hand, chartered flights may facilitate the presence during all the return operation of independent observers, for instance representatives of non-governmental organisations or of ombudspersons institutions. The presence of a medical doctor on the chartered flight may be required, without this representing a disproportionate cost. The presence around the returnee of a number of persons in a situation similar to his/her own may be reassuring and constitute a better guarantee for his/her security upon arrival in the state of origin. The media attention around chartered flights will be in most cases more important than around scheduled flights, ensuring that any alleged abuses will be reported.

In view of the prospect of a proliferation of such joint flights for the return of foreign nationals²⁴⁶, there are two essential remarks to be made on the adopted text.

First, charter operations can lead to sizeable numbers of returnees being held in detention for some time to await the charter date. This might not be compatible with the principle according to which the detention pending removal should be as short as possible. Moreover, the organisation of joint flights for the removal of third-country nationals from two or more Member States heightens the risk of collective expulsions taking place. 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 aliens²⁴⁷. 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 group²⁴⁸. 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 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 Slovaks of Roma origin, who had been ordered to leave Belgian territory after they had answered a notice to present themselves at the police station²⁴⁹. The recourse to removal operations using special flights actually increases the risk of a collective administrative processing of removal orders.

Secondly, an annex establishes “common guidelines on security provisions for joint removals by air”. It addresses questions concerning verification of the state of health and the processing of medical records of persons being removed. It defines the function of escorts and regulates the use of coercive measures, asserting the principle that “in case of doubt, the removal operation including the implementation of legal coercion based on the resistance and

²⁴⁵ The Explanatory memorandum by Ms Vermot-Mangold to the Recommendation 1547(2002)1 of the Parliamentary Assembly of the Council of Europe on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity mentions that “when these alternative means of transport are used [chartered flights instead of scheduled flights], escorts are free to mistreat foreigners expelled in secret, with no witnesses present” (para. 58).

²⁴⁶ In its conclusions, the General Affairs Council of 2 July 2004 urges “an increase in the use of joint flights as a means of demonstrating the commitment of the EU in relation to joint action on returns; increasing the rate of returns from the EU; and making more effective use of resources” (Doc. N° 11104/04 of 12-13.7.2004).

²⁴⁷ Eur. Ct. HR (1st sect.), *Majic v. Sweden*, dec. of 23 February 1999 (Appl. n° 45918/99).

²⁴⁸ Eur. Ct. HR (3rd section), *Conka v. Belgium* judgment of 5 February 2002, Appl. N° 51564/99, § 59.

²⁴⁹ 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.)).

dangerousness of the returnee, shall be stopped following the principle «no removal at all cost” (point 3.2). It provides that at least one medical doctor should be present on a joint flight, and also provides for the possibility of observation by “third parties”. However, Recital 10 of the Decision points out that “the *non-binding* Common Guidelines on security provisions for joint removals by air *should* provide *useful* guidance in the implementation of this Decision” (our emphasis). Given the hesitation to define in a binding manner the obligations of Member States ensuing from the obligation to respect fundamental rights, reference should be made to the considerations developed concerning the forcible removal of foreign nationals by air by the European Committee for the Prevention of Torture on the basis of the experience it has gathered on its visits. We refer to the 2004 Report which sums up the lessons formulated by the CPT on this issue²⁵⁰.

CHAPTER III : EQUALITY

Article 20. Equality before the law

Reference is made to the commentary under Article 21 of the Charter.

Article 21. Non-discrimination

Community policy on combating discrimination is an important and challenging work area, and we should welcome the priority that is given to this matter by DG Employment and Social Affairs of the European Commission. In 2004, emphasis was on following up on the Directives adopted in 2000 on the basis of Article 12 EC²⁵¹. The transposition of those Directives, because of their ambitious nature and the novelty in certain Member States of the prohibition of all direct or indirect discrimination on the grounds of disability, sexual orientation or age – which constitute “new” prohibited grounds for discrimination, whereas the prohibition of all discrimination on grounds of racial or ethnic origin, religion or beliefs is more conventional -, has proven more difficult than expected in all Member States. Furthermore, in order to define in consultation with the interested parties the future development of its policy on combating discrimination, the European Commission published a Green Paper which has aroused many reactions²⁵².

Since the question of the prohibition of discrimination was dealt with in depth in the 2004 Report, and the Network of Independent Experts on Fundamental Rights in 2005 presented a Thematic Observation no. 3 on the rights of minorities in the Union, which is closely linked to these issues, there is no need to enter at great length into the impact on Article 21 of the Charter of Fundamental Rights of the activities of European Union institutions during the period under scrutiny. In the past, the Network of Independent Experts had put forward three proposals. Firstly, it had suggested that it would be a good idea, as well as in compliance with Article 15(3) of the Revised European Social Charter which should be taken into account in the interpretation of Article 26 of the Charter of Fundamental Rights of the European Union, that the European Community should move towards the institution, through a specific Directive, of a general prohibition on discrimination on grounds of disability, reaching

²⁵⁰ See 2004 Report, pp. 89-92, and the excerpts quoted there from the 13th general report of the CPT (CPT/Inf (2003) 35).

²⁵¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19.7.2000, p. 22); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2.12.2000, p. 16).

²⁵² Equality and non-discrimination in an enlarged European Union, COM(2004)379 final.

beyond the areas of employment and occupation. Secondly, it had put forward arguments in favour of stepping up the fight against the discrimination suffered by the Roma population, which might justify the adoption of a specific Directive aimed at integrating this minority in the areas of employment, education and housing. Thirdly, it had underlined the need to think about the compatibility between a policy of combating discrimination, incorporating the concept of indirect discrimination, and comprising the possibility for Member States to allow a presumption of discrimination on the basis of statistical data, on the one hand, and the right to respect for private life with regard to the processing of personal data on the other.

The European Commission has expressed the wish, for the time being, to give priority to the effectiveness of the existing legal framework, and more particularly to the full transposition of the Directives that have already been adopted. Naturally this does not represent a position on the appropriateness of moving forward in the directions that have been proposed, or on the weight of the arguments that may be put forward to justify those initiatives. In accordance with 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 and Article 19 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, the European Commission has to report to the European Parliament and to the Council on the implementation of those instruments on the basis of the information which Member States must supply to the Commission in July and December 2005 respectively. This will provide the opportunity for a more in-depth reflection on the advantages or obstacles of those different proposals, including those contained in Thematic Observation no. 3 on the rights of minorities in the Union.

Article 22. Cultural, religious and linguistic diversity

The question of the protection of national minorities through the requirement of non-discrimination is dealt with in the Thematic Comment n°3 on the rights of minorities in the European Union. No further commentary is required under this provision of the Charter of Fundamental Rights.

Article 23. Equality between men and women

In the field of equal treatment between men and women, the year 2004 has brought about significant developments, not only through the adoption of the Treaty establishing a Constitution for Europe at the closing of the Intergovernmental Conference, but also by the adoption of the Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Finally this report shall highlight certain interesting evolutions in the case-law of the European Court of Justice.

Mainstreaming the requirement of equal treatment between women and men

Article III-116 of the Treaty establishing a Constitution for Europe confirms the necessity of aiming to achieve equal treatment between men and women as an across-the-board objective, to be taken into account in all Union policies:

In all the activities referred to in this Part, the Union shall aim to eliminate inequalities, and to promote equality, between women and men.

According to the Declaration (no. 13) on this provision of the Constitution, the Intergovernmental Conference interprets the requirement of promoting this equality as extending to the obligation to combat all forms of domestic violence.

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

On 13 December 2004, Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services was adopted, on the basis of Article 13 EC. While welcoming this initiative, the 2004 Report had questioned the adequacy of justifying the exemption from the scope of application of the directive of the content of media and advertising²⁵³. Although this exemption is confirmed in the Directive (Article 3(3)), the Preamble fortunately does not invoke freedom of expression and respect for the pluralism in the media as a justification for this exemption. This is a welcome adaptation of the Preamble. Indeed, it should be recalled 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 activities²⁵⁴, amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997²⁵⁵, provides that “Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality”. In that context, it would not have been understandable to maintain a reference in the Preamble of the Directive 2004/113/EC to freedom of expression in order to justify the exclusion of the content of the media from the prohibition of discrimination based on sex.

On the other issue raised in the 2004 Report, the proposal by the Commission was not amended as suggested. Article 9 (Burden of proof) of the Directive states that

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

This provision leaves it to the Member States to determine which “facts” shall lead to a presumption that discrimination has occurred, thus shifting the burden of proof to the defendant in judicial civil or administrative proceedings. It should have been made clear in the Directive itself, or at least in the Preamble, that proof by statistics must be allowed in order for the protection from discrimination based on sex to be effective. Indeed, 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”²⁵⁶. Because Directives 2000/43/EC and 2000/78/EC only provide for the *possibility* that Member States allow for the statistical proof of discrimination, without creating an *obligation* in this regard²⁵⁷, Article 9(1) of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services risks being interpreted in similar fashion. This, it is suggested, would constitute an inadequate understanding of the requirements of an effective protection

²⁵³ See Report 2004, at pp. 108-109.

²⁵⁴ OJ L 298 of 17/10/1989, p. 23.

²⁵⁵ 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.

²⁵⁶ ECJ, 27 October 1993, *Enderby*, C-127/92, *ECR*, p. I-5535, Recital 18.

²⁵⁷ See Recital 15 of Council Directive 2000/43/EC; and Recital 15 of Council Directive 2000/78/EC.

from discrimination based on sex, which has amply been proven to rely on the possibility of statistical proof in the context of work and employment.

Finally, it may be noted that, according to Council Directive 2004/113/EC, “The principle of equal treatment in the access to goods and services does not require that facilities should always be provided to men and women on a shared basis, as long as they are not provided more favourably to members of one sex.” In the context of Council Directive 2000/78/EC, addressing the question whether that instrument was fully adequate for the protection of Roma from the specific forms of discrimination they are subjected to, the 2004 Report has expressed its concern that the Roma might not be fully protected, under the Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, insofar as this instrument does not explicitly prohibit segregation, unless it is accompanied by unequal advantages. Unfortunately, this restrictive interpretation of Council Directive 2000/43/EC risks being encouraged by the distinction made between “separate facilities” and “discrimination” in Directive 2004/113/EC. The case for a Directive specifically addressed at the integration of the Roma is thus reinforced in the new doctrinal context created by the adoption of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

Case-law on equal treatment between men and women

In infringement proceedings brought by the European Commission against Austria in May 2003 (C-203/03), the Commission was asking the European Court of Justice to declare that, by maintaining, contrary to the provisions 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 (OJ 1976 L 39, p. 40), a general prohibition of the employment of women, with a limited number of exceptions, in the sector of the underground mining industry (under Article 2 of the *Verordnung des Bundesministers für Wirtschaft und Arbeit über Beschäftigungsverbote und -beschränkungen für Arbeitnehmerinnen* (Regulation of the Federal Minister for the Economy and Labour concerning prohibitions and restrictions on the employment of female workers) of 4 October 2001 (BGBl. II, 356/2001)), and a general prohibition of the employment of women in high-pressure atmosphere and diving work (under Articles 8 and 31 of the *Druckluft- und Taucherarbeitenverordnung* (Regulation on work in high-pressure atmosphere and diving work) of 25 July 1973 (BGBl. 501/1973)), the Republic of Austria had failed to fulfil its obligations under Articles 2 and 3 of that directive and under Articles 10 EC and 249 EC. The judgment delivered by the Court on 1 February 2005 must be described in some detail.

On the first point (the exclusion of women in the sector of the underground mining industry), the Court considered that, although Article 2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth (point 43), it does not allow women to be excluded from a certain type of employment « solely on the ground that they ought to be given greater protection than men against risks which affect men and women in the same way and which are distinct from women's specific needs of protection, such as those expressly mentioned » (point 45, where the Court refers to Case 222/84 Johnston [1986] ECR 1651, paragraph 44, and Case C-285/98 Kreil [2000] ECR I-69, paragraph 30). The Court concluded therefore that the general prohibition of the employment of women in the underground mining industry laid down in Article 2(1) of the regulation of 2001, even though read in conjunction with subparagraph 2 of that article which concerns female workers employed in the social or health services, does not constitute a difference in treatment permissible under Article 2(3) of Directive 76/207. However, the Austrian

Government also argued that, irrespective of the medical reasons relied on, restrictions on the employment of women in the underground mining industry, within the limits laid down by the new legislation, would be justified by the fact that the Republic of Austria is bound by Convention No 45 of the I.L.O., which it ratified in 1937. It invoked in that respect Article 307 EC, which provides that the obligations arising from agreements concluded, by acceding States before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, are not affected by the provisions of the EC Treaty. The Court recalled that, under Article 307 al. 2 EC, to the extent that earlier agreements within the meaning of the first paragraph of the article are not compatible with the Treaty, the Member State or States concerned are to take all appropriate steps to eliminate the incompatibilities established, including by denunciation of the agreements in question (Case C-62/98 *Commission v Portugal* [2000] ECR I-5171). Nevertheless the Court agreed with Austria that in May 1997, when, for the time after its accession to the European Union in 1995, Austria could have denounced ILO Convention No 45, « the incompatibility of the prohibition laid down by that convention with the provisions of Directive 76/207 had not been sufficiently clearly established for that Member State to be bound to denounce the convention » (point 62). The Court makes clear that Austria should denounce the ILO Convention at the next opportunity, i.e., under the terms of that Convention, on 30 May 2007.

As to the second point, the prohibition of the employment of women in work in a high-pressure atmosphere and in diving work, the Court arrived at the conclusion that, by maintaining a general prohibition of the employment of women in work in a high-pressure atmosphere which places excessive strain on their bodies and in diving work, the Republic of Austria has failed to fulfil its obligations under Articles 2 and 3 of Directive 76/207. With respect to the prohibition of the employment of women in work in a high-pressure atmosphere which places excessive strain on their bodies, the Austrian Government claimed that women have lesser respiratory capacity and a lower red blood cell count in order to justify such exclusion. But the Court considered that the Austrian government relied in that regard on an argument based on measured average values for women to compare them with those for men, and the Court noted that as regards those variables there are significant areas of overlap of individual values for women and individual values for men: « In those circumstances legislation that precludes any individual assessment and prohibits women from entering the employment in question, when that employment is not forbidden to men whose vital capacity and red blood cell count are equal to or lower than the average values of those variables measured for women, is not authorised by virtue of Article 2(3) of Directive 76/207 and constitutes discrimination on grounds of sex » (point 73).

Another notable case is the preliminary ruling delivered by the Court in the case of *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v. Wirtschaftskammer Österreich*²⁵⁸ pending before the Supreme Court of Austria, the European Court of Justice held that a national provision allowing to take military or civilian service into account when calculating termination pays is not discriminatory against people taking parental leave since due to the different nature of the underlying grounds workers who benefit are not in comparable situations. While the military and civilian service are performed on a compulsory basis in the public interest, times of parental leave are taken voluntarily in the private interest of the family. A difference in treatment, as regards termination pays, thus does not contravene Austria's equal pay obligations under Article 141 EC and Article 1 of the Council Directive 75/117/EEC of 10 February 1975.

