

The Implementation of Fundamental Rights through the Open Method of Coordination

by Olivier DE SCHUTTER*

Forthcoming in Olivier de Schutter and Simon Deakin (eds.), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*, Brussels: Bruylant.

The relationship between the open method of coordination and the protection of fundamental rights may at first be characterized by the potential *tension* between two directions in which the institutional developments within the Union have been channelled.¹ One set of developments could be characterized by the search for a ‘high form of constitutionalism’ leading to ‘the shaping of an effective and visible EU government’. Another, contrasting, set of developments, could be characterized rather by the putting in place of ‘a dense and complex system of governance alongside the formal structures of government’, best exemplified by the open method of coordination in the fields of employment, social policies, and the reform of the pensions system. Under the first, constitutional, mode of government, fundamental rights function as a limit to the exercise of the powers of the EU institutions and the Member States acting as decentralized European administration. This corresponds to the function they have fulfilled up to now in the system of the Union, and which the adoption of the Charter of Fundamental Rights in 2000 sought simply to confirm. Considered from the point of view of the second mode of governance, fundamental rights appear not only as limits imposed from the outside to the exercise of the powers which exist within this multilevel form of governance, but they could also fulfil a positive role:² indeed, they could serve to orient the use of these tools the Member States and the institutions now have at their disposal – benchmarking, exchanges of information and the identification of good practices, evaluation of experiences and the promotion of innovative practices –, and perhaps justify expanding the recourse to these new modes of governance to the implementation of the Charter of Fundamental Rights in general. Gráinne de Búrca concludes her accompanying essay in this volume by stating that ‘if the moves towards something like an open method of coordination in the area of protection and implementation of human rights are as yet embryonic, they present a real way forward for an EU human rights policy which avoids the circular disputes on the division of competences, and the exaggerated dichotomy of justiciability and non-justiciability which have characterized the constitutional-level debate on the Charter of Rights’. This essay builds on that proposal. It seeks to identify the usefulness of the open method of coordination for the implementation of the Charter of Fundamental Rights. It proposes a way in which this may be conceived in practice, and therefore it examines the conditions under which such an extension of the open method of coordination may be successful. It relates this new and expanded role for the open method of coordination to the question of the division of powers between the Union and the member states, and to the notion of regulatory competition between the states.

The essay is divided in four parts. First, it recalls the current understanding of the relationship between the protection of fundamental rights within the Union and the question of

* Professor at the Catholic University of Louvain, Visiting Professor, New York University. Co-ordinator of the EU Network of Independent Experts on Fundamental Rights.

¹ See G. de Búrca, ‘The Constitutional Challenge of New Governance in the European Union’, *E.L.Rev.*, December 2003.

² G. de Búrca, ‘Beyond the Charter: How Enlargement has enlarged the Human Rights Policy of the EU’.

competences (I.). Second, it proposes an alternative view of that relationship, based on the intuition that an undertaking by the Union to respect fundamental rights may imply, in specific cases, a positive obligation to act for the fulfilment of fundamental rights (II.). Third, it identifies the different functions of an open method of coordination in the implementation of the EU Charter of Fundamental Rights (III.). In fields where the competences are shared between the Member States and the Union, the open method of coordination may be seen as a searching mechanism to identify where an initiative of the Union may be required, because of the externalities, both positive and negative, which the actions of each Member State produces on all the other States, with which they share a common area of freedom, security and justice – an area in which, in particular, the free movement of persons and the free provision of services are guaranteed and in which competition is to be free and undistorted. Moreover, the open method of coordination could be an adequate means of better reconciling the requirements of market (economic) freedoms constitutive of the internal market with fundamental rights, especially social rights, which the Member States are bound to protect and implement under their jurisdiction. Lastly, the open method of coordination could be seen as an encouragement to mutual learning, as the solutions preferred in certain Member States may inspire the adoption of similar solutions in other Member States, especially where such replication avoids the risk that the implementation of fundamental rights at the level of each State recreate obstacles within the internal market or impede the cooperation between the Member States in the area of freedom, security and justice.

In substance, this essay analyses the limits of a decentralized implementation of the fundamental rights identified in the Charter of Fundamental Rights as values which the Member States have in common, and it presents the open method of coordination as a way to move beyond these limits without implying further transferrals of powers from the Member States to the Union.

I. Fundamental Rights and the Question of Competences

1.1. The classical view

The *defensive* function fundamental rights have fulfilled in the system of the Union is well documented. Fundamental rights were imported and developed in the legal order of the Union to respond to the fear that the transferral of powers from the Member States to the European Union would result in diminishing the level of protection enjoyed by the individual under the national legal systems. This explains both the initial development of fundamental rights as general principles of EC law by the European Court of Justice, and the interpretation by the Court of the secondary legislation which seeks to offer a minimal level of protection of fundamental rights at the level of the Union or vis-à-vis the institutions of the Union.³

³ The case of *Hautala* offers an example. It originated in the refusal by the Council to provide Ms Hautala with the report from the Working Group on Conventional Arms Exports, prepared with a view to further enhancing the consistent implementation of the common criteria governing arms exports, which she requested. The European Court of Justice was therefore requested an interpretation of Council Decision of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), Article 4(1) of which provided that ‘Access to a Council document shall not be granted where its disclosure could undermine (...) the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations) (...)’. Advocate General Ph. Léger questioned rhetorically: ‘is it reasonable to accept that the transfer by Member States of their sovereign rights to the Community legal order in certain specified fields should not be accompanied by a similar transfer of the safeguards which they accord their citizens, which embrace the right to have knowledge of information in the possession of the administration?’ (point 72 of the

