

Towards a proactive EU policy on fundamental rights

The question of fundamental rights was high on the agenda in 2006. The single most important development was that a political agreement was reached within the Council on the establishment of a Fundamental Rights Agency, as called for by the Brussels European Council of December 2003. A review of some of the year's main developments will serve to highlight what the future role of the Agency might be. That role has generally been understood, especially among civil society organisations, as monitoring in the sense of 'evaluation': in that view, the primary function of the Agency should be to follow developments in the laws and policies of the European Union, in order to react where fundamental rights as listed in the EU Charter of Fundamental Rights are violated or at risk of being violated; and to ensure that the implementation of Union law by the Member States complies with the Charter. But an examination of the role of fundamental rights in the establishment of the area of freedom, security and justice leads us to emphasise, rather, the guidance function the Agency could fulfil: in addition to reacting to the adoption of certain instruments at EU level and of implementation measures at national level, the Agency should be proactive, identifying areas where further initiatives might be taken in order to ensure that a high level of protection of fundamental rights is ensured within the Union. I argue in this contribution that the Agency will breathe new life into the Charter of Fundamental Rights: not only will it help to ensure that the Charter is respected, as it is now being recognised that it should, being an authoritative codification of the

Union's *acquis* in the field of fundamental rights (!); it will also ensure that the Charter's values will guide the exercise of the competences attributed to the Union, and influence the understanding of the principles of subsidiarity and proportionality which are to be complied with.

1. The Fundamental Rights Agency

1.1 Background: the purposes of monitoring fundamental rights in the European Union

Even though the formal proposal for the establishment of an Agency of Fundamental Rights of the European Union was presented only in June 2005, the goal of having, within the Union, an institution entitled to monitor fundamental rights developments in the Union and the Member States has been under discussion for some time. A proposal for setting up a human rights monitoring centre within the Union, which could serve to improve coordination of the fundamental rights policies pursued by the Member States, had already been made, in particular in a report prepared for the 'Comité des Sages' responsible for drafting *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* (Alston and Weiler, 1999: 3). The main argument in favour of the creation of such a body was that it could encourage the Union to adopt a more preventive approach to human rights. 'Systematic, reliable and focused information', it was then argued, 'is the starting point of a clear understanding of the nature, extent, and location of the problems that exist and for the identification of possible solutions'. The proclamation, on 7 December 2000, of the Charter of Fundamental Rights of the European Union at the Nice European Summit as the single most authoritative restatement of the Union's *acquis* in the field of fundamental rights also constituted a decisive step

¹ See Case C-540/03, *Parliament v. Council*, judgment of 27 June 2006, not yet reported. In this case, the European Court of Justice dismisses the action for annulment filed by the Parliament against certain sections of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (Council of the European Union, 2003a).

in this regard ⁽²⁾. The impact of the adoption of the Charter on the practice of the institutions was immediate. Since 2000, for instance, the European Parliament's annual reports on the fundamental rights situation in the Union have used the Charter as their main source of reference. The establishment in September 2002, by the European Commission at the European Parliament's request, of the EU Network of Independent Experts on Fundamental Rights ⁽³⁾ also contributed to the move towards implementing the proposal for a Human Rights Agency (European Parliament, 2001) ⁽⁴⁾.

Nevertheless, when the Heads of State and Government of the Member States announced at the Brussels European Council of 13 December 2003 their intention to extend the mandate of the EU Monitoring Centre on Racism and Xenophobia (EUMC) so as to create a 'Human Rights Agency' ⁽⁵⁾ entrusted with collecting and analysing data in order to define Union policy in this field, most observers were taken by surprise. The political decision was made without any feasibility study

² Charter of Fundamental Rights of the European Union, OJ C 364 of 18 December 2000, pp.0001-0022 (http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/c_364/c_36420001218en00010022.pdf).

³ The EU Network of Independent Experts on Fundamental Rights is composed of 25 experts and monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the EU Charter of Fundamental Rights. See the website (http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm).

⁴ In its Resolution, the European Parliament recommended 'that a network be set up consisting of legal experts who are authorities on human rights and jurists from each of the Member States in order to ensure a high degree of expertise and enable the Parliament to receive an assessment of the implementation of each of the rights laid down in the European Union Charter of Fundamental Rights, taking into account developments in national laws, the case-law of the Luxembourg and Strasbourg Courts and any notable case-law of the Member States' national and constitutional courts' (European Parliament, 2001: point 9).

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

being carried out, and essentially, it would seem, to reinforce the Union's presence in Vienna and to find a dignified solution to the need to reform the EU Monitoring Centre on Racism and Xenophobia. The European Council's decision to create the Human Rights Agency by expanding the competences of the EU Monitoring Centre on Racism and Xenophobia ⁽⁶⁾ could at first seem surprising. On the basis of an external evaluation of the EUMC's activities between its creation in 1998 and the end of 2001 (CEC, 2002a), the Commission considered, in its Communication of 5 August 2003, that 'the Centre should continue to concentrate on racism and that an extension to other fields would be an unwelcome distraction within the limits of the resources likely to be available to the Centre and that it would lead to a weakening of the emphasis on racism' (CEC, 2003a: 9). Both the specialised nature of the EUMC's activities – a specialisation which, moreover, was regarded as a condition for effectiveness in the fulfilment of its mandate –, and the definition of its main task, which lies in collecting and processing information rather than in preparing legal opinions ⁽⁷⁾, seemed to clearly distinguish the activities of the EUMC from those of an independent Human Rights Agency for the Union.