Three questions on the interpretation of Article 141 EC and Article 1 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women were raised in

²⁵⁸ ECJ, C-220/02 *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v. Wirtschaftskammer Österreich*, judgement of 8 June 2004.

these proceedings between Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten ('the Gewerkschaftsbund'), a trade union representing employees in the private sector, and Wirtschaftskammer Österreich, an Austrian economic chamber, concerning a claim for equal termination payments for men and women workers. The Court first considered that a national provision that allows to take compulsory military or civilian services into account when calculating the termination payment depending on the length of employment falls within the ambit of the term "pay" of the said provisions. As to the second and third questions concerning the difference in treatment, from the point of view of termination payments, between workers who take parental leave and those who perform military or civilian service, the Court reiterated that "the principle of equal pay enshrined in Article 141 EC and Directive 75/117, like the principle of non-discrimination of which it is a specific expression, assumes that the male and female workers whom it benefits are in comparable situations". However, in the instant case, both services were of a different nature: parental leave is taken voluntarily to raise one's children and firstly has to be differentiated from maternity leave and secondly from the compulsory character of a military or civilian service that is performed in the public and not in the private interest of the worker. The Court therefore concludes that "in each case, the suspension of the contract of employment is thus based on particular reasons, more precisely the interests of the worker and family in the case of parental leave and the collective interests of the nation in the case of national service. As those reasons are of a different nature, the workers who benefit are not in comparable situations". Accordingly, "Article 141 EC and Directive 75/117 do not preclude the calculation of a termination payment from taking into account, as length of service, the duration of periods of military service or the civilian equivalent performed mainly by men but not of parental leave taken most often by women".

Article 24. The rights of the child

The Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography²⁵⁹ represents an important contribution to the protection of the child. This instrument has been commented upon under Article 5 of the Charter.

Apart from the adoption of this instrument, an initiative in favour of the protection of children during the period under scrutiny deserves attention. This consisted in the publication of a report commissioned by DG Employment and Social Affairs, containing a thematic study using transnational comparisons to analyse and identify what combination of policy responses are most successful in preventing and reducing high levels of child poverty. The study has been presented in March 2004.²⁶⁰ The objective of this study was to propose a comparative overview of the public strategies developed in different States (EU Member States and the United States) in order to combat child poverty, in order to compare their effectiveness and identify which mix of policies could deliver the best results. Among the conclusions, the author proposes that « the UN Convention on the Rights of the Child should be used as a framework for the development, implementation and monitoring of policies at EU and Member State level. The EU should integrate the principles of the CRC into policy and legislation in order to make children visible at EU level and to better promote children's rights and well-being ». The other main substantive conclusions are the following:

10. In accordance with the CRC children and young people should participate in decision-making processes that affect their lives. Effort is needed to reach and include those children who are socially excluded.

11. On the European level child poverty and social exclusion should gain a more

²⁵⁹ OJ L 13, 20.1.2004, p. 44.

²⁶⁰ The study is available on : http://europa.eu.int/comm/employment_social/social_inclusion/studies_fr.htm

prominent role within the OMC [²⁶¹] so that processes of benchmarking and peer review are strengthened.

12. All Member States should adopt an explicit and integrated approach to tackle poverty and social exclusion among children and young people. A coherent strategy requires central coordination and cross-departmental coordination.

13. All Member States should adopt targets for the eradication of child poverty on the basis of clear indicators. The effectiveness of policies and their impact on children and young people should be evaluated.

14. Member States should adopt a balanced policy mix to tackle child poverty. This has to include strategies to bring parents into work that pays, to improve the reconciliation of work and family life, adequate cash transfers, access to high quality and affordable childcare, access to child-related services and healthcare. Particular attention has to be given to ensure equal access to education for all children.

15. In the process of reforming welfare systems the effect of policies on children and on low-income families should be monitored and policies should be child- and poverty-proofed.

16. Policies should focus on children's present quality of life, on longer-term impacts of poverty and social exclusion on their future life as adults and also on the society as a whole. The situation of children at a particularly high risk of social exclusion should be targeted specifically.

What this study demonstrates, apart from a relative diversity of approaches between the different States examined combined with a great convergence in the definition of the objectives, is the need to address the prevention and reduction of child poverty by adequate governance mechanisms. These should include, in accordance with General Comment n°5 (2003) of the Committee on the Rights of the Child (General measures of implementation of the Convention on the Rights of the Child)²⁶²: the adoption of a comprehensive national strategy or national plan of action for children, developed through a process of consultation with children, and in which a priority should be given to marginalized and disadvantaged groups of children; the definition of real and achievable targets in relation to the full range of rights of children; an adequate coordination between different departments and levels of government, as well as between Government and civil society; the systematization of both child impact assessment (predicting *ex ante* the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating *ex post* the actual impact of implementation); the collection and analysis of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realization of rights; and the setting up of independent human rights institutions to ensure that the public policies are monitored and that recommendations can be made to improve the situation of children's rights.

Although most of the recommendations concluding the study on the strategies for the prevention and reduction of child poverty are relevant for the national level, they could serve

²⁶¹ The study has the following comment on the inclusion of a concern for children within the National Action Plans against poverty and social exclusion (NAPs/inclusion): « The conditions under which children grow up (...) attract more and more attention, on the national as well as European level. Compared to the first round of National Action Plans against Social Exclusion the new NAP/incl. 2003-2005 overall shows an increasing acknowledgement of poverty and social exclusion among children and contains more strategies to ensure children's healthy development and social inclusion – not least because the situation of children has been highlighted in the Common Outline (The Social Protection Committee 2003) as well as in the Common Objectives (The Social Protection Committee 2002). Though this development is encouraging, children's interests and rights are still not broadly taken into account. Many countries see children and their well-being mainly from an adult's perspective and focus on the needs of parents and families whereas children's views tend to be ignored. The growing convergence of objectives and policies to tackle child poverty and social exclusion thus still goes along with a persistent divergence in the underlying perception and recognition of children and their rights ».

²⁶² CRC/GC/2003/5, 27 November 2003.

to orient the future National Action Plans against poverty and social exclusion (NAPs/inclusion), and to that extent they are relevant to the activities of the EU institutions. Moreover, the recommendations concerning the central role to be recognized to the Convention on the Rights of Child and the institutional devices to be adopted in order to ensure that its requirements are adequately taken into account into law- and policy-making may inspire future initiatives of the Union in this respect, especially in the context of the setting up of the future EU Fundamental Rights Agency.

Article 25. The rights of the elderly

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 26. Integration of persons with disabilities

The previous reports prepared within the Network of independent experts on fundamental rights have been generally detailed on the need to ensure an adequate protection from discrimination of persons with disabilities. Therefore, only one question of interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation may be referred to under this provision of the Charter. It is well documented that the adoption of health and safety regulations at work may constitute in certain cases a barrier to the employment or retention of persons with disabilities. This risk should be particularly a source of concern where the Member States go beyond the minimal requirements established under European Community law in the field of occupational health and safety. As stated by Article 1(3) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ L 183, 29.6.1989, p. 1), this directive « shall be without prejudice to existing or future national and Community provisions which are more favourable to protection of the safety and health of workers at work »; and the other, sectoral directives adopted in this area also establish minimal requirements for the Member States. However, referring to the Report « Pre-Employment Inquiries and Medical Examinations as Barriers to the Employment of Persons with Disabilities : Reconciling the Principle of Equal Treatment and Health and Safety Regulations under European Union Law » commissioned by the DG Employment and Social Affairs of the European Commission to the Group of experts on discrimination on grounds of disability, the Network notes the need to clarify the relationship between the possibility for the Member States to ensure a high level of protection of the health and safety at work, and the requirement to ensure equal treatment in employment and occupation to workers with disabilities.

Referring to the conclusions of that Report, the Network notes that a Member State would currently not be in violation of its obligations under Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation if it provided that it can be a valid defence for employers accused of discriminating against persons with disabilities by denying them employment opportunities that they are acting in order to comply with the existing national regulations protecting health and safety at work. This may be derived from Articles 2(5), 7(2) and 2(2)(b) of the Framework Directive. However, the Member States should strictly define the conditions under which this justification may be invoked : as this constitutes an exception to the principle of equal treatment, it should not be read too widely and authorize health and safety regulations to become false excuses for perpetuating

discrimination against persons with disabilities in the employment relationship. Specifically, the Report mentioned suggested that under the Framework Directive such a justification should only be considered as admissible where a) it would be not only more difficult or burdensome, but impossible for the employer hiring the person with a disability to comply with the requirements set out in the existing health and safety regulations, even by providing a form of reasonable accommodation to that person ; b) this impossibility has been determined following an individualized assessment of the person concerned, of the range of accommodations which could be provided as an alternative to a refusal to hire (or a discontinuation of the employment), and of the incompatibility between the obligations imposed on the employer to guarantee health and safety at work and the recruitment (or the retainment) of the person concerned ; it follows from this requirement that any blanket, across-the-board restriction on the employment of persons with certain categories of disabilities, should be presumed in violation of the Framework Directive, even where such a restriction is purportedly justified by the need to comply with health and safety requirements ; c) the incompatibility between the obligations imposed on the employer to guarantee health and safety at work and the recruitment (or the retainment) of the person concerned, which the employer alleges, relies on current medical knowledge or on the best available objective evidence, rather made to depend on the subjective appreciation of the employer, even where it is admitted that the employer has acted in good faith and with no discriminatory purpose ; and d) the procedure which leads to the conclusion that the employer is justified in refusing to hire a person with a disability (or in not retaining that person) complies with the fundamental rights recognized in EU law, including in particular the right to respect for private life and the protection of personal data. The Report concluded :

A Member State is not obliged under the Framework Directive to screen out from its health and safety regulations those regulations whose protective pretenses may adversely impact upon the access to employment of persons with disabilities. However the Member States could be encouraged and perhaps incentivized to do so, to the extent that they have provided for a level of protection of health and safety at work which goes beyond the minimal levels of requirement set out by EC Directives or required under Article 3(3) of the Revised European Social Charter.

CHAPTER IV : SOLIDARITY

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

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 28. Right of collective bargaining and action

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 29. Right of access to placement services

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 30. Protection in the event of unjustified dismissal

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 31. Fair and just working conditions

Two important debates will be described under this provision of the Charter. The first debate has preceded the proposal for an amendment of 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. The second debate concerned the potential impact of the Proposal for a Directive on the services in the internal market on the fundamental social rights of workers, in the context of an enlarged Union where the protection afforded to workers may differ largely from Member State to Member State.

The organisation of working time

The Commission has made a proposal²⁶³ aiming at the amendment of 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.²⁶⁴ The single most debated aspect of this proposal concerns the « opt-out » provision currently in Article 22(1) of the Directive, a provision on which radically opposite positions have been expressed, on which contradictory arguments (the protection of the health and safety of workers and the compatibility between working and family life on the one hand, flexibility in the management of working time and competitiveness especially of small and middle-size businesses on the other hand) are being exchanged. In order to meet these conflicting expectations, the Commission has proposed to maintain the principle of the individual opt-out from the 48-hour average weekly limit, but – recognizing that « The experience gained in the application of Article 22(1) shows that the individual final decision not to be bound by Article 6 of the Directive can be problematic in two respects: the protection of workers' health and safety and the freedom of choice of the worker » (Preamble, 9th Recital, of the Proposal) – proposes to reinforce the protection of the worker by introducing a dual system, which the Commission believes combines the advantages of the individual approach with those of collective bargaining. According to this dual system, « the individual opt-out will require prior collective agreement or agreement among social partners, but only in those cases where such agreements are possible under national legislation and/or practice. In other cases, opt-out on the basis of individual consent alone will remain possible, but reinforced conditions will apply to prevent abuses and to ensure that the choice of the worker is entirely free. Furthermore, the Directive introduces a maximum duration of working time for any one week, unless otherwise provided by collective agreement »²⁶⁵. Moreover, in order to take into consideration the particular situation

²⁶³ COM(2004) 607 final of 22.9.2004.

²⁶⁴ OJ L 299, of 18.11.2003, p. 9.

²⁶⁵ Explanatory Memorandum to the Proposal, at para. 12.

of SMEs, the opt-out is maintained for companies with no collective agreement in force and no collective representation of the workers that is capable of concluding a collective agreement or an agreement between the two sides of industry on the issue. The proposed Article 22(1), to which a further paragraph is to be added (Article 22(1)(a)), would read :

1. Member States shall have the option not to apply Article 6 [providing for a maximum 48-hours weekly working time], while respecting the general principles of the protection of the safety and health of workers. The implementation of this option must, however, be expressly foreseen by a collective agreement or an agreement between the two sides of industry at national or regional level or, in accordance with national law and/or practice, by means of collective agreements or agreements concluded between the two sides of industry at the appropriate level.

The implementation of this option is also possible, by virtue of an agreement between the employer and the worker, in cases where there is no collective agreement in force and there is no workers' representation within the undertaking or the business that is empowered, in accordance with national law and/or practice, to conclude a collective agreement or an agreement between the two sides of industry on the issue.

(1)a. In any case, Member States making use of the possibility provided for by paragraph 1 shall take the necessary measures to ensure that:

a) no employer requires a worker to work more than forty-eight hours over a seven-day period, calculated as an average for the reference period referred to in Article 16 b), unless he has first obtained the worker's agreement to perform such work. This agreement shall be valid for a period not exceeding one year, renewable. An agreement given at the time of the signature of the individual employment contract or during any probation period shall be null and void.

b) no worker suffers any detriment because he is not willing to give his agreement to perform such work;

c) no worker works more than sixty-five hours in any one week, unless the collective agreement or agreement between the two sides of industry provides otherwise;

d) the employer keeps up-to-date records of all workers who carry out such work and of the number of hours actually worked;

e) the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working time;

f) the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in Article 16(b), as well as information on the number of hours actually worked by the workers concerned.

In order to correctly assess the import of this proposal, we should avoid the reflex of considering as necessarily preferable a solution that turns out to be situated somewhere between the contrasting positions adopted by the social partners on the matter of the review of the individual opt-out provided for in Article 22 of the Directive. The flexibility allowed by maintaining the individual opt-out could have an impact on the health and safety of the workers concerned, since fatigue associated with the risk of cardiovascular diseases and with a rise in the number of work accidents is directly proportional to the number of hours worked. It could discourage women from entering the labour market, since it becomes more difficult to reconcile family and professional life. It may also reinforce the professional segregation between men and women, since the most senior positions in the professional hierarchy require greater availability on the part of the worker. Finally, although the Commission proposal sets out to strengthen the reality of worker consent by preserving the latter's freedom of choice, in particular by guaranteeing that no worker should be disadvantaged by the fact that he is not willing to agree to work longer than 48 hours a week, the worker finds himself restricted

essentially by the fact that he finds himself in a competitive position with other workers of whom the same extension of working time is asked, and that because of his refusal he may end up being given tasks with less responsibility, as well as being denied promotion to positions with greater responsibility. It is noteworthy in this connection that, according to a study giving an evaluation of the profound impact of the proposed Directive, “a significant proportion of those who work longer than 48 hours [from 17% to 35%, according to the type of positions considered] want to work less, even if this means accepting a reduction in salary”²⁶⁶.

It is therefore essential that the consent of the individual worker may not, by and in itself, legitimize the opt-out. In the proposal of the Commission, Article 22(1) provides that the possibility of individual opt-out must be « expressly foreseen by a collective agreement or an agreement between the two sides of industry at national or regional level or, in accordance with national law and/or practice, by means of collective agreements or agreements concluded between the two sides of industry at the appropriate level ». Except for enterprises where there is no collective agreement in force and for which there is no workers' representation that is empowered to conclude a collective agreement or an agreement between the two sides of industry on the issue, this ensures a certain protection of the individual worker, compensating in part his/her vulnerability in the face of pressures which the employer might be tempted to exert. At the same time, it will be recognized that the representatives of workers themselves may be subjected to certain pressures linked to the need for the undertaking concerned to remain competitive in comparison not only with its competitors in other countries of the Union, but also with competitors in third countries in sectors exposed to international competition.