Fundamental rights have thus been imposed as checks on the exercise by the EU institutions of their powers, and per extension, on the acts adopted by the Member States when they implement Union law, acting as a decentralized administration for the Union.⁴ Rather than rehearsing here the well-known stages which this importation has followed, it will be useful to insist on the consequences which follow from this defensive – or negative – function the recognition of fundamental rights in the EU legal order has served to fulfil. Three consequences in particular may be identified here: first, fundamental rights are conceived of as *external limits* to the exercise of powers under EU law, rather than as *objectives* which the EU should seek to promote; second, the need to ensure an effective protection of fundamental rights has not served to allocate competences between the EU and the Member States: instead, such an allocation of competences has been considered to be *neutral* vis-à-vis fundamental rights, in the sense that the existing allocation of competences has not been seen as having a potential impact on the level of protection of fundamental rights in the Union; third, although the Member States are recognized the possibility to fully respect fundamental rights under their jurisdiction, whichever kinds of accommodations this requires from the Union – again, this can be seen as a symptom and a consequence of this defensive attitude towards human rights –, States are neither encouraged, nor do they have incentives to, *develop* human rights beyond the minimal obligation to respect them. These three characteristics of the status of fundamental rights in the Union all have a common matrix: they betray a conception of human rights which sees in them a shield the individual may oppose to the exercise of public power, rather than as a sword which the individual may use to impose on public authorities an obligation to act in order to protect and fulfil them.

a) Fundamental rights as outside limits

Fundamental rights are conceived of in the structure of the Union as limits, and not as a mandate to fulfil. They draw lines which cannot be crossed; they do not indicate the direction in which to move forward. This characteristic has been most clearly expressed by the European Court of Justice in the Opinion 2/94 it delivered on the question of the accession of the European Community to the European Convention on Human Rights, where it stated that the Community institutions do not have at their disposal a ‘general power to enact rules on human rights or to conclude international conventions in this field’, although it did not question that respect for human rights constituted a ‘condition of lawfulness of Community acts’.⁵ The significance of these statements have been much debated in doctrine.⁶ In particular, Ph. Alston and J.H.H. Weiler have underlined that the Court in that Opinion at no point suggested that ‘the protection of human rights was not an objective of the Community, nor did it say that the Community lacked competence to legislate in the field of human

opinion of 10 July 2001). A negative answer of course was implied. See Case C-353/99 P, *Council of the European Union v. H. Hautala*, [2001] ECR I-9565 (judgment of 6 December 2001).

⁴ The European Court of Justice has also imposed on Member States to respect fundamental rights as part of the general principles of EC law when they rely on certain exceptions which are made in their favour in the Treaties or in secondary legislation (see, e.g., Case 36/75, *Rutili*, [1975] ECR 1219 (Recital 32); ECJ, 25 July 1991, *Commission v. Netherlands*, 353/89, ECR, p. 1089 (Recital 30); ECJ, 18 June 1991, *ERT*, C-260/89, ECR, p. I-2925 (Recital 43)). This has been denounced as extending the scope of application of these general principles beyond what a purely ‘defensive’ use of them would require: it has been argued that, by imposing such an extension, the European Court of Justice would have sought to expand its powers, and unduly to restrict the margin of appreciation left to the Member States by Union law. See J. Coppel & A. O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’, 29 *Common Market L. Rev.* 669 (1993).

⁵ *Accession of the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/94, [1996] ECR I-1759, at para. 27 and 34 of the Opinion.

⁶ For a commentary, see G. Gaja, ‘Opinion 2/94’, 33 *Common Market Law Review* 973 (1996).

rights'.⁷ The Convention responsible for the drafting of the Treaty establishing a Constitution for Europe, however, seems to have adopted the opposite view, by considering that fundamental rights in general do not constitute an objective of the Union, although some of the values listed in the Charter of Fundamental Rights have been raised to the level of objectives of the Union.⁸ This latter view, indeed, seems to represent the dominant opinion. Human rights are constraints which the institutions of the Union have to take into account in all their activities. In principle, they are not objectives to be fulfilled by the institutions in the exercise of their powers. In that sense, fundamental rights remain external limits imposed on the Union; they are not part of its mandate.

b) The neutrality on rights of the division of competences between the Union and the Member States

Second and more fundamentally, the instrumental mode through which fundamental rights were imported within the constitutional structure of the Union – more precisely: the way they were *added on* to that structure – implies a separation between the logic which presided over the division of competences between the Member States and the European Economic Community, and now the European Community and the Union, on the one hand, and the logic of fundamental rights, on the other hand. Until recently, these two questions have been treated as clearly distinct. How the powers should be shared, or attributed, has never been decided on the basis of the consequences the different modalities would produce on the protection of fundamental rights. Rather, when the discourse on fundamental rights emerged in the context of the EEC in the late 1960s, the protection of fundamental rights through the general principles of Community law was presented as necessary to limit the risks entailed for the rights of the individual by the affirmation of the supremacy of European Law on the national law of the Member States and the recognition of its direct effect within the national legal orders. The need to respect fundamental rights, thus, accompanied the transferral of powers. But the relationship went only in that direction: the transferral of powers to the Community and the Union, in principle, has not been justified by the need to ensure an effective protection of fundamental rights.