In this context, the European Commission chose, prior to making a formal proposal, to organise a wide-ranging consultation in order to identify more precisely where the added value of a Fundamental Rights Agency for the European Union might lie, how it should be structured, and how its mandate should be defined. The Commission presented a public consultation document on 25 October 2004 (CEC, 2004a). In

⁶ This Monitoring Centre, sometimes referred to as the Vienna Observatory, was created by Council Regulation (EC) 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia (Council of the European Union, 1997).

⁷ According to Article 2(1) of its instituting Regulation, the EUMC must 'provide the Community and its Member States [...] with objective, reliable and comparable data at European level on the phenomena of racism, xenophobia and anti-Semitism in order to help them when they take measures or formulate courses of action within their respective spheres of competence' (Council of the European Union, 1997).

reply to this consultation document, the Commission received contributions from a wide range of actors and, in order to discuss the modalities of the proposed institution, a public hearing was held on 25 January 2005⁽⁸⁾. As illustrated by the different positions expressed in the course of these consultations, expectations varied. Two functions in particular, it was anticipated, could be fulfilled by the Fundamental Rights Agency.

1.1.1 The 'evaluation' function of monitoring

First, the Agency could improve the evaluation of the European Union and its Member States in their implementation of Union law as regards their obligation to comply with the EU Charter of Fundamental Rights. Thus for instance when, on 26 May 2005, the European Parliament called on the Commission to submit a legislative proposal concerning the Agency, it pointed out that 'establishing the Agency should make a contribution to further enhancing mutual confidence between Member States and constitute a guarantee of continued observance of the principles set out in Articles 6 and 7 of the Treaty on European Union' (European Parliament, 2005a: point 26). These provisions define human rights, along with democracy and the rule of law, as part of the values on which the Union is founded. They give the Council the possibility both of adopting sanctions against a State which, in its opinion, has seriously and persistently breached the principles set out in Article 6(1) EU⁽⁹⁾, and – since the entry into force of the Nice Treaty on 1 February 2003⁽¹⁰⁾ – of determining that there is a clear risk of a

⁸ The response from the academic world and from civil society organisations was remarkably high. See, for an overview of the debate, Alston and De Schutter (2005).

⁹ Article 7(2) to (4) EU and, for the implementation of these sanctions in the framework of the EC Treaty, Article 309 EC.

¹⁰ Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice, 26 February 2001, OJ C 180 of 10 March 2001, pp.0001-0087 (http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/c_080/c_08020010310en00010087.pdf).

serious breach by a Member State of the common values on which the Union is based and addressing recommendations on that basis to the Member State concerned. It is on the basis of these provisions that, since 1999, the European Parliament has systematically sought to review the situation of fundamental rights in the Member States, even going so far as to adopt annual reports on the subject during the period 1999-2003. Just as the establishment of the EU Network of Independent Experts was requested by the Parliament as a means to facilitate the exercise of this role, the creation of the Fundamental Rights Agency, through the information it would collect and analyse, should enhance the effectiveness and credibility of such monitoring of the Member States.

This evaluation function should also be exercised vis-à-vis the institutions of the Union. For a few years now, the European Commission has taken the view that the institutions' obligation to act in conformity with the Charter means anticipating that its proposals might violate the Charter. This led the Commission President and Commissioner Vitorino to require in March 2001 that the European Commission services attach to all legislative proposals which could have an impact on fundamental rights an indication that these proposals are compatible with the requirements of the Charter (CEC, 2001). In April 2005, the Commission adopted a Communication whereby it seeks to improve the compliance of its legislative proposals with the requirements of the Charter (CEC, 2005a). On 15 June 2005, it adopted a new set of guidelines for the preparation of impact assessments (CEC, 2005b) which, although they are still based, as in the past (CEC, 2002b), on a division between economic, social and environmental impacts, pay much greater attention to the potential impact of different policy options on the rights, freedoms and principles listed in the Charter of Fundamental Rights ⁽¹¹⁾. The establishment of a Fundamental Rights Agency, it would seem, could further improve this pre-emptive approach to the compliance of EU institutions' activities with the

¹¹ Indeed, a specific report was commissioned by the European Commission (DG Justice, Freedom and Security) from the European Policy Evaluation Consortium (EPEC) (see EPEC, 2004).

Charter. As noted in the Explanatory Memorandum appended to the proposals put forward by the European Commission on 30 June 2005: ‘Securing fundamental rights depends on appropriate governance mechanisms to ensure that they are taken fully into account in policy setting and decision-making in the Union. Not only an adequate legislative framework but also appropriate structures and adequate resource allocations are needed for that purpose’ (CEC, 2005c: 2).

1.1.2 The ‘collective learning’ function of monitoring

Second, the Agency could constitute a mechanism to promote collective learning among the Member States, by ensuring that their experiences in the field of fundamental rights are compared and that best practices are identified and their diffusion, perhaps, encouraged. This idea was clearly present in the proposals put forward by the European Commission on 30 June 2005. The Commission proposed both a Council Regulation establishing a European Union Agency for Fundamental Rights on the basis of Article 308 EC (the ‘implicit powers’ clause), and a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union (i.e. police and judicial cooperation in criminal matters) on the basis of Articles 30, 31 and 34 EU. In the Impact Assessment Report appended to the proposal of 30 June 2005, the establishment of the Agency is justified on the grounds that ‘although the Member States have developed various strategies, policies and mechanisms to respect and mainstream fundamental rights when implementing Union law and policies, there is a lack of systematic observation of how the Member States do this. Such a lack represents a missed opportunity, as the potential for sharing of experiences and good practices and mutual learning is not met’ (CEC, 2005d: 8).