It should be remembered in this respect that, according to the OECD Guidelines for Multinational Enterprises, approved by all governments of the OECD Member States, Member States should encourage multinational enterprises to abide by the principle that “In the context of bona fide negotiations with representatives of employees on conditions of employment, or while employees are exercising a right to organise”, they must not “threaten to transfer the whole or part of an operating unit from the country concerned nor transfer employees from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise” (Chapter IV, par. 7 of the Guidelines). This principle is cited in paragraph 52 of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977). Bearing in mind that, during the period under scrutiny, certain collective agreements have been secured by the enterprises concerned under the threat of such relocations, it seems appropriate to recall the requirement formulated by those guidelines.

Moreover, Article 2(1) of the Revised European Social Charter provides that “With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake: (...) 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.” The European Committee of Social Rights considers that the law must require that collective agreements set a daily or weekly limit to working time and that the possibility of reaching collective agreements at the enterprise level must be surrounded by specific guarantees.²⁶⁷ In its Decision of the merits of Collective Complaint n° 9/2000 adopted on 16 November 2001, the Committee observed that the French law “does not require that collective agreements provide for a maximum daily or weekly limit, although the social partners are clearly free to do so” and considered accordingly that the guarantees afforded by collective

²⁶⁶ SEC(2004) 1154, pp. 26-27.

²⁶⁷ Collective Complaint No. 9/2000, Confédération française de l'Encadrement CFE-CGC against France; and Concl. 2003-1 (France), p. 101.

bargaining are not sufficient to comply with Article 2 para. 1. It further observed that collective agreements may be reached at enterprise level, but that “the possibility to do so is not in conformity with Article 2 para. 1 unless specific guarantees are provided for”. It observed in that respect that “the procedure for contesting collective agreements under Article L. 132-26 of the Labour Code does not constitute such a guarantee since its implementation is of a random nature” and concluded that the situation was not in conformity with Article 2 para. 1 of the revised Charter.

Since Article 31(2) of the Charter of Fundamental Rights of the European Union is based on Article 2 of the European Social Charter, it should be read in conformity with the latter provision, taking into account the interpretation given thereof by the European Committee of Social Rights. It would be advisable if, in the evaluation report on the application of the Directive which it is to submit to the European Parliament, the Council and the European Economic and Social Committee (Article 24b of the proposed Directive), the Commission would examine the compatibility of the transposition measures adopted by the Member States with the requirements of the European Social Charter.

The impact of the proposal for a Directive on the services in the internal market

During the year under scrutiny, an important debate followed the presentation by the European Commission of its proposal for a Directive on the services in the internal market²⁶⁸. One aspect of this debate, of particular importance under Article 31 of the Charter, concerned the relationship between the proposal and the protection of posted workers in the context of a transnational provision of services. Two issues deserve particular attention under this provision of the Charter. The first issue concerns the risk that the principle of the country of origin will encourage a race to the bottom in the field of the protection of the rights of workers, in the context of the posting of workers for a transnational provision of services. The second issue concerns the impact of the proposed directive on the identification of the law applicable to the contract of employment.

1° The risk of regulatory competition to the expense of the rights of workers in the context of the posting of workers for a transnational provision of services

In connection with the provision of transnational services involving the posting of workers – taking the form either of performance of work by an undertaking on its account and under its direction, under a contract concluded between that undertaking and the party for whom the services are intended, or of the hiring-out of workers for use by an undertaking in the framework of a public or a private contract -, the Community legislator has already taken action with the adoption of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services²⁶⁹. Although it is sometimes presented as aiming to promote the transnational provision of services by clarifying the legal framework applicable to the posting of workers and, in particular, the division of tasks between the law of the Member State of destination (where the service is provided) and the Member State of origin (where the service provider is established and where the posted worker is habitually employed), this Directive is in fact intended to prevent a specific form of unfair competition developing in Europe, called “social dumping”, where undertakings wrongfully resort to posting of workers under a contract of services with another undertaking established in another Member State in order to escape the consequences of the national law of the Member State of destination and thus to compete with the undertakings established in that State which are obliged to comply with that national law. The Preamble of Directive 96/71/EC points out that “any such promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect

²⁶⁸ COM(2004) 2 final, of 13.1.2004.

²⁶⁹ OJ L 18 of 21.01.1997, p. 1.

for the rights of workers” (Fifth Recital), which adequately translates the objective that guided the adoption of this instrument. In order to achieve this objective, Directive 96/71/EC coordinates the legislations of the Member States in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided. Article 3(1) of Directive 96/71/EC, which is its essential provision, provides:

Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or
 - by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern [building work relating to the construction, repair, upkeep, alteration or demolition of buildings, or other activities if the Member State of destination so decides [²⁷⁰]]:
- (a) maximum work periods and minimum rest periods;
 - (b) minimum paid annual holidays;
 - (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
 - (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
 - (e) health, safety and hygiene at work;
 - (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
 - (g) equality of treatment between men and women and other provisions on non-discrimination.

The proposed Directive on services in the internal market claims to respect the integrity of this *acquis* of Community law. All the matters covered by Directive 96/71/EC are exempted from the country of origin principle (Article 17(5) of the proposed Directive). This concerns not only the application of the laws, regulations and administrative provisions of the host Member State (as well as, in the building industry, the collective agreements or arbitration awards that have been declared generally applicable) to the issues referred to in Article 3(1) of Directive 96/71/EC, but also the ability for the host Member State to carry out the supervision required by the enforcement of those regulations, as well as the very definition of “worker” in order to ensure their application. The exemption from the country of origin principle extends to the provisions which the host Member State intends to impose on temporary workers, since, in accordance with Article 3(9) of Directive 96/71/EC, Member States may provide that those workers enjoy the conditions that apply to temporary workers in the Member State on whose territory the work is carried out.

²⁷⁰ See Article 3(1) of Directive 96/71/CE.

In the system provided for by the proposed “Services” Directive, the host Member State is obliged to monitor observance of the working conditions on its territory, and to this end to carry out all the necessary inspections and verifications, in particular on building sites. The additional responsibility of the Member State of origin does not take the place of the responsibility of the host Member State but rather complements it, and guarantees that inspections may occur not only at the workplace of the posted worker, but also at the place where the undertaking is established, which may increase the efficiency of supervision and therefore enhance protection of the rights of posted workers.

Bearing in mind the findings that emerge from the report on the state of the internal market for services²⁷¹ and the complaints that have been addressed to it by service providers who are faced with administrative procedures that are considered excessively cumbersome, even dissuasive, for the purposes of the posting of workers, the Commission also proposes the abolition of four specific administrative requirements in the host Member State (Article 24(1) of the proposed Directive): obligation to obtain authorization or registration in the host Member State for the posting of workers; obligation to make a declaration, although in the construction industry those declarations may be maintained until a year after the transposition of the Directive, and without the principle of this prohibition prevents the host Member State from requiring service providers to submit declarations or complete the forms concerning specific employment conditions that must mandatorily be observed, such as forms concerning contributions to holiday pay funds; obligation to have a representative domiciled in the host Member State, although the employer may be required to appoint one of his workers as his representative for the duration of the provision of services; obligation to hold and keep employment documents in the territory of the host Member State, although this does not concern documents that are normally drawn up during the service activities and kept at the workplace rather than at the employer’s place of establishment. According to the recitals that form the basis of the proposed Directive on services in the internal market, obligations may constitute obstacles to the free movement of services involving a posting of workers from the moment that they are even imposed in situations where services are provided on an occasional basis and for a very short period.

In conclusion, according to the European Commission, the adoption of the proposed “Services” Directive will not only have no negative impact on the protection of the rights of posted workers as currently regulated by Directive 96/71/EC, but will actually increase this protection by the additional clarification it offers of the respective obligations of the Member State of origin and the host Member State, and by the obligation of administrative cooperation which it imposes, facilitating enhanced monitoring of the employer’s obligations.

This presentation elicits some basic reservations. First, the application of the country of origin principle to the posting of workers in the context of a transnational provision of services radically modifies the function to be fulfilled by the core provisions for the protection of workers’ rights listed under Article 3(1) of Directive 96/71/EC. Article 3(10) of this Directive states explicitly that it « shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of (...) terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 [cited above] in the case of public policy provisions (...) ». The country of origin principle, on the contrary, prohibits this.

It will be recalled in that respect that in the case of *Rush Portuguesa Limitada*²⁷², which had provoked fears of an unfair competition from Member States less protective of the rights of workers in the framework of transnational provisions of services, the European Court of Justice had considered that the freedom to provide services then laid down in Article 59 of the

²⁷¹ COM (2002) 441 ;

²⁷² ECJ, 27 March 1990, *Rush Portuguesa Limitada v. Office national d’immigration*, C-113/89, ECR, p. I-1417.

EEC Treaty (now Article 49 EC) entails, as specified then by Article 60 of the EEC Treaty (now Article 50 EC), that the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided ‘under the same conditions as are imposed by that State on its own nationals’. These provisions, the Court said,

therefore preclude a Member State from prohibiting a person providing services established in another Member State from moving freely on its territory with all his staff and preclude that Member State from making the movement of staff in question subject to restrictions such as a condition as to engagement in situ or an obligation to obtain a work permit . To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service (para. 12).

However, the Court added in that judgment, ‘in response to the concern expressed in this connection by the French Government’, that (para. 18)

Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means (judgment of 3 February 1982 in Joined Cases 62 and 63/81, *Seco SA and Another v EVI* ((1982)) ECR 223).

Therefore, where the Directive concerning the posting of workers in the framework of the provision of services mentioned (in Article 3(10)) that it does not preclude the application by Member States, « in compliance with the Treaty », to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of terms and conditions of employment on matters other than those referred to in Article 3(1), this Directive did not consider that, beyond the minimal protection afforded to the workers by the application of certain imperative provisions of the State of destination, the national rules regulating the employment relationship in that State should be ignored in favour of the law of the State of origin. This however is what the principle of the country of origin in effect leads to²⁷³. What were minimal safeguards for the workers in the system of the Posted Workers Directive now appears to constitute the maximum room allowed for the law of the State of destination of the transnational provision of services. Of course, under the system of the Posted Workers Directive, not any legislation of the State of destination would be justified under the rules of the Treaty. According to the settled case-law of the European Court of Justice, the freedom to provide services may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established, as the measures applied to providers of services established in other Member States are indeed appropriate for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it. The Court has acknowledged that

²⁷³ Article 17, 5), of the proposal for a Directive on the services in the internal market exempts from the country of origin principle the areas covered by Directive 96/71/EC, however this applies only to the areas enumerated in Article 3(1) of that Directive, and not to any areas covered by the legislation of the Member States which they intend to apply to the employment relationship between the service provider and the worker in the context of a transnational provision of services. The general derogation from the country of origin principle provided for in Article 17, 16), of the Proposal for a Directive on services in the internal market, is not applicable to the regulations of the host State which would contain public policy provisions applicable to the employment relationship or the fundamental rights of workers. Indeed, this would not be an instance of a total ban of certain services in the country of destination.

among the overriding reasons relating to the public interest which may justify restrictions to the free provision of services, the protection of workers is included.²⁷⁴

The application of the country of origin principle to all the matters others than those covered by Directive 96/71/EC (Articles 16 and 17, 5), of the proposal for a Directive on the services in the internal market) implies that even the national legislations of the State of destination which fulfil all the conditions cited shall not be applicable to the employment relationship between the worker and the employer established in another Member State, as this relationship is in principle to be regulated exclusively by that latter State from where the service is provided. Taking into account the freedom of establishment recognized to the service provider, which gives him the possibility to choose under which legislation he will be offering his services throughout the Union, the introduction of this system would result in a heightened pressure being exercised on the provisions in the national legislations of the Member States which seek to protect the rights of workers. The national rules through which the rights of workers are protected are made to compete against one another in an accentuated fashion in a system regulated by the country of origin principle, and where the Member States seek to attract undertakings to establish themselves under their jurisdiction.

The principle of the country of origin applied to the transnational provision of services amounts to imposing a form of mutual recognition without prior harmonisation, and in particular, without a prior determination of a minimum level of protection of workers' rights. The judgment delivered by the Court on 23 November 1999 in the case of *Arblade and others* appears on the contrary, with specific reference to the building sector, to make the substitution of the protection of the country of origin to the protection offered by the host country, dependent on a sufficient comparability between the protections offered by the two regimes. The Court said in its judgment that

It must be acknowledged the public interest relating to the social protection of workers in the construction industry and the monitoring of compliance with the relevant rules may constitute an overriding requirement justifying the imposition on an employer established in another Member State who provides services in the host Member State of obligations capable of constituting restrictions on freedom to provide services. However, that is not the case where the workers employed by the employer in question are temporarily engaged in carrying out works in the host Member State and enjoy the same protection, or essentially similar protection, by virtue of the obligations to which the employer is already subject in the Member State in which he is established (para. 51).

The appreciation we can make on the abolition, either immediate, or at least one year after the entry into force of the proposed directive on services in the internal market, of certain obligations of an administrative nature imposed by Member States on service providers posting workers in another Member State than that where they are habitually occupied in the framework of a transnational provision of services, is closely linked to the very content of the requirements which the host Member States may impose on these service providers. The Court has taken the view that « considerations of a purely administrative nature cannot justify derogation by a Member State from the rules of Community law, especially where the derogation in question amounts to preventing or restricting the exercise of one of the fundamental freedoms of Community law », but it acknowledged however that « overriding reasons relating to the public interest which justify the substantive provisions of a set of rules may also justify the control measures needed to ensure compliance with them ».²⁷⁵

²⁷⁴ See, in particular, Case 279/80, *Webb*, [1981] ECR 3305, paragraph 17 ; Case C-113/89, *Rush Portuguesa*, [1990] ECR I-1417, para. 18 ; Case C-272/94, *Guiot*, [1996] ECR I-1905, paragraphs 11 and 16 ; Joined Cases C-369/96 and C-376/96, *Arblade and others*, [1999] I-8453, para. 34-36.

²⁷⁵ Joined Cases C-369/96 and C-376/96, *Arblade and others*, [1999] I-8453, para. 37-38.

2° *The impact of the country of origin principle on the identification of the applicable law*

A question that is closely linked to that of the risks of “social dumping” entailed by resorting to the country of origin principle in the area of free movement of services is the impact of this principle on the identification of the law applicable to an employment contract. However, this is one aspect of a wider problem, namely that of the impact of the proposed Directive on services in the internal market on the designation of the applicable law, not only with respect to employment contracts, but in other areas as well. This matter calls forth the following considerations²⁷⁶.

Since the origin principle introduced by Article 16 concerns access to service activities as well as the *exercise* of those activities, it also covers all the contractual arrangements of a provision of services as well as the (contractual or non-contractual) liability of the service provider that might be involved in the provision of a service. In other words, for services it will undoubtedly replace the whole system of mandatory rules put in place by the Convention of Rome on the law applicable to contractual obligations with the Rome II Regulation on the law applicable to non-contractual obligations. When we compare the solutions ensuing from Article 16 of the proposed Directive on services in the internal market with the Convention of Rome, the incompatibilities are obvious. We need to consider separately situations where the parties have chosen the law applicable to their contractual relations and situations where they did not express such a wish. We will also look into specific questions that arise in connection with consumer contracts, employment contracts and the involvement of the extra-contractual liability of the service provider.

Contractual autonomy

Traditionally, in contractual matters, the parties are free to choose the law applicable to their relations. This principle is enshrined in Article 3(1) of the Convention of Rome. Article 17(20) of the proposed Directive sets out to maintain this possibility for the parties, by reserving the possibility for them to choose the law applicable to their contract, except for the situation where Article 16 applies. However, this provision simply establishes the principle of contractual autonomy (as a derogation from the systematic application of the law of origin), yet without specifying the *arrangement* of contractual autonomy. More particularly, it does not provide for the possibility of a tacit or implicit choice of applicable law.