The exception to this was, of course, social rights. Because of the close link between social rights and the creation of an international organization aiming at economic integration, the construction of the European Economic Community was preceded by a thorough analysis of the impact the creation of a common market would have on social rights and social protection in the six countries concerned. The ILO Group of Experts presided by B. Ohlin published in 1956 the report 'Social Aspects of European Economic Co-operation', which exercised an important influence on the final shaping of the Treaty of Rome.⁹ The report concluded essentially that there was no need for a 'European regional arrangement for closer economic

⁷ Ph. Alston and J.H.H. Weiler, 'An "Even Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights', in Ph. Alston, M. Bustelo and J. Heenan (ed.), *The EU and Human Rights*, Oxford, Oxford University Press, 1999, p. 3, at pp. 24-25 (see also J.H.H. Weiler and S. Fries, 'A Human Rights Policy for the European Community and Union: the Question of Competences', in that same volume, arguing that Opinion 2/94 should not be seen as constituting an obstacle to the use of Article 308 EC (the implied powers, or 'flexibility' clause) for the realization of human rights in the EU). The same position is adopted in O. De Schutter and Y Lejeune, 'L'adhésion de la Communauté européenne à la Convention européenne des droits de l'homme. A propos de l'avis 2/94 de la Cour de justice des Communautés européennes', *Cahiers de droit européen*, 1996, p. 555.

⁸ See below, text corresponding to notes 56-57.

⁹ International Labour Office, *Social Aspects of European Economic Co-operation. Report by a Group of Experts*, Studies and Reports, New Series, No.46, Geneva, 1956, 179 pages (hereafter: 'Ohlin Report').

co-operation' (the European Economic Community) to be given the power to legislate in the social field. According to the authors, differences in productivity between workers in different countries should per necessity translate into differences in remuneration and other advantages, such differences being unavoidable, and indeed desirable, in a context where the liberalization of international trade should promote allocative efficiency. In fact, the report concludes that the improvement of social conditions will automatically flow from the improvement of productivity which will result from international competition, as the trade unions will be powerful enough to impose that the benefits from economic growth be equitably shared and lead to an improvement of the workers' condition. The following conclusion is typical of the report as a whole, both by its optimistic tone and its belief in the virtues of freeing competition between states:¹⁰

International competition in a common market would not prevent particular countries from raising workers' living standards and there is no sound reason to think that freer international markets would hamper in any way the further improvement of workers' living standards, as productivity rises, through higher wages or improved social benefits and working conditions.

The conviction animating the report is therefore that the improvement in living and working conditions would result from the liberalization of trade and the rise of productivity which this will lead to, thanks to the greater allocative efficiency brought about by the free movement of production factors. There were, however, two exceptions to this general view. One was equality of remuneration between men and women. The Ohlin report noted that in industries where a large proportion of female labour is employed, this may lead to distortions of competition: 'Countries in which there are large sex differentials will pay relatively low wages in industries employing a large proportion of female labour, and these industries will enjoy what might be considered a special advantage over their competitors abroad where differentials according to sex are smaller or non-existent. A policy of gradual reduction of these differentials would tend to prevent this'.¹¹ The other exception concerned weekly working hours and paid holidays.¹² On working hours for instance, the Report notes:

...it may be that in a particular country working hours are very much longer in one industry than in others – for example because workers are very weakly organized in that industry. As a result the industry in question may have significant advantage compared with competitors in other industries where working hours are at the level that is customary in the country concerned. It is doubtful whether many instances of this nature exist but in certain cases the fixing of minimum standards in respect of normal hours of work, the conditions under which overtime is permitted and the payment of overtime, by preventing the standards applied in these matters in particular industries from falling below an internationally accepted level, might eliminate abnormal competition and thus facilitate the establishment and preservation of a régime of freer international trade.

¹⁰ Ohlin Report, p. 115.

¹¹ Ohlin Report, p. 64.

¹² Ohlin Report, pp. 34-35.

Here as in the case of the principle of equal pay for equal work,¹³ however, the Group of Experts considered that an alternative to the harmonization of social rights within the emerging ‘European regional arrangement for closer economic co-operation’ could be the imposition, in all the countries taking part in that arrangement, of international standards set elsewhere, particularly within the International Labour Organization. Thus with respect to working time, the experts put forward that ‘consideration might be given to the possibility of general acceptance by European countries of such standards as are laid down in the ILO Hours of Work (Industry) Convention, 1919, in certain other ILO Conventions relating to hours of work, or perhaps in a new instrument or instruments which might be established through the machinery of the ILO with a view especially to application in Europe’.¹⁴

The answers of the negotiators of the Treaty of Rome to these considerations were selective. Chapter 2 of the ‘Spaak Report’, named after the Belgian Minister of Foreign Affairs who chaired the intergovernmental committee created by the Messina conference of 1-2 June 1955 for the preparation of the Treaty instituting the EEC, whilst adhering to the general non-interventionist proposals of the Ohlin Group,¹⁵ nevertheless also emphasized that a ‘progressive harmonization’ could be justified in certain limited fields: the principle of equal wages between men and women should be affirmed; maximum weekly hours and the rate of remuneration for overtime work may be harmonized; and so could the length of paid holidays. Specific provisions were inserted in the Treaty to provide for the principle of equal pay for equal work (Article 119 EEC Treaty, now, after modification Article 141(1) EC) and the principle of paid holidays, the ‘existing equivalence’ of the schemes of which in the member states should be preserved (Article 120 EEC Treaty, now Article 142 EC). A Protocol was attached to the Treaty, allowing France to adopt measures of protection if the working hours in other Member States were not reduced to the level at which they were fixed in France.¹⁶ However, what really matters is – rather than the result which was finally reached¹⁷ – the very fact that the negotiation of the Treaty of Rome was preceded by a systematic reflection on the impact on social rights of the liberalization of trade between the Member States of the European Economic Community.