These ‘evaluation’ and ‘collective learning’ functions are not always clearly distinguishable from one another, since the kind of evaluation required to ensure that the Member States mutually trust each other is justified by the need to verify not only that the national authorities comply with certain minimum standards – such as those set forth in the EU Charter of Fundamental Rights, but also those deemed to form part of the general principles of law which the Union must comply with –, but also that the implementation of these common values within each Member State does

not diverge too widely. According to this understanding of what is required for mutual trust to be established between the Member States, such mutual trust may be endangered not only where one Member State violates fundamental rights so as to render impossible cooperation with its judicial, administrative or police authorities, as well as the recognition of its national rules or judicial decisions in areas where mutual recognition is imposed. Mutual trust would furthermore be threatened in the presence of overly divergent approaches, i.e. in situations where the level of protection offered in one Member State would clearly be higher than in another, even though the lower level of protection offered in the latter State may still comply with the minimum requirements of the EU Charter of Fundamental Rights or of other relevant instruments. This is for instance the view implicit in a Communication where the Commission describes its understanding of Article 7 EU and specifies, in this regard, that the EU Network of Independent Experts 'has an essential preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded' (CEC, 2003b: 10).

This goal of monitoring the fundamental rights situation in the Union resembles that which had previously justified attributing a similar function to the Working Party on Data Protection, instituted by Article 29 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (European Parliament and Council of the European Union, 1995) ⁽¹²⁾. Its

¹² Article 30(2) of the Data Protection Directive states that 'If the Working Party finds that divergences likely to affect the equivalence of protection for persons with regard to the processing of personal data in the Community are arising between the laws or practices of Member States, it shall inform the Commission accordingly'. The 'Article 29' Working Party also exercises this mission under 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) (European Parliament and Council of the European Union, 2002), in accordance with Article 15(3) of this Directive.

originality is that it moves beyond the two roles described above ('evaluation' and 'collective learning' respectively), and that it leads to a form of monitoring which may be called 'orientative', since it may influence the Union's exercise of its powers to realise fundamental rights.

1.1.3 The 'orientative' function of monitoring

This 'orientative' function of the monitoring of the fundamental rights situation in the Member States, then, sees such monitoring as indispensable for an informed exercise by the Union of its competences in the field of 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 EU to develop a fundamental rights policy. Although there is no authoritatively agreed list of such competences, almost all of them are not exclusive to the Union or the Community, but are shared between the Union or Community and the Member States. Examples of such competences conferred upon the Union or the Community include Article 13 EC which provides that 'the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation', and Article 18 EC which provides that 'every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'. The latter served as a basis for the adoption, by the European Parliament and the Council, of 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 (European Parliament and Council of the European Union, 2004). It is pursuant to Articles 63 and 64 EC, which provide for development by the Union of measures on asylum and immigration policy, that the Council adopted Directive 2003/86/EC of 22 September 2003 on the right to family reunification (Council of the European Union, 2003a) and Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers (Council of the European Union, 2003b). And it is on the basis of Article 31 EU regarding common action on judicial cooperation in

criminal matters that the European Commission proposed the adoption of a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union (CEC, 2004b). Many more such examples could be given.

The blurred division of competences between the Union or the Community and the Member States makes it vital to determine, in conformity with the principles of subsidiarity and proportionality ⁽¹³⁾, *at which level* the need to improve fundamental rights protection may be most effectively addressed. Indeed, the Union's exercise of the competences it shares with the Member States in order to safeguard human rights needs to be guided by information on developments within the Member States, concerning national laws and practices, and by whether such developments might lead to the emergence of diverging standards within the Union, necessitating better coordination. This calls for a monitoring of the fundamental rights situation in the Member States, which would identify, on a systematic basis, in what fields unilateral action by the Member States would fail to achieve the objective of an area of freedom, security and justice where human rights are fully respected, and in what fields an initiative of the Union could better achieve that objective. It should be noted however that such monitoring, if it is to fulfil this third function, obviously cannot apply to the Member States only insofar as they implement Union law. Under the current proposals, both the Fundamental Rights Agency of the Union and the expert networks which it may call upon to provide it with data have a mandate limited to the scope of Union law. A strict division between what is 'within' the purview of EU law and what is 'outside' that purview may be tenable where the objective is to monitor whether the EU institutions, or the Member States acting under Union law, comply with fundamental rights. But when the objective is to identify where the Union may need to take action, and thus potentially expand the scope, this separation simply is not workable. Instead, this boundary should be constantly redefined, according to changing

¹³ See Article 5 EC, which is made applicable with reference to the activities of the European Union by Article 2(2) EU.

circumstances, and according to what is required in order to protect fundamental rights effectively in the Union.

1.2 The debate following the proposal for a Fundamental Rights Agency

According to Article 2 of the Commission's proposal of 30 June 2005, the objective of the Agency will be 'to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights' (CEC, 2005c: 14). The thematic areas of the Agency's activities – which would always include the fight against racism and xenophobia – will be defined in a Multiannual Framework drafted by the European Commission (Article 5 of the proposal). Within these thematic areas, according to Article 4, the tasks and missions of the Agency would essentially consist in collecting, recording, analysing and disseminating relevant, objective, reliable and comparable information and data; developing methods to improve the comparability, objectivity and reliability of data at European level; formulating conclusions and opinions on general subjects, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission; and enhancing cooperation with civil society.

Following the Commission's presentation of its proposals, the debate within the Council's *Ad hoc* Working Party – the European Parliament being consulted through an informal dialogue between the three institutions (14) – revolved around three issues (15). The first was the

¹⁴ On this issue, see, in particular, the three reports published by the European Parliament (European Parliament, 2005b and 2006a and b).