The Convention of Rome, on the other hand, authorizes the parties to choose the law applicable to all or part of the contract and acknowledges the choice that is expressed or demonstrated with certainty by the terms of the contract. It also determines the law applicable to the material and formal validity of the choice made by the parties (Article 3(4)). Finally, it also imposes certain limits on the exercise of contractual autonomy for purely domestic contracts (Article 3(3)) and for international contracts (Article 7). The domestic contracts remain subject to the mandatory rules of the State where the situation is entirely located; the latter cannot escape the application of the rules of the law of the forum, which are mandatory irrespective of the law otherwise applicable to the contract and which generally ensures the protection of important social interests.

By comparison, the proposed Services Directive, even where it does not ensure respect for an implicit choice, does not impose any limit on the exercise of contractual autonomy. The parties may thus choose the law of a third State and escape the application of national rules of immediate application (*lois de police*) as well as national rules resulting from Community harmonization that constitute *lois de police*.

²⁷⁶ The following paragraphs benefited from the contribution of Mrs Stéphanie Francq, assistant at the Faculty of Law, UCL.

The proposed Directive is also deficient in that it contains no provision on the material and formal validity of a clause of applicable law. From reading the proposed Directive we cannot know whether this matter is governed by Article 16 and therefore to the law of origin of the service provider, or whether – the question of validity of the choice being covered by the derogation under Article 17(20) – any choice of applicable law is materially and formally valid, without any requirement ensuring the existence of an actual consent. This creates a problem of legal uncertainty.

The second hypothesis is that where the parties have not chosen the law applicable to the contract. In that case, the Convention of Rome designates as applicable law the law of the country with which the contract is most closely connected (Article 4(1)). It is *presumed* that the contract is most closely connected with the country on whose territory the party providing the service has his habitual residence, in the case of a natural person. If the party providing the service is a legal person, the presumption designates, depending on the circumstances of the contract, the place of its central administration, its principal place of business, or the place of business that performs the service. In the absence of choice, the Convention of Rome designates the law of the service provider's place of establishment on the basis of a presumption. However, if all the circumstances indicate that the contract is most closely connected with another country than that where the service provider is established, the presumption is discarded, allowing a return to the main rule and the designation of the law of the country with which the contract is most closely connected.

The proposed Services Directive also designates the law of the Member State on whose territory the service provider has his establishment, a concept which presupposes a fixed and lasting establishment and the actual pursuit of an economic activity. This derives from the combination of Articles 16 and 4(4) and (5)²⁷⁷. However, where the Convention of Rome establishes a refutable presumption, the proposed Directive on services in the internal market establishes a rule that cannot be derogated from. The two instruments adopt radically opposed philosophies on this matter. The proposed Directive does not set out to designate the law of a country that is closely connected with the situation, whereas this search is the essential objective of international private law.

Even more important are the practical problems linked to the application of the country of origin principle, if this principle is to replace the rules of the Convention of Rome for the whole area of services. Those problems arise in particular in connection with mixed contracts and contracts where the parties provide reciprocal services to each other.

In the case of mixed contracts (for example, contracts of sale and service, or contracts for different types of services, some of which fall under the Directive on services in the internal market and others do not), part of the contract will be governed by the country of origin principle and another part by the provisions of the Convention of Rome (or of the Vienna Convention on the International Sale of Goods).

In the case of contracts binding parties that provide reciprocal services to each other (for example, franchising contracts, contracts on the development of technologies, etc), the country of origin principle is impossible to apply. Should each party be subject to its own legislation? This is an impracticable solution since various legislations may offer different solutions to the same problem. It would involve considerable expense for the parties, who not only have to learn all about the content of several legislations, but also need to find out with a sufficient degree of certainty how they are linked together for each problem connected with the contract. Such a solution should be dismissed.

²⁷⁷ The 38th Recital of the Preamble of the proposed Directive (in its version of 10 January 2005, doc. 5161/05) stipulates that the establishment is meant through which the service is provided. This important presumption should be incorporated in the main body of the text rather than in the Preamble.

Consumer contracts

A further difficulty created by the proposed Directive on services in the internal market concerns more specifically consumer contracts. The Convention of Rome contains special clauses (Article 5) on consumer protection, taking into account the interests of the professional and those of the consumer. In combination with Article 15 of Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters²⁷⁸, this provision constitutes a coherent system of consumer protection in international contracts.

Article 17 of the proposed Directive on services in the internal market excludes from the scope of the country of origin principle the law applicable to consumer contracts, insofar as no full harmonization exists yet in this area. At first sight, this exclusion preserves the system put in place by the Convention of Rome. The solution will be no less difficult to implement in practice, and will create real legal uncertainty. First, it should be pointed out that consumer contracts may be simultaneously subject to two sets of rules for the determination of applicable law: the Convention of Rome for the areas that are not fully harmonized, and the country of origin principle for the issues that are fully harmonized, even though the country of origin principle and the Convention of Rome adopt opposing obligations in the area of consumer contracts²⁷⁹. Consequently, different issues within the same contract may be governed by different legislations. In order to determine the law applicable to consumer contracts, we need to establish in which areas, or rather on which points of law, full harmonization exists. This will be all the less easy since the proposed Directive on services in the internal market does not allow us to identify at which moment the degree of harmonization has to be evaluated (moment of conclusion of the contract, time of the lawsuit, submission of the case to the court, even of the deliberations). Nevertheless, it is not desirable, or even conceivable, to expect the consumer to know the state of progress of the European harmonization, to the extent of being able to determine what the legal problems are for which he is not protected by the Convention of Rome. It should be added that even apart from the cases of full harmonization, the principle of mutual recognition remains. In other words, the host State cannot impose its protection laws (of consumers in particular) on a service provided by a service provider established in another Member State where he complies with equivalent laws and regulations. It is therefore not so much the full harmonization or not of the legislations that interests us as their equivalence.

Employment contracts

In the area of employment contracts, two hypotheses should be distinguished according to whether or not the situation is covered by Directive 96/71/EC on the posting of workers.

If the situation does not involve a posting of workers, the Convention of Rome only is currently applicable (Article 6). It provides that parties can choose the law applicable to the contract. Even if a choice is made, they cannot derogate from the application of the mandatory rules of the country where the work is habitually carried out. In the absence of choice, the applicable law shall be that of the country where the worker habitually carries out his work. If such place is difficult to determine (for example in the case of air hostesses), the law of the country in which the place of business through which the worker was engaged is situated shall apply. Finally, an exception clause allows the designation of another law with which the situation is more closely connected than with the law designated on the basis of presumptions.

²⁷⁸ OJ L 12 of 16.1.2001.

²⁷⁹ The country of origin principle designates the law of the country where the professional is established, whereas the Convention of Rome designates the law of the country where the consumer has his habitual residence.

The draft Services Directive does not provide for a general derogation from the application of the country of origin principle in employment contracts. This principle will therefore govern the individual employment relations entered into between a service provider and his employees, unless contractual autonomy is exercised. This leads to different solutions from those envisaged by the Convention of Rome.

Firstly, the parties could choose the law applicable to the employment contract without taking into account the mandatory rules of the law of the country where the work is habitually carried out. In contracts similar to membership contracts, this would encourage undertakings to impose the choice of legislation where the level of social protection is low. The exercise of contractual autonomy in fact encourages a regulatory competition between States, bearing in mind that, in practice, it is the employer – and not the worker – who defines the law applicable to the employment contract of which he proposes the terms to the job applicant.

If contractual autonomy is not exercised, the proposed Directive on services in the internal market designates the law of the country where the service provider is established, whereas the Convention of Rome designates the law of the country where the work is habitually carried out. However, the place where the service provider is established does not necessarily coincide with the place where the work is habitually carried out. In particular, in the context of the provision of a service in Member State A, the provider, established in country B, may be led to hire local workers (from country A). The law applicable to the contract between the foreign provider and the local workers will, under the Directive, be that of Member State B (law of origin of the service provider), whereas under the Convention of Rome, the law of country A (place where the work is habitually carried out) will apply. This would encourage companies from country A to establish themselves in country B if the level of social protection is lower there, in order to subsequently provide services in country A by employing qualified workers from that country. Provided that the company in question carries out certain economic activities in country B²⁸⁰, it benefits from the country of origin principle and therefore from the designation of the law of country B for all contractual matters connected with the performance of the service. Such a situation leads to a difference in treatment between local workers hired by a local company and local workers hired by a foreign company providing services.

In the case of a posting of workers, that is to say, the temporary dispatch of workers to another country for the purpose of performing certain services for a period of less than twelve months, the aforementioned Directive 96/71/EC provides that the posted worker may invoke the laws of the host country concerning employment conditions. In combination with the Convention of Rome from which it constitutes a derogation, Directive 96/71/EC offers the following solution: the worker may invoke the employment conditions in the law of the place where the work is habitually carried out or those of the place to which he is posted, depending on which are the most favourable for him.

The draft Directive provides that the country of origin principle does not apply in the case of posting of workers. A posted worker retains the possibility to invoke the employment conditions of the country of posting.

However, the interaction between the proposed Directive on services in the internal market and the Directive on the posting of workers in another Member State may prove unfortunate in certain situations. As we have seen, according to Directive 96/71/EC, collective labour agreements that are not universally applicable do not form part of the minimum conditions applicable in the host State to the posted worker (Article 3(1) of Directive 96/71/EC). The

²⁸⁰ The proposed Directive on services in the internal market defines “establishment” as a place where an economic activity is actually pursued (Article 4(5)) and therefore rules out that a company can benefit from the country of origin principle by using a mere “P.O. box” in the country from where it claims to operate.

host State therefore has to adopt certain rules to make certain collective labour agreements applicable to posted workers (Article 3(8) of Directive 96/71/EC). In the absence of specific measures, the posted workers do not benefit from collective agreements. The specific measures needed for the application of collective agreements in the absence of a system for declaring collective agreements to be of universal application often require that a collective agreement be signed by the representative of the service provider in the host State. Moreover, from a practical point of view, the implementation of a collective agreement requires the presence of a representative²⁸¹. However, the proposed Directive on services in the internal market prohibits the host State from imposing on the service provider the presence of a representative (Article 16(4)(c)). In practice, the combination of the two texts could make it impossible to apply collective agreements to posted workers in the absence of a system for declaring collective agreements to be of universal application.

Reservation concerning mandatory rules

In the system of designation of applicable law put in place by the Convention of Rome, the State where a lawsuit has been filed can always impose its internationally mandatory rules (rules of immediate application), or even impose those of another State that is closely connected with the situation, even if the law chosen by the parties or the law designated in the absence of the exercise of contractual autonomy is that of a third State (Article 7). This possibility exists for all types of contract. The object is to protect certain socio-economic interests that are considered so important that the international configuration of the situation, which could lead to the application of a foreign law, does not suffice to justify a derogation. The Court of Justice does not oppose the imposition by a Member State of its mandatory rules, even if this constitutes a constraint, insofar as this operation is carried out in the pursuit of a general interest justifying such constraint and with observance of the condition of proportionality²⁸², which involves a verification of the equivalence of the legislations concerned.

Under the proposed Directive on services in the internal market, there are no restrictions on the designation of the law of origin. There are no reservations in connection with the application of the mandatory rules of a State involved. Article 17(16) only excludes from the scope of the country of origin principle activities that are prohibited for reasons of public policy, public security or public health. The prohibition of an activity does not at all cover all the cases where a mandatory rule may intervene. Commercial practices, for example, are often governed by mandatory rules.

This confirms the importance of the choice of a company's place of establishment, since the law of that State will apply without restriction, and is even linked to the defence of important socio-economic interests of the States in which the company can subsequently perform its services.

Interaction with the "Rome II" Regulation

The Commission plans the adoption shortly of a Regulation containing a complete set of rules of attachment allowing the designation of the law applicable to non-contractual obligations. Generally speaking, this act will designate the law of the place of damage. This is meant to better protect the interests of victims of damage who never sought to come into contact with the perpetrator of the damage. Nevertheless, in the case where the persons involved (victim and perpetrator of damage) are bound by a pre-existing contract, the law applicable to the

²⁸¹ See for example no. 4 annexed to the report of the hearings by the European Parliament on the Directive on services in the internal market on 11 November 2004.

²⁸² ECJ, 23 November 1999, C-369/96, C-376/99 *Arblade*, *ECR*, 1999, I-8453; 15 March 2001, C-165/98, *ECR*, 2001, I-2189.

non-contractual liability may be that governing the contract. This makes it possible to have all the relations between the parties governed by the same law.

The proposed Directive extends the country of origin principle to all questions of extracontractual liability, with the exception of damage suffered by a person as a result of an accident (Article 17(23))²⁸³. In the case of an accident causing damage to a person, the future Rome II Regulation could apply. For all other situations where the extracontractual liability of a service provider may be involved, it follows from the Directive on services in the internal market as it is proposed that the applicable law shall be that of the place where the service provider is established.

This may seem contrary to the interest of the victims. For example, in cases of acts of libel committed in the press, the applicable law would be that of the place where the person who has written the libellous information is established (irrespective of where the publisher or the victim is located). In the case of a house being built in Belgium by a Latvian company which causes flooding on the property of the neighbours, or whose delays cause major financial prejudice for the recipient of the service, Latvian law shall be the applicable law. A pharmaceutical company established in Member State A which implements a vaccination programme in other Member States, resulting in contamination due to negligence, will see its liability defined by the law of country A. In those three cases, there is no question of an accident, which means that the exclusion provided for by Article 17 for extracontractual liability does not apply²⁸⁴. Here, too, it should be pointed out that in choosing his place of establishment, the service provider in a large number of cases chooses the conditions that apply to his extracontractual liability.

Conclusion

It emerges from the foregoing considerations that the proposed Directive on services in the internal market effectively holds the risk of an attenuation of the protection due to the consumer of services as well as to the workers, by the ease with which a company providing services in any Member State of the European Union can, by choosing its place of establishment, choose the law applicable to important aspects of its activities as a service provider. Compared with the present system (or future system, i.e. the draft “Rome II” Regulation) of designating the applicable law, the country of origin principle encourages companies to establish themselves in countries whose legislation seems favourable to them, yet offers the other party (employee, damage victim) a low level of protection. This observation is most blatant in connection with extracontractual liability.

There is a basic flaw in the country of origin principle which will not be removed by outward embellishments made to the proposed Directive on services in the internal market, if at the very least we want to avoid the negative impact on the fundamental rights that have been mentioned above. The country of origin principle entails an obligation for Member States to admit goods or services that comply with the rules of the country of origin (Member State of manufacture for goods or Member State of establishment for services) that are equivalent to those of the host State. This implies a certain degree of equivalence between the legislations governing the marketing of the goods or services. This equivalence may be the result of a harmonization of laws achieved through a Directive or a de facto equivalence established between the laws of different States where the laws pursue the same objectives. In the latter case (in the absence of harmonization), the host State retains the possibility to invoke its own

²⁸³ It is not easy to determine precisely what an “accident” is for the purposes of this provision, nor whether the damage suffered by a legal person can be covered by the hypothesis intended by it.

²⁸⁴ Nevertheless, as has already been pointed out, the term “accident” which is only commonly used in connection with motor vehicles remains vague in the proposed Directive and should certainly be specified.

legislation, provided that this is called for by mandatory or pressing requirements of general interest and the State imposes its legislation in a proportional manner.

The proposed Services Directive does not achieve a true harmonization of legislations. The number of harmonized substantive provisions is extremely limited. Moreover, the harmonization takes place in an area where there are major differences between national legislations. Finally, Article 16 of the Directive provides for the application of the law of origin for the entire coordinated field. This field is defined in Article 4(9) and means any requirement applicable to access to service activities or to the exercise thereof, which greatly exceeds the framework of the few substantive provisions contained in the Directive. The introduction of the principle of mutual recognition or the law of origin in the Directive thus makes this principle apply outside the framework (equivalence or harmonization) for which it had been instituted.