The European Court of Justice has clearly recognized this indebtedness of the European constitutional structure – and particularly of the ‘Economic Constitution’ embedded in the EC

¹³ With respect to that principle, the Report refers to Article 2 of the draft European Social Charter drawn up by the Council of Europe in 1955 (Ohlin Report, p. 63). This provision would become Article 4 in the text of the European Social Charter as opened for signature and ratification in Turin on 18 October 1961, which provides for ‘the right of men and women workers to equal pay for work of equal value’.

¹⁴ Ohlin Report, p. 72. Reference could have been made, in this respect also, to the draft European Social Charter of the Council of Europe (see Articles 2(1) and 4(2) of the 1961 European Social Charter (providing for reasonable daily and weekly working hours and the right of workers to an increased rate of remuneration for overtime work)).

¹⁵ See e.g., *Rapport des chefs de délégation aux ministres des affaires étrangères*, Brussels, 21 April 1956, at p. 60: ‘...on croit fréquemment qu’une concurrence valable ne peut s’établir qu’une fois que les principaux éléments du prix de revient ont été partout rapprochés. C’est au contraire sur la base de certaines différences qu’un équilibre peut s’établir et des échanges se développer’.

¹⁶ Part II of the Protocol on Certain Provisions Affecting France.

¹⁷ On the influence the Ohlin Report exercised on the Treaty of Rome, see esp. C. Barnard, ‘The Economic Objectives of Article 119’, in T. Hervey and D. O’Keeffe (eds.), *Sex Equality Law in the European Union*, Chichester, Wiley, 1996; P. Davies, ‘The Emergence of European Labour Law’, in W. McCarthy (ed.), *Legal Intervention in Industrial Relations: Gains and Losses*, London, Blackwell Publ., 1993, pp. 313-359; S. Deakin, ‘Labour Law as Market Regulation: the Economic Foundations of European Social Policy’, in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds.), *European Community Labour Law: Principles and Perspectives*, Oxford, Clarendon Press, 1996, pp. 62-93; J. Kenner, *EU Employment Law. From Rome to Amsterdam and Beyond*, Oxford and Portland, Oregon, Hart Publishing, 2003, pp. 2-6.

Treaty – towards the economic analysis of the relationship of free trade to social rights.¹⁸ The second *Defrenne* case for instance clearly recalled the economic foundation of Article 119 EEC, stating that the aim of this provision was ‘to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay’.¹⁹ Conversely, in cases such as *Sloman Neptun*²⁰ and *Gimenez Zaera*,²¹ the Court denied that the statement of social objectives in the EEC Treaty produced any legally binding effect, and it was influenced in this view not only by the very wording of the Treaty, but also by the argument that, as phrased by Advocate general F. Mancini in *Giménez Zaera*, the realization of the objective identified in Article 2 of the EEC Treaty – the accelerated raising of the standard of living – is left by the Treaty to a ‘process in which economy, science, technology are more important than the interventions of public authorities’.²² In *Giménez Zaera*, the Court says:²³

The aims laid down [in Article 2 of the EEC Treaty, including social progress and the accelerated raising of the standard of living] are concerned with the existence and functioning of the Community; *they are to be achieved through the establishment of the common market and the progressive approximation of the economic policies of Member States*, which are also aims whose implementation is the essential object of the Treaty.

The aim of an accelerated raising of the standard of living, therefore, is under a ‘systematic dependence on the establishment of the common market and progressive approximation of economic policies’:²⁴ as such, the aim in question cannot impose legal obligations on Member States. The belief was that the market would automatically produce social progress. Social rights were not needed, not because they were not desirable, but because they would naturally result from the process of economic integration. The interrelationship between the market and social rights may appear to us, with hindsight, as naive or worse – ideological. But at least such a relationship was debated, where it could have been simply ignored.

It is striking that no such reflection was attempted concerning the impact of the common market on the preservation of other fundamental rights. This should be attributed, not of course to a hostility towards these rights, but rather to two other factors. First, there was no perception that such an impact could even exist. Indeed, outside the field of employment, there was hardly any visible link between the level at which fundamental rights were protected and the competitiveness of the undertakings established in a particular country. The freeing of international trade was not seen, therefore, as capable of exerting any kind of influence on the capacity of states to protect those rights and further realize them. Moreover, all the six original Member States of the EEC were parties to the European Convention on Human Rights (ECHR) of 4 November 1950 when the Treaty of Rome was negotiated, with the sole exception of France. There was, therefore, a commonly agreed ‘floor of rights’ – civil

¹⁸ On this, see also G. Majone, ‘The European Community Between Social Policy and Social Regulation’, 31 *J. Common Market Stud.* 153 (1993); and C. A. Ball, ‘The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community’s Legal Order’, 37 *Harv. Int. L. J.* 307 (1996).

¹⁹ Case 43/75, *Defrenne* (n° 2), [1976] ECR 455.

²⁰ Case C-72/91, *Sloman Neptun Schiffahrts*, [1993] ECR I-887.

²¹ Case 126/86, *Giménez Zaera*, [1987] ECR 3697.