¹⁵ The following presentation takes into account, as the most recent document available at the time of writing, the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights in the compromise version prepared by the Finnish presidency of the Council and approved by the COREPER on 29 November 2006 (Council of the European Union, 2006).

structure of the Agency. The Commission had at least two models to borrow from. First of course, it could seek inspiration from the existing European agencies – in particular the European Foundation for the Improvement of Living and Working Conditions (Dublin) ⁽¹⁶⁾. But due to the specific mandate of the Fundamental Rights Agency, another source of inspiration was the national human rights institutions (NHRI) based on the United Nations ‘Principles relating to the Status of National Institutions’ (Paris Principles) of 20 December 1993 (United Nations, 1993) ⁽¹⁷⁾. There were two ways in which the Paris Principles could have inspired the structure of the Fundamental Rights Agency. A first interpretation of the Principles would have consisted in considering the future Agency as an institution for the protection and promotion of human rights in the legal order of the Union, which could have sought inspiration, for the identification of guarantees of its independence, for the composition of its bodies, and for the definition of its powers and working methods, from the practice of the existing NHRIs in the Member States. A second option could have been to conceive the Agency as a body based on the existing network of European NHRIs, and as a forum in which the existing NHRIs (or equivalent institutions in Member States which have no NHRI in the meaning of the Paris Principles) could exchange their experiences and work together in order to contribute, through reports, recommendations and opinions, to improving the protection of fundamental rights in the Union. The structure of the Agency, as proposed by the European Commission on 30 June 2005 – which comprises a management board, an executive board, a director and a forum – was a form of compromise – or middle way – between these two interpretations. Subsequent discussion in the Council’s *Ad hoc* Working Party led to the inclusion within the Agency of a Scientific Council with 11 Members, whose role it is to ensure that

¹⁶ <http://www.eurofound.eu.int/>

¹⁷ For an overview of the situation of national human rights institutions in the European Union, see the Opinion of the EU Network of Independent Experts in Fundamental Rights regarding the role of national institutions for the protection of human rights in the Member States of the European Union, Opinion 2004/1, March 2004 (http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2004_1_en.pdf).

the Agency's reports, opinions and recommendations are of high scientific quality and that they reflect a truly independent evaluation of the fundamental rights situation. The other parts of the Commission's proposal were largely retained. In particular, despite a suggestion by certain delegations (France, in particular) that the management board should be composed of representatives of the Member States, the original idea of the Commission – that it should comprise independent persons, for instance heads of national institutions for the promotion and protection of human rights – gained most support. The relationship between the Agency and civil society organisations is to be structured by the establishment of a 'Fundamental Rights Platform', conceived as a 'cooperation network' composed of 'non-governmental organisations dealing with human rights, trade unions and employer's organisations, relevant social and professional organisations, churches, religious, philosophical and non-confessional organisations, universities and other qualified experts of European and international bodies and organisations', and which 'shall constitute a mechanism for the exchange of information and the pooling of knowledge' (Council of the European Union, 2006: 21-22). The Commission's initial proposal was to create a 'Fundamental Rights Forum' which would meet annually; this idea gained little support, and the 'Platform' as defined in the regulation finally adopted represents a clear gain in efficiency. Finally, despite a European Parliament proposal to include a specific reference to the EU Network of Independent Experts on Fundamental Rights in the Regulation establishing the Fundamental Rights Agency, no such reference has been made in the Regulation (18).

18 The Parliament suggested an amendment to Article 6(1) of the draft Regulation, formulated thus: 'In order to ensure the provision of objective, reliable and comparable information, the Agency shall, drawing on the expertise of a variety of organizations and bodies in each Member State and taking account of the need to involve national authorities in the collection of data:

- (a) set up and co-ordinate information networks, such as the network of independent experts on fundamental rights, and use existing networks;
- (b) organize meetings of external experts; and,
- (c) whenever necessary, set-up ad hoc working parties' (European Parliament, 2006c).

A second issue on which the debate focused concerned the need to avoid duplicating the work of Council of Europe bodies, and more generally to ensure proper cooperation and coordination between all bodies entitled to intervene in the field of fundamental rights on the territory of EU Member States. Partly as a result of certain concerns expressed by the Council of Europe¹⁹, it was decided in the course of the negotiations, first, that the Fundamental Rights Agency would only monitor fundamental rights in European Community law (including the implementation of EC Law by the Member States, but not in other fields), and second, that the General Secretary of the Council of Europe would appoint one independent person to the Agency's management board, who would also be allowed to take part in meetings of the executive board. Moreover, again in order to alleviate certain fears of overlapping mandates, the Agency's authority to examine the fundamental rights situation in third countries was severely restricted. The only countries, apart from the EU Member States, to which the geographical remit of the Agency may extend are the candidate countries (currently Turkey, Croatia and the former Yugoslav Republic of Macedonia), and the so-called pre-candidate countries, i.e. the countries in the Western

The text agreed to within the Council does not include such an explicit reference to the network. Instead, it provides more flexibility: 'In order to ensure the provision of objective, reliable and comparable information, the Agency shall, drawing on the expertise of a variety of organizations and bodies in each Member State and taking account of the need to involve national authorities in the collection of data:

- (a) set up and co-ordinate information networks as well as use existing networks;
- (b) organize meetings of external experts and,
- (c) whenever necessary, set-up ad hoc working Parties' (Council of the European Union, 2006: 22-23).

¹⁹ On the concerns of the Council of Europe that the European Union Fundamental Rights Agency might duplicate tasks performed by Council of Europe bodies, see, inter alia, Parliamentary Assembly of the Council of Europe, Resolution 1427 (2005) of 18 March 2005; and the Memorandum of 8 September 2005, submitted by the Council of Europe General Secretariat to the Vice-President of the European Commission in charge of justice, freedom and security, Mr F. Frattini.