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

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 33. Family and professional life

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 34. Social security and social assistance

Article 34 of the Charter of Fundamental Rights sets forth that the Union recognizes and respects the right to housing assistance. This guarantee should influence the Commission's attitude in the application of the provisions of the EC Treaty relating to State aid. Since aid to social housing organizations is a form of State aid, it must be reported to the Commission, failing which it will be considered illegal and may have to be repaid in case of dispute. This type of aid, however, is compatible with the rules of the Treaty in that it simply compensates for the extra cost represented by the limitations that are characteristic of social housing as defined by the Member States (reduced rent, accommodation for people on welfare, allocation, etc). This system, however, does not guarantee sufficient legal certainty. It leaves uncertainties about the conditions governing a policy of Member States aimed at stimulating access to housing for the poorest or encouraging private investors to increase the amount of available housing in certain areas. This explains why the European Liaison Committee for Social Housing (CECODHAS) urged that the situation of social housing organizations be clarified, either by applying the criteria defined by the Court of Justice²⁸⁵, or by ceasing to class the subsidies that are paid to them as State aid, or by securing an exemption arrangement for that category of organizations, or by adopting an *a priori* decision that the social housing sector is compatible with Community law.

²⁸⁵ ECJ, 24 July 2003, *Altmark*, C-280/00.

In a press release of 18 February 2004, the Commission proposed to the Member States to increase legal certainty for services of general economic interest²⁸⁶. As regards housing, the Commission announced that “the funding of public services provided by hospitals and social housing would also be exempt from notification, irrespective of the amounts involved”. Therefore social housing should be exempt from notification in the light of Article 87 EC and be recognized as a mission of general interest. This is a welcome development, which is in keeping with the view expressed by the European Parliament in Recital 22 of the resolution which it adopted on 14 February 2004 (rapporteur Herzog)²⁸⁷, and where it points out that “services of general interest provided as essential functions by public authorities, such as education, public health, *public and social housing* and social services of general interest assuming functions of social security and social inclusion, do not fall within the scope of EU competition law; considers that the same should apply to services of general interest aiming at maintaining or increasing pluralism of information and cultural diversity; wishes, moreover, to see objectives and tools put in place that will enable more active common policies to be pursued in those areas”. The interpretation proposed by this resolution lends all its meaning to Article 34 of the Charter of Fundamental Rights of the European Union, which “(...) recognizes and respects the right to (...) housing assistance so as to ensure a decent existence for all those who lack sufficient resources (...)” as well as to Article 36 which “(...) recognizes and respects access to services of general economic interest (...) in order to promote the social and territorial cohesion of the Union”.

Article 35. Health care

The proposed Directive on services in the internal market presented by the European Commission on 13 January 2004 also applies to health care, since, on the basis of the definition of service deriving from the interpretation by the Court of Justice of Articles 49 et seq. of the Treaty of Rome, the Directive means by “service” any economic activity normally provided for consideration, without this service necessarily being paid for by the recipients of the service and irrespective of how the financial consideration is financed. Nevertheless, the application of the Directive to healthcare services pays too little regard to the specific features of this field and could infringe Article 35 of the Charter. It would be advisable to exclude healthcare services from the scope of application of the Directive and to dedicate a specific instrument to healthcare services in the internal market which takes better into account the peculiarities of this sector.

One peculiarity of the field of health care is that the relationship between patient and healthcare provider is profoundly unbalanced. Bearing in mind the specific nature of this service and the specialized nature of the information that is supplied to him, the patient is unable to make a fully informed choice, for example, with regard to the respective merits of the various treatments that are proposed to him or the guarantees that insure him against the risk of medical errors. Moreover, he is often in a situation of need, even dependence or emergency, which is liable to deprive him of the ability to choose the healthcare provider by whom he wishes to be treated. Furthermore, through the organization of a social security system, the State intervenes financially in the relationship between patient and healthcare providers. This financial intervention is designed to meet the needs of the population in the area of health care, and in particular to make health care accessible to everybody, especially also the poorest members of society. It is accompanied by the adoption of regulations governing healthcare services, aimed at preventing abuses (medical overconsumption) and protecting the patient in his relations with healthcare providers by strictly monitoring their

²⁸⁶ IP/04/235, 18 February 2004.

²⁸⁷ This recital is derived from Amendment 93 to the draft report of the Economic and Monetary Affairs Committee of the European Parliament on the Green Paper on Services of General Interest (2003/2152 (INI)), submitted by Bernard Rapkay and Göran Färm (PE 323.188/1-193 of 20 November 2003).

qualifications and the conditions under which they can provide healthcare services. It is inappropriate to address this issue as if it concerned a bilateral relationship entered into by a recipient of services (the patient) and a provider (the carer), a situation which is actually trilateral, and in which the financial intervention of the State through the organization of a social security system cannot be dissociated from its power to regulate the supply of healthcare services and the service itself, including the conditions in which it is provided.

Assumption of the cost of health care provided in another Member State than the Member State of affiliation

The proposed Directive on services in the internal market devotes a clause (Article 23) specifically to the assumption of healthcare costs by the Member State with whose social security system the patient is affiliated, while this care is provided in another Member State. The proposed Directive provides that Member States may not make assumption of the costs of non-hospital care in another Member State subject to the granting of an authorization, where the cost of that care, if it had been provided in their territory, would have been assumed by their social security system, but that the conditions and formalities to which the receipt of non-hospital care in their territory is made subject by Member States may be imposed on a patient who has received non-hospital care in another Member State. Hospital care, on the other hand, can be subject to the granting of an authorization, yet Member States shall ensure that this authorization is not refused where the treatment in question is among the benefits provided for by the legislation of the Member State of affiliation and where such treatment cannot be given to the patient within a time frame which is medically acceptable in the light of the patient's current state of health and the probable course of the illness. Furthermore, the authorization system must satisfy certain conditions: it must be transparent, in other words, it must be based on criteria that are precise and unambiguous, objective and made public in advance; it must be non-discriminatory; it must be objectively justified by an overriding reason relating to the public interest; finally, the objective pursued by the authorization system cannot be attained by means of a less restrictive measure, in particular by a system of a posteriori inspection²⁸⁸.

The declared objective of this provision of the proposed Directive on services in the internal market is to provide greater legal certainty as regards the reimbursement of health costs, which should benefit patients (who are no longer dissuaded from seeking treatment in other Member States, given the improved guarantees they receive in terms of the assumption of the costs of such treatments) as well as health professionals and, according to the Preamble of the proposed Directive, managers of social security systems²⁸⁹.

The Court of Justice clarified the system, under the free provision of services, for the assumption by the Member State of residence of the patient of the health care given to him in another Member State. The Court basically considers that Article 49 EC precludes the application of any national rules that make the reimbursement of medical expenses incurred in another Member State subject to prior authorization where it appears that such a system deters, even prevents, insured persons from approaching providers of medical services established in Member States other than the Member State of affiliation, unless the barrier to the free provision of services resulting therefrom can be justified by one of the exceptions allowed by the Treaty or for an overriding reason of general interest, and provided that the measures in question do not exceed what is objectively necessary²⁹⁰. According to the case-law of the Court, the concern of a Member State to maintain the financial equilibrium of its social security system constitutes an overriding reason of general interest justifying the

²⁸⁸ See Articles 9 to 11 of the proposed Directive, to which Article 23(4) refers.

²⁸⁹ See Recital 51 of the Preamble of the Directive.

²⁹⁰ ECJ, 28 April 1998, Kohll, C-158/96, ECR, p. I-1931, par. 33 to 36; ECJ, 12 July 2001, Smits and Peerbooms, C-157/99, ECR, p. I-5473, par. 62, 69 and 71; ECJ, 13 May 2003, Müller-Fauré and Van Riet, C-385/99, ECR, p. I-4509, par. 44-45.

maintenance of a barrier to allowing a patient to receive treatment in another Member State while benefiting from the same reimbursement conditions as when he had chosen to be treated in the Member State where he is affiliated with a social security system²⁹¹.

A State is not obliged to bear the additional expense created by a patient's choice to receive treatment elsewhere, although it cannot refuse the reimbursement of healthcare costs up to the level of reimbursement that would have been granted if the healthcare services had been provided by care providers established on its territory. Moreover, it may make this reimbursement subject to conditions that are necessary for preserving the financial equilibrium of its social security system. In the *Vanbraekel* case²⁹², the Court has recalled that "it cannot be excluded that the risk of seriously undermining the financial balance of a social security system might constitute an overriding reason in the general interest capable of justifying a barrier to the principle of freedom to provide services" (point 47) and that, "as regards the objective of maintaining a balanced medical and hospital service open to all, (...) even if that objective is intrinsically linked to the method of financing the social security system, it may also fall within the derogations on grounds of public health under 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" (point 48). Therefore, Article 46 EC (applicable to services by referral of Article 55 EC) "allows 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 the public health, and even the survival, of the population" (point 49).

This case-law will receive additional support, after the entry into force of the European Constitution, in Article 35 of the Charter of Fundamental Rights. It would be desirable if the Directive on services in the internal market makes at least explicit reference to this provision of the Charter,²⁹³ and that it stipulates in this connection that Article 23 of the Directive is without prejudice to the possibility for Member States to justify the maintenance or introduction of certain conditions and formalities imposed on the reimbursement of non-hospital care provided in another Member State which would be necessary to maintain a certain level of health care or medical competence on the national territory, as well as the maintenance or introduction of authorizations for the assumption by their social security system of the costs of hospital care provided in another Member State, which would be justified by the same necessity.

Free establishment of healthcare providers

The impact of the proposed Directive on services in the internal market on health care and on the possibility for Member States to ensure health care within the meaning of Article 35 of the Charter is not, however, confined to Article 23 of this proposed Directive, which is expressly devoted to the matter of the assumption of the costs of health care provided in another Member State by the Member State with whose social security system the patient is affiliated. In the area of freedom of establishment, the proposed Directive provides that Member States must not make access to or the exercise of a service activity in their territory subject to the case-by-case application of an economic test making the granting of an authorization subject to an assessment of the economic effects of the activity (Article 14(5)). Depending on the interpretation that will be given of this clause, this may deprive Member States from the possibility to limit the supply of medical services, which generally has the effect of stimulating demand and contributing to medical overconsumption, which is one of the main factors endangering the social security systems of the Member States of the European Union.

²⁹¹ See during the period under scrutiny, ECJ, 18 March 2004, Ludwig Leichtle, C-8/02, par. 41-48.

²⁹² See also, on all these points, the judgment of the Court of 28 April 1998 in *Kohll*, points 41 and 50-51.

²⁹³ At this moment, the Preamble only mentions Articles 8, 15, 21 and 47 of the Charter (Recital 72), which leads us to believe that the matter of health care was not addressed from the viewpoint of the right to health care which is guaranteed by the Charter of Fundamental Rights.

At the very least, the national rules of Member States aimed at limiting the excessive supply of medical services should be included among the requirements to be evaluated, insofar as they impose quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between service providers (Article 15(2)(a)). The rules concerning medical tariffs should also be evaluated, in accordance with Article 15(2)(g). The requirements fixing the number of employees, for example in proportion to the number of patients taken on, may be reconsidered (Article 15(2)(f)). Article 15(2)(i) evaluates “requirements that an intermediary provider must allow access to certain specific services provided by other service providers”. This concerns in particular the requirement not to call upon the services of a medical specialist except upon referral by a general practitioner, which also constitutes an important tool for combating medical overconsumption.

It is true that the requirements to be evaluated under Article 15 of the proposed Directive need not necessarily be abolished. They may be maintained on condition that they are non-discriminatory, objectively justified by overriding reasons of general interest, and do not exceed what is necessary to achieve the objective pursued. This, however, does not constitute a guarantee that the requirements imposed by Member States on the free establishment of medical service providers will be considered justified whenever they contribute to the quality of health care on the territory of the Member State. Here, too, it is advisable that the field of health care – not only as regards the free movement of medical services, but also as regards the free establishment of service providers – be excluded from the scope of application of the Directive on services in the internal market and that this field be examined taking into account its specific features.

Communication on social services of general interest

In its White Paper of May 2004 on services of general interest, the European Commission announces a Communication on social services of general interest, including health services, which is due to be adopted in the course of 2005. The content of this Communication will be studied with particular care in the light of Article 35 of the Charter of Fundamental Rights.

Cooperation on health services and medical care

The Commission has also set out a wide range of activities to promote cooperation on healthcare issues more generally. Following recent Court cases on the subject of health services, the Council recognised the need to strengthen cooperation on patient mobility and healthcare in Conclusions of June 2002, and in response the Commission convened a high level reflection process on patient mobility and healthcare developments in the European Union. This brought together ministers from all Member States (except Luxembourg) together with representatives of patients, medical professions, purchasers and providers of healthcare, and the European Parliament. The report agreed at the final meeting in December 2003 made nineteen recommendations across five main areas, and represented a political milestone by recognising the potential value of European cooperation in helping Member States to achieve their healthcare objectives.

The Commission set out its response to the report of the reflection process in Communication COM (2004) 301 of 20 April 2004, making proposals on European cooperation to enable better use of resources; information for patients, professionals and providers; the European contribution to health objectives; and responding to enlargement through investment in health and health infrastructure. One of the key recommendations was to establish a permanent mechanism to take forward these issues, which the Commission met through creating a High Level Group on health services and medical care.

This High Level Group started work in July 2004, with a first report to the Council in December. This set out work in seven main areas as follows:

- **cross-border healthcare purchasing and provision:** Future work should focus on a deeper analysis of the financial impact and sustainability of cross-border healthcare, developing a framework that could be used for cross-border healthcare purchasing, studying the reasons for mobility and the need for purchasing care abroad, providing information to patients on quality, safety and continuity of care as well as on patients' rights and responsibilities, considering liability issues in cross-border care, and gathering information to monitor cross-border healthcare purchasing and provision;
- **health professionals:** work should be taken forward through exchanging information on continuing professional development to ensure quality; ensuring that basic data on migration of health professionals is provided by all Member States; surveying the impact of migration out of Member States; and sharing information on recruitment practices in order to assess whether common principles could be developed;
- **centres of reference:** some principles have been developed regarding European centres of reference, including their role in tackling rare diseases or other conditions requiring specialised care and volumes of patients and some criteria that such centres should fulfil. Options and procedures for designating European centres of reference for limited periods of time at European level based on agreed lists of pathologies, technologies and techniques are also being developed. The High Level Group will work towards a common approach which could then be implemented through pilot activities;
- **health technology assessment:** the usefulness of establishing a sustainable European health technology assessment network has been recognised. Such a network should address methods for developing common core information packages, methods to support transferability of assessments, methods for identifying and prioritising topics and commissioning reports, tailoring common core information to national health policy processes and sharing methodologies, expertise and practice issues. This network could be established initially through the public health programme;
- **information and e-health:** e-health is the priority focus in this area, and its potential to add value to existing health services, improve quality and continuity of care and support citizen-oriented services - interoperability at national and European level is the cornerstone for achieving this. An overall health systems information strategy in a European context is needed, considering mobility of citizens and availability of Europe-wide e-health services. Future work will focus on developing such an information strategy and on outlining activities for the implementation of the e-Health Action Plan, looking at the information which should be available for patients, professionals and policy-makers; and looking at the appropriate structures for cooperation on information and e-health;
- **health impact assessment and health systems:** The European Union's impact on health takes place largely through policies other than those specifically related to public health. Work is required to ensure a coherent approach to evaluating the impact on health of other Community policies. However, there is no EU methodology to prospectively and systematically address the potential impacts of non-health policies on health systems. Work underway, including by other international organisations, will be drawn on to develop agreed instruments to measure impacts of non-health EU policies on health through impacts on health systems, which could then be tested for reliability and validity.
- **patient safety:** Health care interventions, although intended to benefit patients, may in some cases cause harm. An EU patient safety network or forum, working with other international organisations, could provide focus for efforts to improve the safety of care

for patients in all EU Member States, through sharing information and expertise. Proposals for an EU patient safety network could be further developed during 2005, in collaboration with the Luxembourg and British Presidencies who have both identified this as a priority topic.