²² Case 126/86, *Giménez Zaera*, [1987] ECR 3697, at p. 3709.

²³ Case 126/86, *Giménez Zaera*, [1987] ECR 3697, Recital 10 (our emphasis).

²⁴ Case 126/86, *Giménez Zaera*, [1987] ECR 3697, Recital 11.

and political at least – in the Community, which probably would have led the delegations, if the question had been asked during the negotiation of the Treaty of Rome (it was not), to answer that the ECHR had done the task, and that all that remained to be done in that field was to convince France to adhere to the instrument implementing the Universal Declaration of Human Rights in Europe.

c) Fundamental rights as exceptions to fundamental market freedoms

Despite the apparent reluctance of the European Court of Justice to read social rights into the Treaty of Rome beyond those which are explicitly recognized, the Court did accept that States may justify imposing certain interferences with the free movement of goods,²⁵ the free provision of services,²⁶ or freedom of competition,²⁷ where these interferences were justified by the need to preserve certain social rights or to promote objectives of a social nature. This is of course to be welcomed. It highlights, however, a third consequence on the status of fundamental rights in the EU legal order of their instrumental nature, i.e., of the fact that fundamental rights were imported within EU law in order to protect the Union from the accusation that the expansion of its powers would result in lowering the protection of the rights which the individuals enjoyed under the national legal systems. Indeed, in this context, where a conflict arises between the so-called ‘fundamental freedoms’ recognized by the EC Treaty and the protection of fundamental rights, the European Court of Justice tends to accept that the latter objective may justify that certain restrictions be imposed on the former, *but only to the extent that imposing such an obstacle is necessary for a Member State to respect its obligation towards human rights*. The further a State wishes to go on the path of the progressive realization of human rights, the more difficult it may be for the State to justify such restrictions. This relationship between economic freedoms constitutive of the internal market and fundamental rights – particularly social rights – is of course a consequence of the different functions these guarantees fulfil in the constitutional structure of the Union. As expressed by Nicholas Bernard: ‘Market rights have been invoked in an offensive mode against measures adopted by Member States susceptible of hindering the realization of the internal market. By way of contrast, social rights have primarily been invoked in a defensive, to protect national competence from Community law incursions likely to have a negative impact on national systems of social protection’.²⁸

The relationship which has just been described does not sufficiently take into account that fundamental rights are not simply to be ‘respected’, as if their meaning could be identified once and for all, but instead should be progressively realized by the States in all the areas where such competence has not been attributed exclusively to the Union: the Member States of the Union should be under an incentive to ensure the development of fundamental rights under their jurisdiction, rather than limited in their capacity to move in that direction. Perhaps

²⁵ See, e.g., Case 155/80, *S. Oebel*, [1981] ECR 1993 (Recitals 12 and 16); Case C-145/88, *Torfaen Borough Council*, [1989] ECR 3851; Case C-304/90, *Payless*, [1992] ECR I-6493; Case C-169/91, *B & Q*, [1992] ECR I-6635; Joined Cases C-401/92 and C-402/92, *t Heukske*, [1994] ECR I-2199; Joined Cases C-69/93 and C-258/93, *Punto Casa*, [1994] ECR I-2355; Case C-120/95, *Decker*, [1998] ECR I-1831.

²⁶ See, e.g., Case 279/80, *Webb*, [1981] ECR 3305; Joined Cases 62/81 and 63/81, *Seco and Desquenne & Giral*, [1982] ECR 223; Case C-113/89, *Rush Portuguesa*, [1990] ECR I-1417 (Recital 17); Case C-272/94, *Guiot*, [1996] ECR I-1905 (Recital 16); Case C-158/96, *Kohll*, [1998] ECR I-1931; Joined Cases C-369/96 and C-376/96, *Arblade*, [1999] ECR I-8453.

²⁷ Case C-67/96, *Albany*, [1999] ECR I-5751.

²⁸ N. Bernard, ‘A “New Governance” Approach to Economic, Social and Cultural Rights in the EU’, in T. Hervey and J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective*, Oxford, Hart Publ., 2003, p. 245, at p. 249.

the balancing of the economic freedoms constitutive of the internal market and fundamental rights, then, should be more contextualized, and instead of defining the former as the rule and the latter as the exception, perhaps we should search for the most adequate solution in the specific circumstances of each case. An example borrowed from the recent case-law may both serve to illustrate this problem associated with such a relationship between economic freedoms and fundamental rights, and point towards a possible solution. In a judgment of 12 June 2003, the European Court of Justice was led to balance the fundamental rights, as recognized *inter alia* in the European Convention on Human Rights, with the fundamental freedoms of movement of the EC Treaty.²⁹ An enterprise of international transport alleged before an Austrian jurisdiction that the authorization given to an association for the defence of the environment to manifest its views by occupying the Brenner highway, leading this highway to be blocked for almost 30 hours, was incompatible with the principle of freedom of movement of goods. Requested to interpret EC Law in that context, the Court ruled that Article 28 EC ‘does not prohibit only measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State’ (Recital 57).³⁰ Therefore the abstention of the Austrian authorities to prohibit the manifestation is normally to be considered as a measure equivalent to a quantitative restriction incompatible with Articles 28 and 29 EC, unless it can be objectively justified. The Court notes in that respect that ‘the national authorities relied on the need to respect fundamental rights guaranteed by both the ECHR and the Constitution of the Member State concerned in deciding to allow a restriction to be imposed on one of the fundamental freedoms enshrined in the Treaty’, and that therefore ‘The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter’.³¹ As to how to operate this conciliation, the Court says that ‘the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests’;³² it adds:

The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.³³

The judgment confirms that a Member State may justify imposing certain restrictions on the fundamental market freedoms of the EC Treaty by the need to respect the fundamental rights recognized in the legal order of the Union, as these are codified, in particular, by the Charter

²⁹ Case C-112/00, *Schmidberger*, nyr.