Balkans whose natural vocation it is, in the future, to accede to the European Union, and for which the conclusion of Stabilisation and Association Agreements is seen as an instrument to prepare themselves as candidate countries ⁽²⁰⁾.

Finally, a third topic of debate concerned the extension of the mandate of the Fundamental Rights Agency to ‘third pillar’ issues, i.e. issues of police cooperation and judicial cooperation in criminal matters which are covered by Title VI EU. Despite the fact that these fields are highly sensitive from the point of view of civil liberties, certain Member States opposed the Commission’s proposal to allow the Agency also to analyse the fundamental rights situation under this Title of the EU Treaty. Instead, a political declaration is attached to the Regulation adopted containing a ‘rendez-vous’ clause allowing the mandate to be re-examined in 2009, ‘with a view to the possibility of extending it to cover the areas of police and judicial cooperation in criminal matters’. In addition, according to another declaration by the Council appended to the Regulation, ‘the Union institutions may, within the framework of the legislative process and with due regard to each others’ powers, each benefit, as appropriate and on a voluntary basis, from [the expertise gained by the Agency in the field of fundamental rights] also within the areas of police and judicial cooperation in criminal matters’; this expertise ‘may also be of use to the Member States that wish to avail themselves thereof when they are implementing legislative acts of the Union in that area’ (Council of the European Union, 2006: 47). Therefore, although the Agency’s remit does not extend beyond Community law, to the domains of police cooperation and judicial cooperation in criminal matters covered by Title VI EU, its future is

²⁰ See, in particular, the Declaration adopted in Thessaloniki on 21 June 2003, following the EU-Western Balkans Summit (document 10229/03) (<http://register.consilium.europa.eu/pdf/en/03/st10/st10229en03.pdf>), and the *Thessaloniki agenda for the Western Balkans: Moving towards European Integration*, General Affairs and External Relations Council, 2518th Council session, External Relations, Luxembourg, 16 June 2003, adopted by the European Council on 20 June 2003 (<http://register.consilium.europa.eu/pdf/en/03/st10/st10369en03.pdf>). The third countries concerned are Albania, Bosnia and Herzegovina, Montenegro, and Serbia, which are all considered as potential candidates.

secured. Indeed, it can be expected that any sensitive instrument proposed under Title VI EU will be presented to the Agency for it to deliver an opinion, since it might be politically difficult to justify circumventing the Agency, once it has gained sufficient credibility by being truly independent and, especially, through the quality of its reports. Finally, although the Agency will not be tasked with the preparation of regular reports on third pillar issues, the evaluation of policies pursued by the Union and the Member States in this field might be conducted by other means – in particular peer review mechanisms, coordinated and facilitated by the Commission, on the basis of information provided by the Member States –, as was proposed by the Commission in June 2006 (CEC, 2006).

The establishment of the Fundamental Rights Agency, which should be up and running by the end of 2007, does not merely constitute an institutional development. It would be surprising if this institutional innovation did not have a powerful dynamising effect on the exercise by the Union of the competences it has been attributed, in a number of fields, to contribute to implementing the values enshrined in the EU Charter of Fundamental Rights. As the examples below illustrate, the European Union's potential contribution to the promotion and protection of fundamental rights is considerable, if the powers attributed to the Union for the establishment of an area of freedom, security and justice are used with a view to ensuring that fundamental rights are better realised in Europe (21).

2. Fundamental rights in the area of freedom, security and justice

One of the objectives of the European Union is that it should 'maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum,

²¹ A similar analysis could be made as regards the exercise of the Community's powers in the establishment of the internal market. For reasons of space, this chapter is confined to the other central aim of European integration.

immigration and the prevention and combating of crime' (Article 2, al. 1, 4th indent, EU) The establishment of such an area between the Member States of the European Union is based on the idea that national courts and administrations, as well as law enforcement authorities, should cooperate with one another, in particular by exchanging information and mutually recognising judicial decisions in civil and criminal matters. This in turn presupposes that the Member States share a set of common values, which Article 6(1) EU refers to, and which include fundamental rights. However, where the Member States' approaches to fundamental rights diverge too widely, it may be necessary to approximate the national rules implementing such rights as listed in the Charter or recognised in international instruments ratified by the Member States, in order to ensure that mutual trust will not be threatened by such divergences.

2.1 Mutual recognition of judicial decisions in criminal matters and the need to strengthen mutual trust

The Hague Programme adopted by the European Council of 4-5 November 2004 states that the mutual trust on which mutual recognition of judicial decisions is based could be enhanced by a number of means, including providing 'the certainty that all European citizens have access to a judicial system meeting high standards of quality'; the 'development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions'; 'the establishment of minimum rules concerning aspects of procedural law is envisaged by the treaties in order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension' (European Council, 2004: 36 and 38); and, finally, the approximation of substantive criminal law as regards 'serious crime with cross border dimensions', as provided for in the EU Treaty (European Council, 2004: 38). It is in this spirit that, for instance, the European Commission put forward a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the

European Union (CEC, 2004b) ⁽²²⁾, which the Explanatory Memorandum justifies on the grounds that: ‘to date, the Member States have complied on a national basis with their fair trial obligations, deriving principally from the ECHR, and this has led to discrepancies in the levels of safeguards in operation in the different Member States. It has also led to speculation about standards in other Member States and on occasion, there have been accusations of deficiencies in the criminal justice system of one Member State in the press and media of another. This would be remedied by the adoption of common minimum standards. By definition, the standards can only be common if they are set by the Member States acting in concert, so it is not possible to achieve common standards and rely entirely on action at the national level’ (CEC, 2004b: 6).

More needs to be done, however. The proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union has apparently been met with scepticism by a number of Member States – and is progressing very slowly within the Council. Moreover, other measures may be called for in this area, given that approximation of national legislations in certain fields or improved coordination may be a condition for the establishment of mutual trust between the Member States, for instance in order to allow for the mutual recognition of judicial decisions in criminal matters.