These concrete collaboration at European level will contribute to giving effect to Article 35 in practice, through improving the efficiency and effectiveness of health systems across the Union and through helping patients to have access to the high-quality healthcare they seek, wherever it can most appropriately be provided.

Article 36. Access to services of general economic interest

The context of the debate on services of general economic interest

The 2004 Report offered extensive comments on the Green Paper on services of general interest presented by the European Commission on 21 May 2003²⁹⁴. That Green Paper aimed at initiating a broad consultation concerning in particular the usefulness of adopting a Framework Directive laying down the principles relating to services of general interest underlying Article 16 EC²⁹⁵ and on the content of such legislation²⁹⁶. In 2004, the Commission built on that consultation²⁹⁷ to present a White Paper where it presented its proposals in the field of services of general economic interest – performed by enterprises of an economic nature exempted from the application of the rules of the EC Treaty because of the general interest mission they are to fulfil²⁹⁸ – and the respective roles of the Member States and Union law in defining their status²⁹⁹. Earlier in the year, the European Parliament had adopted a resolution³⁰⁰ on the Green Paper of the Commission, based on the report prepared by MEP Ph. Herzog. These positions are presented at a time when, with the enlargement of the European Union to ten new Member States, the structural policies of the Community and its policy of supporting trans-European networks have an essential part to

²⁹⁴ COM(2003)270 final.

²⁹⁵ In the wording of Article 16 EC: “Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions”.

²⁹⁶ 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).

²⁹⁷ For the results of the public consultation, see Report on the public consultation on the Green Paper on services of general interest, Commission Staff Working Paper, SEC(2004) 326, 15.03.2004, available at: http://europa.eu.int/comm/secretariat_general/service_general_interest

²⁹⁸ 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; ECJ, 22 January 2002, *Cisal*, C-218/00, *ECR* I-691, Recital 22; 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”.

²⁹⁹ COM(2004) 374 final, of 12.5.2004.

³⁰⁰ Resolution of the European Parliament on the Green Paper on services of general interest, 14.1.2004 (T5-0018/2004).

play in helping to prevent the exclusion of vulnerable social groups or regions from access to essential services³⁰¹.

This question has also led to developments at the constitutional level. In July 2003, the European Convention had proposed that Article III-6 of the Constitution, building on Article 16 EC, should provide for the possibility of adopting a Framework Law on services of general economic interest. The proposed article read: "...given the place occupied 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 had thus been recognized as desirable. Article III-122 of the Treaty establishing a Constitution for Europe adopts that same principle, but emphasizes that the definition of the services of general interest is left to the Member States. It now provides:

Without prejudice to Articles I-5, III-166, III-167 and III-238, and given the place occupied by services of general economic interest as services to which all in the Union attribute value as well as their role in promoting its social and territorial cohesion, the Union and the Member States, each within their respective competences 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 conditions, which enable them to fulfil their missions. European laws shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Constitution, to provide, to commission and to fund such services.

Finally, a last aspect of the debate on the preservation of services of general economic interest as a fundamental aspect of the European social model concerns the proposal for a Directive on services in the internal market, presented by the European Commission on 13 January 2004³⁰². Some participants in this debate have considered that this proposal, if adopted, would pre-empt the debate on the preservation of services of general economic interest and that, therefore, the two proposals – for a directive ensuring the exercise of the freedom of establishment of service providers and the free movement of services on the one hand, for a framework directive on services of general economic interest, on the other hand – should be linked to one another and should progress together.

The need for Member States to respect the definition of general interest

Article 36 of the Charter of Fundamental Rights should constitute the reference clause of the comments called forth in the context of this report by the debate on services of general economic interest in the Union during the year under scrutiny. This Article says, "The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Constitution, in order to promote the social and territorial cohesion of the Union". This holds an obligation for the Union to make sure not to take any initiatives that are liable to make it impossible or more difficult for Member States to define, organize and finance services of general economic interest.

³⁰¹ See in particular "A new partnership for cohesion: Third progress report on economic and social cohesion", COM(2004) 107 of 18.2.2004.

³⁰² COM(2004) 2 of 13.1.2004.

As both the Commission White Paper on services of general interest³⁰³ and the proposed Directive on services in the internal market itself underline³⁰⁴, this proposal concerns only services corresponding to an economic activity. It does not apply to services of general interest of a non-economic nature. The rules of the EC Treaty do not apply to activities that are the traditional prerogatives of the State (security and justice, international relations), those which the State chooses to undertake in order to fulfil its duty towards its own population in the social, cultural and educational fields, or which are based on the principle of solidarity, and activities “conducted by organizations performing largely social functions, which are not profit-oriented and which are not meant to engage in industrial or commercial activity” (trade unions, churches, consumer associations or relief and aid organizations)³⁰⁵. These non-economic activities fall outside the scope of the proposed Directive on services in the internal market. As regards activities carried out by undertakings entrusted by Member States with a task of general interest – services of general economic interest, of which Article 86(2) EC says that they may be exempted from the rules of the Treaty concerning competition law and the rules concerning the internal market insofar as is necessary for the performance, in law or in fact, of the particular tasks assigned to them –, some of those are excluded from the scope of application of the proposed Directive, such as transport services or certain matters connected with electronic communications services and associated services³⁰⁶, or qualify for derogation from the country of origin principle, such as postal services³⁰⁷ and electricity³⁰⁸, gas³⁰⁹ and water³¹⁰ distribution services. The White Paper of May 2004 on services of general interest states that “the proposal does neither require the Member States to open up services of general economic interest to competition nor does it interfere with the way they are financed or organized”.

In the present legal framework, it is already for the European Commission, as guardian of the treaties, under the supervision of the Court of Justice, which is the ultimate interpreter of those treaties, to define the scope of application of the rules of the Treaty concerning the internal market and those concerning competition law and the freedom of movement. To this end, it must distinguish “economic activities” that are subject to those rules from “non-economic” activities where the pursued social objective or solidarity aspects prevail. While economic activities are carried out by actors constituting “undertakings” within the meaning of Community law, whatever their status under domestic law, their conditions of regulation or financing in the Member State concerned, activities in which an element of redistribution prevails are non-economic activities to which the rules of the Treaty of Rome do not apply. The proposed Directive on services in the internal market, which only applies to services within the meaning of the case-law of the Court of Justice based on Article 50 EC³¹¹, does not alter this distinction between activities that are subject to the rules of the Treaty and those which are not, nor does it alter the important and delicate role of the European Commission and the Court of Justice in defining this distinction.

³⁰³ COM(2004) 374 final, of 12.5.2004, p. 11.

³⁰⁴ COM(2004) 2 of 13.1.2004, pp. 15-16.

³⁰⁵ See Commission Communication on services of general interest in Europe, COM(2000) 580 final of 20 September 2000, JO C 17 of 19.1.2001, par. 28-30.

³⁰⁶ Article 2(2) of the proposed Directive on services in the internal market.

³⁰⁷ Postal services covered by Article 2(1) of Directive 97/67/EC of the European Parliament and of the Council, OJ L 15 of 21.1.1998, p. 14. See Article 17(1) of the proposed Directive on services in the internal market.

³⁰⁸ Electricity distribution services within the meaning of Article 2(5) of Directive 2003/54/EC of the European Parliament and of the Council, OJ L 176 of 15.7.2003, p. 37. See Article 17(2) of the proposed Directive on services in the internal market.

³⁰⁹ Gas distribution services within the meaning of Article 2(5) of Directive 2003/55/EC of the European Parliament and of the Council, OJ L 176 of 15.7.2003, p. 57. See Article 17(3) of the proposed Directive on services in the internal market.

³¹⁰ See Article 17(4) of the proposed Directive on services in the internal market.

³¹¹ Article 4(1) of the proposed Directive on services in the internal market.

Where an actor carrying out an economic activity on the market constitutes an “undertaking” within the meaning of Community law, it will be exempted from the rules of the Treaty concerning competition law³¹², State aid³¹³, or fundamental economic freedoms insofar as this is justified by the need not to obstruct the performance of a task of general interest that has been entrusted to it (Article 86(2) EC). It is in this sense that by defining the services of general economic interest, Member States can help to avert the consequences that would result from the application of the rules of the Treaty.

The conditions in which the country of origin principle applicable in the area of the free movement of services from one Member State to another and the resulting arrangements in Articles 16 to 19 of the proposed Directive on services in the internal market are defined tend, however, to threaten the balance thus established in Community law. This framework provides that a Member State may entrust a task of general interest to private or public operators providing services on its territory, which justifies them being granted certain special or exclusive rights insofar as is necessary to enable those operators to perform that task. The country of origin principle may prevent a Member State from imposing certain obligations on service providers from other Member States according to its interpretation of requirements of general interest. The general derogations from the country of origin principle certainly include “specific requirements of the Member State to which the provider moves, that are directly linked to the particular characteristics of the place where the service is provided and with which compliance is indispensable for reasons of public policy or public security or for the protection of public health or the environment”, as well as requirements relating to “the authorization system applicable to the reimbursement of hospital care”³¹⁴. These are derogations from the country of origin principle which exempt from that principle certain regulations aimed at organizing and regulating the provision of services of general economic interest on the territory of the host Member State for the benefit of its population. These derogations, however, only cover certain aspects of general interest. Consequently, they restrict the possibility for Member States, which in principle they are offered by the Treaty of Rome, to impose public service obligations beyond those specific situations. For example, of financial services were not excluded from the scope of application of the proposed Directive³¹⁵, a Member State that would want to impose a universal public service obligation covering basic banking services³¹⁶ would not be able to rely upon the derogations from the country of origin principle enumerated in Article 17 of the proposed Directive to justify the imposition of such an obligation on service providers from other Member States. As a result, operators of banking services established on the territory of that State – upon whom such a universal public service obligation would be imposed – would find themselves in an unfavourable competitive position in relation to their competitors established in other Member States, and whose activities are governed by the law of the country of origin.

³¹² During the period under scrutiny, see ECJ, 16 March 2004, *AOK-Bundesverband and others*, joined cases C-264/01 and others, not yet published.

³¹³ Under the conditions which the recent case-law of the Court of Justice has clarified: see ECJ, 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00; and ECJ, 24 November 2003, *Enirisorse SpA*, joined cases C-34/01 to C-38/01. These judgments, however, did not suffice to remove all uncertainties. The Commission proposes, in its White Paper on services of general interest, to help clarify the applicable rules and thus facilitate the financing by the public authorities, in particular at the local level, of services of general economic interest: see White Paper, par. 4.2. “Clarifying and simplifying the legal framework for the compensation of public service obligations”. The Commission proposes in particular to adopt in 2005 a Decision on the application of Article 86 of the Treaty to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, as well as a Community framework for state aid in the form of public service compensation.

³¹⁴ Article 17(17) and (18) of the proposed Directive.

³¹⁵ Article 2(2)(a) of the proposed Directive.

³¹⁶ See for example the Act of 24 March 2003 establishing a basic banking service, which became effective in Belgium on 1 September 2003 (M.B., 15 May 2003).

The Explanatory Note on the activities covered by the proposal for a Directive on services in the internal market, which the European Commission submitted to the Working Party on Competitiveness and Growth of the Council, indicates that the proposal

does not affect the freedom of the Member States to define what they consider to be services of general economic interest, how those services should be organised and financed and what specific obligations they should be subject to. In particular the Proposal does not require Member States to liberalise or to privatise those activities which are considered as services of general economic interest, nor to open them up to competition, and does not require the abolition of monopolies³¹⁷.

This assertion is correct, yet it remains silent on the fact that, without imposing an *obligation* on Member States to refrain from organizing certain services of general economic interest, the proposed Directive could have the effect of *making this more difficult* when the activities of certain economic operators are regulated in such a way that public service obligations are imposed on them whereas those same regulations cannot be imposed on operators established in other Member States. For example, a local authority that obliges all undertakings serving ‘meals on wheels’ to provide this service in the territory of that local authority without making a difference in price according to the geographical location of the recipients, in order to ensure that this service is financially affordable to all, including persons living furthest away, could be criticized for wanting to oblige a service provider established in another Member State to submit to a regulation of his activity, whereas this service provider, in accordance with the country of origin principle, should only have his activity governed by the law of the place where he is established. The above-mentioned Explanatory Note of the Commission says that, as regards the impact of the provisions concerning freedom to provide services on services of general economic interest, “it should be noted that those activities which can be provided across national borders like postal services and electricity, gas and water distribution services are not subject to the country of origin principle given their specific nature. Thus the Proposal does not in any way affect the possibility for the host Member States to impose on such services specific obligations concerning the accessibility, affordability, availability or quality of such services”. However, the choice made by the authors of the proposal to give a restrictive enumeration of the services that do not fall within the scope of application of the proposed Directive on services in the internal market or that are covered by a general derogation is in contradiction with the assertion that it is for Member States, and not Community law, to define the services of general economic interest on their territory. No more than it is the task of Community law to define the services that are of general interest, the EC Treaty having given this power to the Member States, is it legitimate to confine services of general economic interest only to activities which, being carried out by network industries in which there are so-called ‘natural’ monopolies, must be organized by the Member States on account of their economic characteristics. It is for the Member States to establish their own definition of general interest, without this definition having to depend on an economic theory of natural monopolies³¹⁸. Only a derogation relating to the organization of those services, *irrespective of the field concerned*, appears to be in keeping with the division of tasks which the EC Treaty currently establishes between Community law and the Member States.

³¹⁷ COMPET 106, ETS 45, SOC. 323, JUSTCIV 94, CODEC 850, Brussels, 25 June 2004, p. 5.

³¹⁸ This is acknowledged in the White Paper on services of general interest, COM(2004) 374 final of 12.5.2004, which in its Annex gives the following definition of services of general economic interest: “The term refers to services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion. The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications. However, the term also extends to any other economic activity subject to public service obligations”.

In order to avoid the risk that the imposition of the country of origin principle might prevent each Member State from freely determining, on the basis of its own definition of general interest, the range of services of general economic interest it offers on its territory, it would be advisable to complete the list of general derogations from the country of origin principle contained in Article 17 of the proposed Directive on services in the internal market by providing that this principle does not apply to the regulations imposed on undertakings entrusted with the operation of services of general economic interest, in accordance with Article 86(2) EC, and to the interpretation given of this provision by the Court of Justice. This will simply confirm the system currently ensuing from Article 86 EC, reliance upon which by Member States in order to justify the special rights or aid which they grant to certain public or private economic operators remains subject to review by the Court of Justice.

Article 37. Environmental protection

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 38. Consumer protection

The impact of the proposal for a Directive on services in the internal market has been discussed above, in the commentary relating to Article 31 of the Charter. This provision of the Charter shall otherwise not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

CHAPTER V: CITIZEN'S RIGHTS

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

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

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

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 41. Right to good administration

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 42. Right of access to documents

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 43. Ombudsman

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 44. Right to petition

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 45. Freedom of movement and of residence

During the period under scrutiny, the European Parliament and the Council adopted Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.³¹⁹ The Member States should implement the directive by 30 April 2006 (Article 40). The adoption of this instrument is based on the understanding that it is necessary to simplify and strengthen the right of free movement and residence of all Union by codifying and reviewing the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons. The Directive is also based, in accordance with the case-law of the Court of Justice, on the idea that “Union citizenship should be the fundamental status of nationals of the Member States”³²⁰. It distinguishes a right of residence of up to three months, acquired without any conditions or any formalities other than the requirement to hold a valid identity card or passport; a right of residence for three months to five years, subject to registration where this is required by the host State, and requiring the person to have sufficient means of subsistence; finally, a right of permanent residence after five years of residence in the Member State other than that of which the Union citizen has the nationality. From the

³¹⁹ OJ L 158 of 30.4.2004, p. 77.