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

³¹ Case C-112/00, *Schmidberger*, Recitals 76 and 77.

³² Case C-112/00, *Schmidberger*, Recital 81.

³³ Case C-112/00, *Schmidberger*, Recital 82.

of Fundamental Rights.³⁴ While recalling that one could not exclude a situation where, under the pretext of respecting the fundamental rights guaranteed in his own national legal order, a State would in fact be pursuing objectives incompatible with the EC Treaty – disguising protectionist measures behind the professed concern for fundamental rights³⁵ –, AG Jacobs considered in his opinion that ‘where a Member State seeks to protect fundamental rights recognized in Community law the Member State necessarily pursues a legitimate objective. Community law cannot prohibit Member States from pursuing objectives which the Community itself is bound to pursue’.³⁶ The crucial element however, is not whether that objective is legitimate, but how it will be reconciled with the fundamental market freedom of the EC Treaty. The *Schmidberger* case exemplifies in that respect that an examination of the proportionality of the restrictions imposed on the fundamental freedom of movement under the Treaty, where such restrictions are justified by the concern to protect fundamental rights, should not take the form of a strict examination of necessity. A restriction which is not strictly ‘necessary’ for the protection of a recognized fundamental right, in the sense that this right would not be infringed even if the restriction were not adopted, it may nevertheless be justified by the fundamental right beyond what is strictly required its observance. In several cases where the Netherlands and Austria claimed to justify certain restrictions on the free provision of services or the free movement of goods in the name of the necessity of media pluralism, this justification has been accepted, even though, as recognized for instance in the European Convention on Human Rights, freedom of expression does not necessarily call for the organization of such pluralism.³⁷ This position of the Court of Justice merits approval. Fundamental rights do not merely have to be ‘respected’. They possess a dynamic content, which is progressively clarified by measures that ensure their implementation. It is important that, in the implementation of those rights, the States are not too strictly bound by the respect due to the economic freedoms of the Treaty, provided that the measures they adopt are not discriminatory and are reasonably linked to the objective of developing the fundamental rights that are recognized as legitimate.

Whichever notions of proportionality or necessity are invoked when the fundamental market freedoms recognized by the EC Treaty are balanced against the fundamental rights included among the general principles of EC law, the latter remain construed as *exceptions* to market freedoms, which the Member States are authorized to introduce only under well-defined conditions. This is again a consequence of the way in which fundamental rights were

³⁴ With respect to obstacles to the free movement of goods, the solution is confirmed by Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States (OJ 1998 L 337, p. 8). Indeed, this regulation covers obstacles to the free movement of goods which are attributable to a Member State, whether through action or inaction on its part, which may constitute a violation of Article 28 and ff. EC where such obstacles lead to serious disruption of the free movement of goods. In conformity with the judgment of 9 December 1997 in *Commission v. France*, ‘inaction’ of Member States’ authorities refers to cases when the competent national authorities, in the presence of an obstacle caused by actions taken by private individuals, fail to take all necessary and proportionate measures within their powers with a view to removing the obstacle and ensuring the free movement of goods in their territory. The Regulation states that it ‘may not be interpreted as affecting in any way the exercise of fundamental rights as recognized in Member States, including the right or freedom to strike’ (Article 2). This is the solution which is confirmed, on constitutional grounds, in the *Schmidberger* case-law.

³⁵ See the Opinion of Advocate General M.F. G. Jacobs in Case C-112/00, *Schmidberger*, esp. points 97 and 98 of the opinion.

³⁶ Point 102 of the opinion.

³⁷ See Case 353/89, *Commission v. Netherlands*, [1991] ECR 4089 (Recital 30); Case 288/89, *Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media*, [1991] ECR 4007 (Recital 23); Case 148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR 513 (Recitals 9 and 10); Case C-368/95, *Familiapress*, [1997] ECR I-3689 (Recital 24).

introduced in the EU legal order, as a means of protecting that legal order from the risk of being accused to lead to a diminishment of the level of protection of fundamental rights previously enjoyed by the individuals under the national legal systems. In this scheme, fundamental rights are not considered to be an ingredient, contributing to the effectiveness or the progress of market freedoms; instead, they are seen as a potential obstacle to their development, and therefore should be construed as restrictively as possible to avoid any temptation by the Member States to rely on them as a pretext to justify a protectionist attitude.