Recent judgments of the European Court of Justice, for example, have highlighted the problems which may result from application of the *ne bis in idem* principle as embodied in Article 54 of the Convention implementing the Schengen Agreement (CISA) of 14 June 1985 on the gradual abolition of checks at the common borders, of 19 June 1990 (Schengen Convention) ⁽²³⁾. This provision had already led to the

²² For the position of the European Parliament, see its legislative resolution on the proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union (European Parliament, 2005c).

²³ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239 of 22 September 2000, pp.0019-0062.

judgment delivered on 11 February 2003, in the historic case of *Gözütok and Brügge* where the Court justified giving it a generous reading as ‘a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied’ (24). Article 54 of the CISA provides that a person whose trial has been finally disposed of in one Contracting Party ‘may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party’. In *Gözütok and Brügge*, the Court considered that this provision applies to the procedure for discontinuing criminal proceedings through a settlement proposed by the Public Prosecutor. In the case of *Van Straaten* (25), it has been applied to bar the criminal conviction of a person based on the same material facts in a case where that person had been acquitted in another Contracting State for lack of evidence: the Court took the view that in such a circumstance, ‘the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations. The accused would have to fear a fresh prosecution in another Contracting State although a case in respect of the same acts has been finally disposed of’ (paragraph 59). In *Gasparini*, decided on the same day as *Van Straaten*, the European Court of Justice took the view that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the

²⁴ Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, [2003] ECR I-1345, Judgment of 11 February 2003, paragraph 33. This paraphrases the view of the European Commission that ‘Mutual recognition is a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one’s own state, the results will be such that they are accepted as equivalent to decisions by one’s own state’ (CEC, 2000: 4).

²⁵ Case C-150/05, *Van Straaten*, Judgment of 28 September 2006, not yet reported.

accused is finally acquitted because prosecution of the offence is time-barred ⁽²⁶⁾. This decision is even more remarkable, since it would not seem to address the problem of what AG Sharpston called ‘criminal forum-shopping’, which she defined as the situation of an individual ‘deliberately courting prosecution in a Member State where he knew that proceedings would necessarily be declared to be time-barred; and then relying on *ne bis in idem* to move freely within the EU’ ⁽²⁷⁾. In a way, then, the Court in *Gasparini* placed the objective of the free movement of persons within the Schengen zone (which would be enhanced by the certainty of the individual that he will not be prosecuted once prosecution for the same facts had led to an acquittal in one Member State) above the objective of ensuring that the establishment of an area of freedom, security and justice among the Member States will provide EU residents with the ‘high level of safety’ also referred to in Article 2 EU as one of its objectives.

These cases highlight an apparent tension between two competing objectives: providing EU citizens with a high level of safety by ensuring that authors of crimes presenting a transnational dimension will not abuse the *ne bis in idem* principle by playing off the criminal system of one Member State against another, on the one hand; and, on the other hand, developing a robust understanding of the *ne bis in idem* rule in a transnational context, by applying this rule between different Member States, *mutatis mutandis*, as it would be applied within one single State. However, such tension is by no means inescapable. It simply results from the Member States’ failure to adopt common rules allocating jurisdiction in criminal cases or procedures for resolving positive conflicts of jurisdiction between EU Member States. In the absence of such rules, crimes presenting a transnational character over which more than one State may exercise jurisdiction will be decided by the jurisdiction where the criminal proceedings are fastest. The allocation of

²⁶ Case C-467/04, *Gasparini and Others*, Judgment of 28 September 2006, not yet reported.

²⁷ Opinion of Advocate General Sharpston delivered in the case C-467/04, *Gasparini and Others* on 15 June 2006, paragraph 104.

jurisdiction should depend, one would think, on the strength of the links the competing jurisdictions have to a case, on the respective locations of the victims, the evidence, or the defendant, or on the outcome of consultations between the different States concerned. Instead, under the current system, this allocation is left to chance, at best; at worst, the authors of crime will exploit the lack of coordination⁽²⁸⁾. In February 2003, Greece put forward a proposal for a Framework Decision on *ne bis in idem*⁽²⁹⁾. Later, the Commission adopted a Green Paper on this subject⁽³⁰⁾. The case of *Gasparini*, which presented the European Court of Justice with a real dilemma, shows the urgency of acting on this matter.

2.2 The principle of availability and the need to strengthen personal data protection in third pillar activities

Personal data protection offers another illustration of the interplay between what might be called ‘negative’ integration, through the abolition of barriers between the Member States, and ‘positive’ integration, through the adoption of common standards, which should be seen as its necessary complement. In this field, the principle of availability plays the role which, in the field of judicial cooperation in criminal matters, is played by the principle of mutual recognition: it is both presupposed by the mutual trust which should exist between the Member States’ national authorities, and, as a technique through which leverage may be

²⁸ This is clearly acknowledged by the European Commission: ‘without a system for allocating cases to an appropriate jurisdiction while proceedings are ongoing, *ne bis in idem* can lead to accidental or even arbitrary results: by giving preference to whichever jurisdiction can first take a final decision, its effects amount to a “first come first served” principle. The choice of jurisdiction is currently left to chance [...]’ (CEC, 2005e: 3).

²⁹ Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the ‘*ne bis in idem*’ principle, OJ C 100 of 26 April 2003, pp.0024-0027 (http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/c_100/c_10020030426en00240027.pdf). The proposal included a provision on the need to hold consultations between the States concerned in situations of *lis pendens*, as well as criteria for the determination of jurisdiction.