³²⁰ ECJ, 20 September 2001, *Grzelczyk*, C-184/99, *ECR*, p. I-6193, point 13; ECJ, 2 October 2003, *Garcia Avelo*, C-148/02, *ECR*, p. I-11613, point 22.

perspective of fundamental rights, Directive 2004/38/EC calls for three remarks.

The possibility for the holder of the right to move and reside freely in a Member State other than that of which he has the nationality to be accompanied by members of his family calls for a first observation. Recognizing that « The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality » (Preamble, 5th Recital), the Directive recognizes a right to exit each Member State to enter another Member State and a right to enter that other Member State (articles 4 and 5), a right of residence for up to three months (article 6), and a right of residence beyond three months under certain conditions (article 7), both to citizens of the Union and family members who are not nationals of a Member State with a valid passport. For the purposes of the Directive, « Family member » means, according to Article 2(2):

- (a) the spouse;
- (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
- (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
- (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).

Of course, the Member States are to implement the Directive without discrimination between its beneficiaries, *inter alia*, on grounds of sexual orientation. The notion of « spouse » under the Directive therefore may not be restricted to spouses of a different sex, where the marital relationship has been recognized as valid by the national law of the Member State of origin. As recalled by the Network in its Opinion n°1-2003 delivered on 10 April 2003, a Member State would be creating a direct discrimination based on sexual orientation if it refused to recognize as a « spouse » the spouse of the same sex as the citizen of the Union wishing to move to that State, validly married under the laws of the Member State of origin.

In this connection, it is worth noting that in Belgium, following the entry into force of the Act of 13 February 2003 opening marriage to persons of the same sex, a Circular of 23 January 2004 (Circular of 23 January 2004 replacing the Circular of 8 May 2003 concerning the Act of 13 February [2003] opening marriage to persons of the same sex and amending certain provisions of the Civil Code, *Moniteur belge*, 27 January 2004) set forth that, if a provision of the national law of one or both of the spouses prohibits persons of the same sex from marrying, the application of this provision should henceforth be ruled out in favour of Belgian law which authorizes marriage between persons of the same sex insofar as one of the spouses is Belgian or habitually resides in Belgium. The prohibition of marriage between persons of the same sex is in fact considered discriminatory and contrary to Belgian international public order. In the Netherlands, the Act of 21 December 2000 amending Volume I of the Civil Code (*Staatsblad* 2001, no. 9) had already opened marriage to same-sex couples, providing that for such a marriage to be concluded, at least one of the partners must either have Dutch nationality or be a resident of the Netherlands. This ensues from the provisions governing marriage between persons of the same sex: Article 1:43 (par. 1) *Burgerlijk Wetboek* [Civil Code] and Article 2(a) *Wet conflictenrecht huwelijk* [Marriage (Conflict of Laws) Act 1989, amended in 2001]. Any third-country national residing in the Netherlands may marry a person of the same sex, irrespective of nationality or place of residence. A marriage concluded in Belgium or in the Netherlands between a person having Belgian or Dutch nationality or habitually residing in Belgium or the Netherlands, on the one hand, and a national of another

State, whether or not a third country, on the other hand, must be recognized by the other Member States of the Union for the purposes of family reunification under Directive 2004/38/EC of 29 April 2004. In this case, refusal to recognize such a marriage should be considered as discrimination on grounds of sexual orientation.

In accordance with Directive 2004/38/EC, where a citizen of the Union has contracted a registered partnership with a third-country national, this registered partnership only entitles the latter to follow his or her partner to another Member State on condition that the latter State recognizes registered partnerships as equivalent to marriage. The possibility that is thus given to the host Member State to rule out that a registered partnership grants the right to family reunification implies that, unless the partners have Belgian or Dutch nationality or permanently reside in one of those two countries, which gives them access to marriage in those countries, the freedom of movement recognized by Article 45 of the Charter of Fundamental Rights – which is inconceivable without the holder of this right being able to be reunited with his family – will in actual fact be less effective for persons of homosexual orientation than for other Union citizens. This solution is questionable from the viewpoint of both Article 45 of the Charter and the requirement of non-discrimination enshrined in Article 21 of the Charter. This is all the more so since several States that instituted forms of registered partnership, under different names, actually wanted to equate those unions, open to same-sex couples, with marriage, save only for certain effects connected with filiation (presumption of paternity or maternity of the partner if a child is born to the couple, and possibility of joint adoption), with the difference in terminology only being kept essentially for symbolic reasons. The solution adopted by Article 2(2)(b) of Directive 2004/38/EC in fact has the effect of instituting an additional difference between marriage and registered partnership which the States that created the latter form of union did not want at the time when they formulated such legislation. Moreover, there where marriage is not open to same-sex couples, the difference in treatment that is established between marriage and registered partnership in terms of the impact on the right to family reunification leads to discrimination on grounds of sexual orientation.

Article 3(2) of Directive 2004/38/EC provides that, without prejudice to any right to free movement and residence the persons concerned may have in their own right, « the host Member State shall, in accordance with its national legislation, facilitate entry and residence » for , *inter alia*, « the partner with whom the Union citizen has a durable relationship, duly attested », and shall therefore « undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people ». The Member States should be encouraged to take into account the requirements of Article 21 of the Charter of Fundamental Rights when making such an examination. It may be recalled 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 »³²¹. One fails to see which justification could be offered, under present-day conditions, for the solution of the Directive.

Directive 2004/38/EC grants an autonomous right of residence to the family members of the citizen of the Union who has exercised his/her right to move within the Union. Article 12 concerns situations where the citizen has departed from the host Member State or his/her death. Article 13 provides that « divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State ». Article 13(2) states in this regard that « divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where: (a) prior to initiation of the divorce or annulment proceedings or termination of

³²¹ Eur. Ct. HR (1st section), *Karner v. Austria* (Appl. N° 40016/98), judgment of 24 July 2003, § 37.

the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or (b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or (c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or (d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required ».

The provisions cited above are certainly welcome and reflect a concern worth emphasizing to protect the spouse of a Union citizen who exercised his right to free movement against the risk of abuse or domestic violence. A different solution would on the contrary have left the spouse vulnerable to this kind of situations.

From the point of view of fundamental rights, Directive 2004/38/EC calls for a third observation. The Preamble states that « As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion » (16th Recital). Although citizens of the Union in principle are recognized the right of residence on the territory of another Member State for a period of up to three months « without any conditions or any formalities other than the requirement to hold a valid identity card or passport » (Art. 6 (1)), they shall have this right « as long as they do not become an unreasonable burden on the social assistance system of the host Member State » (Art. 14(1)), although « An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State » (Art. 14(3)).

On 30 November 2002, the Network of Independent Experts addressed an opinion (no. 1-2002) to the European Commission on the compatibility with the international obligations of the European Union Member States of a provision which, while guaranteeing for Member State nationals an unconditional right of residence for a maximum period of six months on the territory of any Member State of the European Union of which they do not have the nationality, excludes persons exercising such a right of residence from social assistance. The Commission more particularly pondered over the question whether, in order to allow Member States to comply with their international obligations, the proposal for a Directive on the free movement of Union citizens and their family members should not provide for the possibility for Member States to expel a person who has recourse to the social assistance system during the first six months of residence.

Having regard to Article 13(1) of the European Social Charter, both in its original version of 18 October 1961 and in its revised version of 3 May 1996, Article 11(1) of the International Covenant on Economic, Social and Cultural Rights of 16 December 1966, and Articles 3(2) and 27 of the International Convention on the Rights of the Child of 20 November 1989, the Network concluded:

Bearing in mind the obligations entered into by the Member States of the European Union in the context of the Council of Europe and in the universal context, it seems difficult to grant to nationals of Union Member States a right of movement in all

Member States, coupled with an unconditional right of residence for a six-month period, without accepting the consequences, namely the obligation for the host Member State to extend to Union citizens the right to social assistance which it grants to its own nationals who are in identical needy circumstances. In such cases, the granting of a right of movement and residence to citizens of the Union and their family members should be coupled with the possibility for Member States to ask persons having recourse to the social assistance system to leave the territory.

It is to be welcomed that this solution has been adopted in Directive 2004/38/EC. It allows Member States to ensure a faithful transposition of the Directive while complying with their international obligations. We refer to Opinion no. 1-2002 of 30 November 2002 for a full justification of this conclusion.

Finally, Article 28 of Directive 2004/38/EC provides for a protection from the adoption of expulsion decision on grounds of public policy or public security, the host Member State taking such a decision being imposed a requirement to take account of considerations « such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin » (Art. 28(1)) and the citizens of the Union of their family members, whichever their nationality, who have the right of permanent residence on its territory, as well as those who have resided in the host Member State for the previous ten years or are minors being recognized further guarantees (Art. 28(2) and (3)). This protection, as well as the accompanying procedural guarantees (Art. 31), should take into account, in the interpretation which they will be given, the case-law of the European Court of Human Rights, which ensures respect of the right to respect for private and family life of foreigners served with an expulsion order.

Article 46. Diplomatic and consular protection

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

CHAPTER VI : JUSTICE

Article 47. Right to an effective remedy and to a fair trial

The two issues addressed under this provision of the Charter are connected with the *acquis* of the Treaty establishing a Constitution for Europe. One of the principal merits of the Treaty from the point of view of the protection of fundamental rights lies in the extension of the competences of the Court of Justice of the European Union and, consequently, in the new means that are given to the European court to ensure the protection of fundamental rights. The Treaty offers solutions to two questions that were recently much debated, including during the period under scrutiny.

Extension of direct action for annulment by individuals

The first issue that is effectively addressed by the Treaty is the right for an individual to seek the annulment of a Community act of general application. Article 230(4) EC provides that any natural or legal person may institute proceedings against a decision addressed to him or

“against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former”. In its judgment in *Plaumann & Co. v. Commission* of 15 July 1963, the Court of Justice clarified the substance of the latter condition by considering that “persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed”³²². This case-law appears to be dictated by the very wording of Article 230(4) EC (formerly Article 173(4) of the EEC Treaty), which seems to require that a Community act be equated with an individual decision in the substantive sense of the word for an individual – then equated with the person to whom the decision is addressed – to be able to seek the annulment thereof.

Despite certain compromises which it may have undergone in the case-law³²³, this interpretation has been criticized by many commentators as being excessively restrictive from the viewpoint of the requirement of an effective judicial protection of the individual against the adoption of Community acts of general application that might infringe primary law or the general principles of Community law. It is indeed certain that an act of secondary Community law, whatever its scope of application – whether or not the group it is addressed to is defined by abstract and general criteria³²⁴ –, is likely to affect the legal situation of the individual since it produces direct effects, without necessarily having to wait for this Community act to be implemented by the national authorities of the Member State.

The alternatives to direct action for annulment that are open to individuals are not such as to make up for the inadequacies of this kind of action. When a Community regulation imposes certain obligations on the individual on pain of sanctions, the individual may put himself in violation of the regulation in order to provoke the adoption of a national measure of enforcement (for example, acts of prosecution or the imposition of a fine) that can be challenged in court. The action which he will then bring before the national court will in this case offer the individual the opportunity to request from the national court a reference to the Court of Justice of the European Communities for a preliminary ruling on validity. However, a reference for a preliminary ruling on validity does not constitute a satisfactory alternative to a direct action for annulment:

- On the one hand, “individuals cannot be required to breach the law in order to gain access to justice”³²⁵.
- On the other hand, a reference for a preliminary ruling on the validity of Community law, effected on the initiative of a national court, which remains in charge of the formulation of the question addressed to the Court of Justice, does not satisfy the requirements of the right to an effective remedy: the parties to the action before the

³²² ECJ, 15 July 1963, *Plaumann & Co. v. Commission*, 25/62, ECR, p. 197.

³²³ See ECJ, 16 May 1991, *Extramet Industrie v. Council*, C-358/89, ECR p. I-2501, point 13; ECJ, 18 May 1994, *Codorniu v. Council*, C-309/89, ECR p. I-1853, point 19, and 31 May 2001, *Sadam Zuccherifici and others v. Council*, C-41/99 P, ECR p. I-4239, point 27. The uncertainty which those decisions lay on the precise extent of the right of the individual to seek the annulment of Community acts of general application is actually all the more harmful since, when the individual was able to bring an action for annulment but failed to do so, he will thereafter no longer be able to request a reference to the Court of Justice for a preliminary ruling on validity: ECJ, 9 March 1994, *TWD Textilwerke Deggendorf*, C-188/92, ECR p. I-833; ECJ, 11 November 1997, *Wijlo*, C-178/95, ECR, p. I-585; ECJ, 15 February 2001, *Nachi Europe*, C-239/99, ECR, p. I-1197.

³²⁴ It is settled case-law that “the general applicability of an act is not called into question by the fact that it is possible to determine more or less exactly the number or even the identity of the persons to whom it applies at any given time, as long as it applies to them by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose” (ECJ, 15 January 2002, *Libéros v. Commission*, C-171/00 P (point 29)).

³²⁵ Opinion of Mr Advocate General Jacobs, ECJ, 25 July 2002, *Union de Pequeños Agricultores v. Council*, C-50/00 P, not yet published in ECR, point 43.

national court can merely suggest such a reference, without them being empowered to initiate it, even when under Community law the national court is normally obliged to effect such a reference³²⁶; and even if we suppose that the obligation of reference imposed on the national courts of last instance, since it deprives those courts of the power to assess the appropriateness of such reference, in actual fact leads to a situation similar to that which would exist if the individual may initiate the preliminary reference on his own initiative, we may doubt the “effective” nature of such a “remedy” open to the individual, bearing in mind the resulting considerable delays to the detriment of the individual and the hesitation which the national court may feel about granting him interim protection, having regard to the relatively restrictive conditions imposed by the case-law on the granting of such protection³²⁷.

No more than references for a preliminary ruling on validity, actions for non-contractual liability, which enable the individual to seek compensation for the prejudice he has suffered from an infringement of Community law where this infringement is sufficiently serious to be considered a fault, do not constitute a satisfactory alternative to direct actions for annulment. The Community judicature itself stated the reasons for this: “Given that it presupposes that damage has been directly occasioned by the application of the measure in issue, [an action for damages based on the non-contractual liability of the Community] is subject to criteria of admissibility and substance which are different from those governing actions for annulment, and does not therefore place the Community judicature in a position whereby it can carry out the comprehensive judicial review which it is its task to perform. In particular, where a measure of general application (...) is challenged in the context of such an action, the review carried out by the Community judicature does not cover all the factors which may affect the legality of that measure, being limited instead to the censuring of sufficiently serious infringements of rules of law intended to confer rights on individuals”³²⁸.

Article 365(4) of the Treaty establishing a Constitution for Europe extends the possibilities for the individual to bring actions for annulment against Union acts of general application: “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*”. Although this seems to meet the concerns expressed by the Court of First Instance and by several members of the Court of Justice who are aware of the unsatisfactory nature of the conditions currently contained in Article 230(4) EC, in particular in terms of the judicial protection of fundamental rights which is threatened by the adoption of Community acts of general application, this extension only concerns regulatory acts, and not normative acts: in the distinction that is made by Article I-33(1) of the Constitutional Treaty (in this respect it is regrettable that Article 365(4) of the Treaty has not adopted the terminology of Article I-33), the acts in question that are of direct concern to the individual are European regulations, but not European laws.

³²⁶ See Article 234(3) EC (national courts against whose decisions there is no judicial remedy under national law).