1.2. The alternative view

Thus, fundamental rights in the EU legal order are conceived of as rights which neither the institutions of the Union, nor the Member States acting upon delegation of the Union or upon its authorization, may violate: they impose to the institutions of the Union and the national authorities implementing Union law to abstain from unjustifiably interfering with those rights in the exercise of their respective powers. However, fundamental rights are not seen as influencing the allocation of powers between the Member States and the Union: the Union has not been attributed a competence to fulfil fundamental rights; the distribution of competences between the levels has been devised without the debate having been influenced by the need to ensure an effective protection of fundamental rights in the Union; finally, although the recognition of fundamental market freedoms constituting the legal infrastructure of the internal market should not oblige States to renounce protecting the fundamental rights of persons under their jurisdiction, the development of those market freedoms – freedom of movement of workers now extended to the citizens of the Union, freedom of establishment for the self-employed or for undertakings, free provision of services, free movement of goods, and free competition – is considered to be independent from the protection of fundamental rights, in the sense that the shape of the evolution of market freedoms is not seen as having to be influenced by the need to effectively promote fundamental rights. It is this classical understanding of the position of fundamental rights in the EU legal order which Article 51 of the Charter of Fundamental Rights restates. This provision states:

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 51 contains two interrelated rules. The first rule is that the Charter may be invoked vis-à-vis the institutions, bodies or agencies of the Union, as well as vis-à-vis the Member States when they implement Union law, but it may not extend the scope of application of Union law beyond its current reach. Therefore, when they act outside the domain of application of Union law, the Member States are not bound to respect the Charter, despite the fact that any violations of fundamental rights they could commit might discourage the exercise of certain freedoms of movement, could lead to distortions of competition within the Union, or could endanger the mutual trust on which cooperation in the fields of justice and home affairs is based.

The second rule is that the adoption of the Charter should not be seen as investing the Union with a new task, that of realizing the fundamental rights recognized in the Charter: the

Charter, we are told, ‘does not establish any new power or task for ... the Union’, by which it is meant – to relate this to the above presentation – that, in the understanding at least of the drafters of the Charter, the rights of the Charter have a purely *defensive* function to fulfil. The allocation of competences between the Member States and the Union responds to a logic which is independent from the need to ensure the protection of fundamental rights, and the introduction of the Charter in the constitutional scheme should not be seen as modifying this. To formulate things somewhat more provocatively: the extent and rhythm of the transferral of powers from the Member States to the Union have been decided upon with a view to realizing certain objectives assigned to the Community and the Union, but has remained blind to the impact on fundamental rights, and the Charter is not meant to change this state of matters.

A radical alternative to this classical view would imply, correlatively, two changes, both of which are of constitutional dimension, requiring a modification of the Treaties. The first change concerns the scope of application of Union and, therefore, of the fundamental rights recognized in Union law. The second change concerns the impact of the fundamental rights dimension of the construction of the Union on the allocation of competences between the Member States and the EU, either at a general level or with respect to certain specific fundamental rights. These modifications define the alternative view to the current situation. The two components of this alternative view are examined in turn.

First, such an alternative view would imply a move towards the ‘incorporation’ of the fundamental rights recognized in the Charter in the general obligations imposed on the Member States under Union law, much in the same way certain provisions of the Bill of Rights of the United States Federal Constitution were considered to be applicable to the States of the Union after they were – selectively – ‘incorporated’ in the Due Process Clause of the Fourteenth Amendment.³⁸ There would be two plausible channels for such an ‘incorporation’ of the Charter of Fundamental Rights in the Union, making its provisions applicable to the Member States even in situations which are currently considered not to present a sufficient nexus to Union law to justify the application of the general principles of Union law.

One channel could be Article 6(1) EU, which states that ‘The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, *principles which are common to the Member States*’. The European Court of Justice could derive from this clause that the mutual understanding between the Member States of the Union is that each State shall fully respect the mentioned principles, including ‘respect for human rights and fundamental freedoms’ – either all the rights of the Charter or at least a limited number of core rights from the Charter. Today, the main obstacle to this development resides in the formulation of Article 46 EU, which defines the scope of the jurisdiction of the European Court of Justice in the framework of the EU Treaty. This article currently states in particular that the Court will be competent with respect to ‘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’, but it excludes, *a*

³⁸ Although the Bill of Rights was initially conceived as a check only against the Federal Government and, thus, as not applicable to the States of the Union, the fourteenth amendment of the United States Constitution provided in 1868 that ‘No State shall [deprive] any person of life, liberty, or property, without due process of law’. The United States Supreme Court progressively incorporated a growing number of provisions of the Bill of Rights in the ‘due process’ language of the fourteenth amendment, however, at an accelerated pace since the 1960s. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusion from criminal trials of evidence illegally seized); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Malloy v. Hogan*, 378 U.S. 1 (1964) (right to be free of compelled self-incrimination); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial). The doctrine on this question is too large to cite, except at the risk of being exceedingly selective.

contrario, the justiciability of Article 6(1) EU. The Draft Treaty establishing a Constitution for the Union however contains a clause similar to the current Article 6(1) EC,³⁹ and there is no such limitation imposed on the jurisdiction of the European Court of Justice such as is now provided by Article 46 EU.⁴⁰ It may not be excluded, therefore, that in the future, the European Court of Justice will be presented with a situation where a Member State seriously violates the fundamental rights, in particular as these are listed in the Charter, and will consider that the situation thus created constitutes a violation of the obligations of that State under Article 2 of the Constitution – thus obliging the Member State to put an end to that situation and, if the case is raised before a national court having referred the question of interpretation of the Constitution to the European Court of Justice, obliging the said jurisdiction to protect the rights of the individual litigant, as an obligation under European law.