³⁰ See above, footnote 29.

exercised in favour of the adoption of common standards, a principle which justifies the adoption of measures aimed at strengthening mutual trust (de Biolley, 2006). As defined in the Hague Programme adopted by the European Council of 4-5 November 2004, the principle of availability ‘means that, throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State’ (European Council, 2004: 27). In other words, information available in one Member State should be made available to the authorities of any other Member State, just as if these were authorities of the same State: ‘The mere fact that information crosses borders should no longer be relevant. The underlying assumption is that serious crimes, in particular terrorist attacks, could be better prevented or combated if the information gathered by law enforcement authorities in EU Member States would be more easily, more quickly and more directly available for the law enforcement authorities in all other Member States’ (CEC, 2005f: 7). It is this principle which is currently codified in the proposal for a Framework Decision on the exchange of information under the principle of availability (CEC, 2005g).

But, as was stressed in the Hague Programme itself (paragraph 2.1), the implementation of the principle of availability requires in turn that all Member States ensure a high level of personal data protection, thus justifying the high level of trust which this principle presupposes between the national authorities of different Member States. Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (European Parliament and Council of the European Union, 1995) indeed does not apply to the processing of personal data in the course of an activity which falls outside the scope of Community law, such as the State’s activities in areas of criminal law or matters falling under Title VI EU (Article 3(2) of the Directive). Therefore, almost at the same time as proposing an instrument implementing the principle of availability, the Commission put forward a proposal for a Framework Decision on the protection of personal data processed in the framework

of police and judicial cooperation in criminal matters (CEC, 2005h). This was favoured by the European Parliament⁽³¹⁾ and welcomed by the European Data Protection Supervisor⁽³²⁾.

Conclusion

The establishment of the Fundamental Rights Agency was not intended, at least explicitly, as a means to promote a more active fundamental rights policy in the Union. The objective pursued in creating such an agency was better evaluation, from the point of view of the fundamental rights recognized in the EU Charter of Fundamental Rights, of the measures adopted by the Union and its Member States in the implementation of Union law, and to promote mutual learning in this field. The intention was not for the Union to exercise its legal competences in this field more dynamically; nor, of course, was it to transfer supplementary powers to the Union. At the same time, it seems almost unavoidable that, just as the adoption of the EU Charter of Fundamental Rights is already influencing the exercise by the Union of the competences it shares with the Member States, the creation of the Agency will lead the Union to move from a reactive approach to fundamental rights – focused on the obligation to avoid violating them – to a proactive approach, asking instead how it may contribute to promoting them. This is all the more necessary in the current context, at a time when harmonisation has become difficult to achieve due to enlargement and the diverse sensibilities which coexist within the

³¹ See its recommendation to the European Council and the Council on the exchange of information and cooperation concerning terrorist offences (2005/2046(INI)), adopted on 7 June 2005, in favour of harmonising existing rules on the protection of personal data in the instruments of the current third pillar, bringing them together in a single instrument that guarantees the same level of data protection as provided for under the first pillar.

³² See his Opinion on the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (COM (2005) 475 final), OJ C 47 of 25 February 2006, pp.0027-0047 (http://eur-lex.europa.eu/LexUriServ/site/fr/oj/2006/c_047/c_04720060225fr00270047.pdf).

Council, and when, as a result, mutual recognition (in its many incarnations) appears as a potential substitute. Not only compliance with the minimum standards imposed by fundamental rights but also the absence of excessively large divergences between the Member States in implementing fundamental rights should define the limit – or the precondition – for authorising the development of such mutual recognition techniques and enabling them to function without strain. There are signs that the need for the Union to actively promote a high level of protection of fundamental rights in the Union is being recognised (De Schutter, 2004). It is the hope of this author that this development – the gradual transformation of the European Union into an organisation dedicated to the realisation of fundamental rights, within the limits of its powers – will continue in the future.

References

Alston, Ph. and De Schutter, O. (2005) (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency*, Hart Publishing, Oxford.

Alston, Ph. and Weiler, J.H.H. (1999), ‘An “Ever Closer Union” in Need of a Human Rights Policy: The European Union and Human Rights’, in Ph. Alston, with Bustelo, M. and Heenan, J. (eds.), *The European Union and Human Rights*, Oxford University Press, Oxford, pp.3-66.

CEC (2000), Communication from the Commission to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters, COM (2000) 495 final of 26 July 2000 (http://eur-lex.europa.eu/LexUriServ/site/en/com/2000/com2000_0495en01.pdf).

CEC (2001), Memorandum from the President and Mr. Vitorino, Application of the Charter of Fundamental Rights of the European Union, SEC (2001) 380/3, Brussels, 13 March 2001 (http://ec.europa.eu/justice_home/doc_centre/rights/doc/sec0380_3_en1.pdf).

CEC (2002a), ‘Evaluation of the European Monitoring Centre on Racism and Xenophobia’, *Final Report*, Centre for Strategy and

Evaluation Services, May 2002 (http://ec.europa.eu/employment_social/fundamental_rights/pdf/arcg/eumc_eval2002_en.pdf).

CEC (2002b), Communication from the Commission on Impact Assessment, COM (2002) 276 final of 5 June 2002 (http://ec.europa.eu/governance/impact/docs/key_docs/com_2002_0276_en.pdf).

CEC (2003a), Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Activities of the European Monitoring Centre on Racism and Xenophobia, together with proposals to recast Council Regulation (EC) 1035/97 and Proposal for a Council Regulation on the European Monitoring Centre on Racism and Xenophobia (Recast version), COM (2003) 483 final of 5 August 2003 (http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubsg/483_03_en.pdf).

CEC (2003b), Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, 'Respect for and promotion of the values on which the Union is based', COM (2003) 606 final of 15 October 2003 (http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0606en01.pdf).