³²⁷ ECJ, 21 February 1991, *Zuckerfabrik Süderdithmarschen*, joined cases C-143/88 and C-92/89, *ECR*, p. I-415; ECJ, 9 November 1995, *Atlanta Fruchthandelsgesellschaft*, C-465/93, *ECR*, p. I-3761. A national court can only order a suspension of application of an act of secondary Community law whose validity is challenged or grant interim measures subject to the conditions governing interim proceedings before the Court of Justice in the context of direct actions that are brought before it (see Articles 242 and 243 EC): “The interim legal protection which Community law ensures for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself” (*Zuckerfabrick*, point 20). Moreover, the Court of Justice requires in these judgments that the national court takes account of “the damage which the interim measure may cause the legal regime established by [the Community act whose validity is challenged] for the Community as a whole. It must consider, on the one hand, the cumulative effect which would arise if a large number of courts were also to adopt interim measures for similar reasons and, on the other, those special features of the applicant’s situation which distinguish him from the other operators concerned” (*Atlanta*, point 44). Furthermore, the national court must “set out, when making the interim order, the reasons for which it considers that the Court should find [the Community act] to be invalid” (*id.*, point 36).

³²⁸ CFI, 3 May 2002, *Jégo-Quéré & Cie v. Commission*, T-177/01, not yet published in *ECR*, here point 46.

Nevertheless, it is important both from the viewpoint of Article 47 of the Charter of Fundamental Rights and in the perspective of the accession of the European Union to the European Convention on Human Rights that the individual can benefit from effective judicial protection against all acts that are likely to concern him directly, that is to say, irrespective of the adoption of implementing measures. To this end, we need to reassert the obligation for Member States to cooperate sincerely in the implementation of Union law (now Article 10 EC)³²⁹. This obligation may involve an obligation to reform the national system of legal remedies in such a way as to offer the individual the possibility to request a *preventive* review³³⁰ of the national measure to implement Community law, even before such a measure is adopted.

In its judgment in the case of *Union de Pequeños Agricultores* of 25 July 2002, the Court of Justice of the European Communities thus considered that “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” (point 41) and that “in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty [now Article 10 EC], 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” (point 42). The right to an effective legal remedy against any European Union act should rest on the combination of remedies open before the Court of Justice of the European Union and the remedies open before the national courts. While the individual can bring a direct action for the annulment of any Union act that concerns him directly and individually as well as of any regulation that concerns him directly, even if the act is of general application, he should be able to request the national courts, anticipating the adoption of a national implementing measure, to agree where appropriate to refer to the Court of Justice for a preliminary ruling on the validity of the European law whose compatibility with the Treaty is challenged. Although this solution is not entirely satisfactory, particularly since it does not really satisfy the requirement of an effective remedy instituted *on the initiative of the individual*, and the reference for a preliminary ruling on validity is conditional upon a decision of the national court, without the individual requesting such a reference having the power to oblige the court to request a preliminary ruling³³¹, it is still the best way to make up for what in the view of the

³²⁹ See CFI, 27 June 2000, *Salamander et al. v. Parliament and the Council*, joined cases T-172/98, T-175/98 to T-177/98, ECR, p. II-2487, point 74 (“As regards the argument that there are no national remedies which might allow the validity of the Directive to be reviewed by means of a reference for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC), the Court points out that the principle of equality of conditions of access to the Community judiciary by means of an action for annulment requires that those conditions do not depend on the particular circumstances of the legal system of each Member State. It should be observed, moreover, that pursuant to the principle of genuine cooperation set out in Article 5 of the Treaty, Member States must help to ensure that the system of legal remedies and procedures established by the EC Treaty and designed to permit the Community judiciary to review the lawfulness of acts of the Community institutions is comprehensive”); as well as the position of the Commission as reflected in the judgment in the case *Union de Pequeños Agricultores v. Council* given on 25 July 2002 by the Court of Justice, in point 30 of the judgment (“a Member State which makes it excessively difficult, or even impossible, to submit a question for a preliminary ruling infringes the fundamental right to effective judicial protection and thereby fails to fulfil its duty of sincere cooperation laid down in Article 5 of the Treaty [now Article 10 EC]”).

³³⁰ It is only on this condition that an action brought before the national judicial authorities may constitute a more or less satisfactory alternative to a direct action for annulment: in the absence of the possibility to institute legal proceedings to *prevent* the infringement of a threatened right, the individual has to put himself in violation of the Community act in order to provoke the adoption of national measures of enforcement before he can request the national court for a reference for a preliminary ruling on the validity of the Community act.

³³¹ The requirement of an effective remedy available to the individual against acts that are likely to adversely affect his situation in fact means not only that there should *in principle* exist the possibility of a judicial review of those acts, but also that such review should be able to be *initiated by the individual*, and in this way does not depend on the goodwill of the authorities before whom he requests the benefit of such a review: Eur. Ct. H.R., *Brozicek v. Italy*, judgment of 19 December 1989, Series A n° 167, § 34; Eur. Ct. H.R., *Spadea and Scalabrino v. Italy*, judgment of 28 September 1995, § 34.

author of this report remains a shortcoming in the Treaty establishing a Constitution for Europe. A communication from the Commission interpreting the requirements ensuing from Article 47 of the Charter of Fundamental Rights with respect to the reform of the national system of legal remedies could clarify the obligations imposed in this area by the requirement for Member States to cooperate sincerely in the implementation of European Union law.

Judicial protection in the context of a common foreign and security policy

The second issue to which the present report wishes to draw attention is that of the judicial review of measures adopted within the framework of Title V of the Treaty on European Union, which sets forth the provisions on a common foreign and security policy. It follows from Article 46 EU that at present the Court of Justice of the European Communities has no jurisdiction to ensure compliance with the law in the application and interpretation of the EU Treaty with respect to measures adopted under Title V of this Treaty. The Treaty establishing a Constitution for Europe should at least partly remedy this shortcoming in the judicial review, since although it provides in Article III-376 that “the Court of Justice of the European Union shall not have jurisdiction with respect to Articles I-40 and I-41 and the provisions of Chapter II of Title V concerning the common foreign and security policy and Article III-293 insofar as it concerns the common foreign and security policy”, it adds “However, the Court shall have jurisdiction to monitor compliance with Article III-308 and to rule on proceedings, brought in accordance with the conditions laid down in Article III-365(4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V.”

The importance of this aspect was already underlined in Thematic Comment no. 1 of the Network of Independent Experts on the balance between freedom and security in the context of the measures adopted by the European Union and its Member States to combat the terrorist threat. It is illustrated by the registration of persons or movements in the anti-terrorist lists of the EU. The establishment of those lists is situated principally in the context of the common foreign and security policy of the Union (CFSP), although two types of anti-terrorist lists coexist: on the one hand the “CFSP” lists that allow the mechanisms of police and judicial cooperation under Title VI of the Treaty of European Union to be called upon, and on the other hand “Community” lists that allow financial measures to be taken as authorized by the EC Treaty.

In the case of *Segi and others v. Council of the European Union* – which is currently under appeal before the Court of Justice -, the Court of First Instance of the European Communities made an order on 7 June 2004 in which it acknowledged the deficit in judicial protection created by the present situation. It observes with regard to the inclusion of Segi in the list of “persons, groups or entities involved in terrorist acts” by virtue of Articles 1 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ L 344, p. 93), adopted on the basis of Article 15 EU under Title V of the EU Treaty entitled “Provisions on a common foreign and security policy” (CFSP), and Article 34 EU under Title VI of the EU Treaty entitled “Provisions on police and judicial cooperation in criminal matters”, that these persons, groups or entities:

Probably have no effective judicial remedy, either before the Community courts or before the national courts, against the inclusion of Segi in the list of persons, groups or entities involved in terrorist acts. Indeed, (...) it would be of no avail to the applicants to implicate the individual responsibility of each Member State for national acts that are adopted in pursuance of Common Position 2001/931, while they are seeking to obtain compensation for the prejudice allegedly caused by the inclusion of Segi in the Annex to this Common Position. As for the implication of the individual responsibility of each Member State before the national courts for taking part in the adoption of the common positions in question, such an action seems to be of little effect. Moreover, questioning

the lawfulness of including *Segi* in this Annex, more particularly by virtue of a reference for a preliminary ruling on validity, is made impossible by the choice of a common position instead of, for example, a decision under Article 34 EU. Nevertheless, the absence of a judicial remedy cannot of itself found a claim to Community jurisdiction proper in a legal system based on the principle of specific jurisdiction, as follows from Article 5 EU (see in this sense the judgment of the Court of 25 July 2002, *Unión de Pequeños Agricultores v. Council*, C-50/00 P, ECR, p. I-6677, points 44 and 45)” (point 38).

This order illustrates that the Court of First Instance, like the Court of Justice in the case of *Unión de Pequeños Agricultores* which is cited in this connection, refuses to extend its jurisdiction beyond the terms of the Treaty on European Union, even if this amounts to an infringement of the right to a judicial remedy as guaranteed by Articles 6 and 13 of the European Convention on Human Rights and by Article 47 of the Charter of Fundamental Rights, and recognized as featuring among the general legal principles of which the Court of Justice ensures observance³³². It is this solution which is prescribed by Article 46(d) EU, which says that the Court of Justice of the European Communities has jurisdiction to ensure observance of Article 6(2) EU, “with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty”. In other cases of the same type, concerning the Taliban³³³ or other applicants who have subsequently been added to the Community “list”³³⁴, the Court of First Instance did not question its jurisdiction to rule in interlocutory proceedings on the “Community” list. However, with regard to the “CFSP” list at stake in the case of *Segi and others*, the judicial protection which the Community judicature may grant is limited by the attributed nature of its jurisdiction.

As the European Court of Human Rights itself suggests in connection with the same case of *Segi and others*,³³⁵ it is for the national courts, in their review of the national measures adopted to implement the Common Position, to ensure the effective judicial protection which the Community judicature seems unable to assume in view of how its jurisdiction is defined. It should be recalled that, according to the Court of Justice, it is for the Member States to organize the legal remedies that are available in their countries to ensure an effective judicial protection of the individual, in accordance with the principle of sincere cooperation governing the relations between the Member States and the institutions of the European Union³³⁶. Article I-29(1)(2) of the Treaty establishing a Constitution for Europe in fact sets up this obligation as a constitutional obligation. This solution, however, is likely to perpetuate unacceptable discriminations in the extent and effectiveness of judicial protection between Member States and, as a result, disrupt the unity of application of European Union law. Moreover, it does not answer the concern expressed in the above-mentioned Thematic Comment no. 1, where the mere fact of appearing in the list of “persons, groups or entities involved in terrorist acts” may constitute an infringement of the right to the presumption of innocence or, at the very least, an

³³² See in particular, the judgments of 15 May 1986, *Johnston*, 222/84, ECR p. 1651, point 18, of 27 November 2001, *Commission/Austria*, C-424/99, ECR p. I-9285, point 45; and of 25 July 2002, *Unión de Pequeños Agricultores/Council*, C-50/00 P, ECR p. I-6677, points 38 and 39.

³³³ CFI, 7 May 2002, *Aden et al.*, T-306/01 R

³³⁴ CFI, 15 May 2003, *Sison*, T-47/03R

³³⁵ Eur. Ct. H.R., decision (inadmissible) of 23 May 2002, *Segi and others v. Germany and others (15 Member States of the European Union)* and *Gestoras Pro-Amnistia and others v. Germany and others (15 Member States of the European Union)* (joined applications n° 6422/02 and n° 9916/02) (“Concrete measures such as those which have been adopted or might be in the future would be subject to the form of judicial review established in each legal order concerned, whether international or national. That is true more specifically of measures which might give rise to disputes under Articles 10 and 11 of the Convention. The same applies to Community acts such as the above-mentioned Council Regulation (EC) no. 2580/2001 (subject to review by the Court of Justice of the European Communities), other international instruments binding the member States or even any decisions that may have been taken by domestic courts which have referred to the common positions”).

³³⁶ ECJ, 10 December 2002, *Imperial Tobacco*, C-491/01.

assault on a person's reputation as an aspect of the right to respect for private life, irrespective of any national measure adopted to implement the common position in question.

Finally, it should be pointed out that, in a declaration accompanying the adoption of the common position that gave rise to the action for damages brought by Segi and others before the Court of First Instance, the Council of the European Union expressly states that persons, groups or entities that have been erroneously placed on the list of "persons, groups or entities involved in terrorist acts" have a legal remedy to challenge the infringement of their rights³³⁷. In its order of 7 June 2004, however, the Court of First Instance rejects the argument which the applicants claimed to draw from this declaration: "... according to settled case-law, declarations appearing in a report have a limited value, in the sense that they cannot be used for the purpose of interpreting a provision of Community law where no reference is made to the content of the declaration in the wording of the provision in question and, therefore, such declaration has no legal significance (Court judgments of 26 February 1991, *Antonissen*, C-292/89, *ECR* p. I-745, point 18, and of 29 May 1997, *VAG Sverige*, C-329/95, *ECR* p. I-2675, point 23). It should be noted that the declaration in question specifies neither the remedies nor, *a fortiori*, the conditions for making use thereof. In any case, it cannot refer to an action before the Community judicature, since this would contradict the judicial system organized by the Treaty on European Union. Therefore, in the absence of any jurisdiction allocated to the Court of First Instance by the said Treaty, such a declaration cannot lead it to take cognizance of the present action" (point 46).

Article 48. Presumption of innocence and right of defence

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 49. Principles of legality and proportionality of criminal offences and penalties

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

This provision of the Charter shall not be commented upon in the present report. Reference is made to the national reports as well as to the *Synthesis Report on the state of fundamental rights in the Union and its Member States in 2004* which contains the conclusions and recommendations of the Network for the year 2004.

³³⁷ Press Release of 11/01/2002 (5112/1/02 (Press 3): in the words of the Council declaration adopted on 27 December 2001: "The Council points out, with regard to Article 1(6) of the Common Position on the application of specific measures to combat terrorism, and Article 2(3) of the Regulation on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, that any error in relation to the persons, groups or entities in question shall entitle the injured party to seek legal redress".

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

CHAPTER I: DIGNITY

Article 1: Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2: Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Article 3: Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
 - a) the free and informed consent of the person concerned, according to the procedures laid down by law,
 - b) the prohibition of eugenic practices, in particular those aiming at the selection of persons,
 - c) the prohibition on making the human body and its parts as such a source of financial gain,
 - d) the prohibition of the reproductive cloning of human beings.

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

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5: Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

CHAPTER II: FREEDOMS

Article 6: Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7: Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8: Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

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

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11: Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Article 12: Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13: Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14: Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

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

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16: Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Article 17: Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

Article 18: Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

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

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

CHAPTER III: EQUALITY**Article 20: Equality before the law**

Everyone is equal before the law.

Article 21: Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth,

disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 22: Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23: Equality between men and women

Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24: The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25: The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26: Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit

from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

CHAPTER IV : SOLIDARITY

Article 27: Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

Article 28: Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article 29: Right of access to placement services

Everyone has the right of access to a free placement service.

Article 30: Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.

Article 31: Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

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

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 33: Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article 34: Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.
3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

Article 35: Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Article 36: Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

Article 37: Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article 38: Consumer protection

Union policies shall ensure a high level of consumer protection.

CHAPTER V: CITIZENS' RIGHTS**Article 39: Right to vote and to stand as a candidate at elections to the European Parliament**

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

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

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Article 41: Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

b) 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;

c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42: Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

Article 43: Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

Article 44: Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

Article 45

Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

Article 46: Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

CHAPTER VI : JUSTICE

Article 47 : Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48: Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49: Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.
3. The severity of penalties must not be disproportionate to the criminal offence.

Article 50: Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

CHAPTER VII: GENERAL PROVISIONS**Article 51: Scope**

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote

the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

Article 52: Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Article 53: Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54: Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