CEC (2004a), Communication from the Commission 'The Fundamental Rights Agency - Public consultation document', COM (2004) 693 final of 25 October 2004 (http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0693en01.pdf).

CEC (2004b), Proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final of 28 April 2004 (http://www.eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0328en01.pdf).

CEC (2005a), Communication from the Commission 'Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring', COM (2005) 172 final of 27 April 2005 (http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0172en01.pdf).

CEC (2005b), Impact Assessment Guidelines, SEC (2005) 791, 15 June 2005 (http://ec.europa.eu/governance/impact/docs/SEC2005_791_IA%20guidelines_annexes.pdf).

CEC (2005c), Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, COM (2005) 280 final of 30 June 2005 (http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0280en01.pdf).

CEC (2005d), Commission Staff Working paper, Annex to the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, and to the Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, Impact Assessment Report, SEC (2005) 849 of 30 June 2005 (http://ec.europa.eu/justice_home/doc_centre/rights/doc/sec_2005_849_en.pdf).

CEC (2005e), Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, COM (2005) 696 final of 23 December 2005 (http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0696en01.pdf).

CEC (2005f), Commission staff working document - Annex to the: Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters - Impact assessment [COM (2005) 475 final], SEC (2005) 1241 of 4 October 2005 (http://ec.europa.eu/justice_home/doc_centre/police/doc/sec_2005_1241_en.pdf).

CEC (2005g), Proposal for a Council Framework Decision on the exchange of information under the principle of availability, COM (2005) 490 final of 12 October 2005 (http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0490en01.pdf).

CEC (2005h), Proposal for a Council framework decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters, COM (2005) 475 final of 4 October 2005 (http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0475en01.pdf).

CEC (2006), Communication from the Commission to the Council and the European Parliament 'Evaluation of EU Policies on Freedom, Security and Justice', COM (2006) 332 final of 28 June 2006 (http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0332en01.pdf).

Council of the European Union (1997), Council Regulation (EC) No.1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151 of 10 June 1997, pp.0001-0007.

Council of the European Union (2003a), Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251 of 3 October 2003, pp.0012-0018 (http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_251/l_25120031003en00120018.pdf).

Council of the European Union (2003b), Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31 of 6 February 2003, pp.0018-0025 (http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_031/l_03120030206en00180025.pdf).

Council of the European Union (2006), Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, Document 16018/06, Brussels, 29 November 2006 (<http://register.consilium.europa.eu/pdf/en/06/st16/st16018.en06.pdf>).

de Biolley, S. (2006), 'Collecte, échange et protection des données dans la coopération en matière pénale', *Journal des tribunaux - Droit européen*, No.131, September 2006, pp.193-199.

De Schutter, O. (2004), 'Les droits fondamentaux dans le projet européen. Des limites à l'action des institutions à une politique des droits fondamentaux', in De Schutter, O. and Nihoul, P. (eds.), *Une*

Constitution pour l'Europe. Réflexions sur les transformations du droit de l'Union européenne, Larcier, Brussels, pp.81-117.

EPEC (2004), 'The Consideration of Fundamental Rights in Impact Assessment', *Final Report*, European Policy Evaluation Consortium, Brussels, December 2004.

European Council (2004), Hague Programme: Strengthening Freedom, Security and Justice in the European Union, Annex I, *Presidency Conclusions*, Brussels European Council, 4-5 November 2004, Document 14292/04, Brussels, 5 November 2004 (<http://register.consilium.europa.eu/pdf/en/04/st14/st14292.en04.pdf>).

European Parliament (2001), European Parliament resolution on the situation as regards fundamental rights in the European Union (2000), Strasbourg, 5 July 2001 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2001-0401+0+DOC+XML+V0//EN>).

European Parliament (2005a), European Parliament Resolution on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency, P6_TA(2005)0208, Brussels, 26 May 2005 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2005-0208+0+DOC+XML+V0//EN>).

European Parliament (2005b), Report A6-0144/2005 on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Kinga Gál, 11 May 2005 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2005-0144+0+DOC+PDF+V0//EN&language=EN>).

European Parliament (2005c), European Parliament legislative resolution on the proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union, P6_TA(2005)0091, Strasbourg, 12 April 2005 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2005-0091+0+DOC+PDF+V0//EN>).

parl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2005-0091+0+DOC+XML+V0//EN&language=EN).

European Parliament (2006a), Report A6-0306/2006 on the proposal for a Council regulation establishing a European Union Agency for Fundamental Rights, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Kinga Gál, 25 September 2006 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2006-0306+0+DOC+PDF+V0//EN&language=EN>).

European Parliament (2006b), Report A6-0282/2006 on the proposal for a Council decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Magda Kósáné Kovács, 18 September 2006 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2006-0282+0+DOC+PDF+V0//EN&language=EN>).

European Parliament (2006c), Resolution on the proposal for a Council regulation establishing a European Union Agency for Fundamental Rights, P6_TA-PROV(2006)0414, Brussels, 12 October 2006 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0414+0+DOC+XML+V0//EN&language=EN>).

European Parliament and Council of the European Union (1995), Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23 November 1995, pp.0031-0050 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>).

European Parliament and Council of the European Union (2002), 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 L 201 of 31 July 2002, pp.0037-0047 (http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/l_201/l_20120020731en00370047.pdf).

European Parliament and Council of the European Union (2004), 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 of 30 April 2004, pp.0077-0123 (http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_158/l_15820040430en00770123.pdf).

United Nations (1993), 'National institutions for the promotion and protection of human rights', Document A/RES/48/134, 85th plenary meeting, 20 December 1993 (<http://www.un.org/documents/ga/res/48/a48r134.htm>).