A second channel, one which possesses a firmer basis in the case-law, are the provisions of the EC Treaty which concern the citizenship of the Union. Article 12 EC says that ‘Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited’. The prohibition of any discrimination based on nationality has benefited students who were recognized a right to access to education offered in another Member State than their own,⁴¹ a British tourist who was aggressed in the Parisian metro and claimed a compensation under the French legislation under the terms of which such compensation could only be paid to French nationals,⁴² or an Austrian and a German who were prosecuted in the Italian province of Bolzano but were denied the right to use the German language in the criminal proceedings, although this right was recognized to the persons belonging to the German-speaking minority in that province.⁴³ More recently, Article 12 EC was successfully invoked by a Spanish national who, although not possessing a residence permit in Germany, was authorized to stay in that State for humanitarian reasons, and was claiming a child-raising allowance. The Court considered that a benefit such as the child-raising allowance provided for by the State legislation in question, which is automatically granted to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses, falls within the scope *ratione materiae* of Community law as a ‘family benefit’ in the meaning of Article 4(1)(h) of Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community⁴⁴ and as a ‘social advantage’ within the meaning of Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community.⁴⁵ The Court considered however that it did not have sufficient information to decide whether the applicant was covered by these Regulations, i.e., whether she was an ‘employed person’ or a ‘worker’ under the definitions of those instruments. But the Court continued:

³⁹ See Article 2 (‘The Union’s values’): ‘The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination’.

⁴⁰ Comp. Article 282-III of the Draft Constitution.

⁴¹ Case 293/83, *Gravier*, [1985] ECR 593, Recitals 23-24.

⁴² Case 186/87, *Cowan*, [1989] ECR 195, Recitals 15-17.

⁴³ Case C-274/96, *Bickel and Franz*, [1998] ECR I-7637, Recitals 15-16.

⁴⁴ As amended and updated by Council Regulation (EEC) No. 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 3427/89 of 30 October 1989 (OJ 1989 L 331, p. 1).

⁴⁵ OJ, English Special Edition 1968(II), p. 475.

55. In the sphere of application of the Treaty and in the absence of any justification, such unequal treatment [resulting from the fact that non-nationals were obliged to produce a formal residence permit issued by the national authorities in order to receive a child-raising allowance, although no identical obligation was imposed upon German nationals] constitutes discrimination prohibited by [Article 12 EC]. [...]

61. As a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship.

62. [Article 17(2)] of the Treaty attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in [Article 12 EC], not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty.

Piet Eeckhout has perfectly identified the possible significance of these cases for the understanding of the scope of application of the Charter of Fundamental Rights.⁴⁶ There is therefore no need here to offer a very detailed explanation of their potentialities. What these cases illustrate is that the citizen of the Union who has exercised his right to move freely within the Union – whether as worker, as tourist and therefore user of services, or even without qualifying as an economic agent –, he or she may claim the protection against discrimination based on nationality.⁴⁷ This may be explained by the importance of the principle of non-discrimination on grounds of nationality – a principle which, Eeckhout reminds us, is indeed ‘foundational for much of the European construct’.⁴⁸ Another reason for extending the protection of Article 12 EC to such situations, which present no link to EC Law but for the nationality of the person concerned and the fact that she has crossed a border, is that this encourages the exercise of the right to move freely throughout the Union. The Court says that much in *Bickel and Franz*: ‘the exercise of the right to move and reside freely in another Member State is enhanced if the citizens of the Union are able to use a given language to communicate with the administrative and judicial authorities of a State on the same footing as its nationals’.⁴⁹ Both these reasons for recognizing a broad scope of application to Article 12 EC, however, would appear to be valid also when the question will arise before the European Court of Justice under which conditions the Charter of Fundamental Rights may be invoked vis-à-vis the acts adopted by the Member States. The centrality of the value of fundamental rights can hardly be doubted since the endorsement of the case-law of the European Court of Justice in Article F § 2 (now Article 6(2) EU) of the Treaty of Maastricht on the European Union and the insertion by the Treaty of Amsterdam of the current Article 6(1) in the Treaty of the European Union. And the contribution which an equivalent level of protection of fundamental throughout the Union could make to the effectiveness of freedom of movement can hardly be doubted – indeed, it has led Advocate General F. G. Jacobs to consider that the citizen of the Union should be entitled to ‘be treated in accordance with a common code of fundamental values ... wherever he goes to earn his living in the European Community’,⁵⁰ and Advocate General W. van Gerven to consider that a violation of freedom

⁴⁶ P. Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’, 39 *Common Market L. Rev.* 945 (2002), 958-962.

⁴⁷ The link between these fundamental freedoms – free movement of persons, goods, services and capital, and freedom of establishment – and the principle of non-discrimination on grounds of nationality even appears to be reinforced in the Draft Constitution, as both appear in a same provision (Article 4 of the Draft Constitution).

⁴⁸ P. Eeckhout, cited above, p. 961.

⁴⁹ Cited above, Recital 16.

⁵⁰ Opinion delivered in Case C-168/91, *Konstadinidis*, [1993] ECR I-1191.

of expression should be considered, *ipso facto*, as constituting a violation of the free provision of services to the extent a situation falls under the protection afforded by this provision.⁵¹

A second component of this alternative view would consist in identifying the promotion of fundamental rights as an objective of the Union. This would imply, in particular, that the flexibility clause, which leads to recognize to the Union certain implied powers where the Treaty has not provided the necessary powers for the attainment of the objectives set for the Union, could be invoked to adopt measures seeking to realize fundamental rights. The inclusion of this new objective would amount to attributing to the Union a general power to realize fundamental rights, albeit with the requirement that it may only act when it is necessary to do so, and that this meets with the unanimous approval of the Member States. Alternatively, it could be systematically examined whether supplementary powers should not be transferred to the Union, where the current allocation of competences leads to situations where fundamental rights cannot be guaranteed within the Union at a sufficient level of protection. This would extend to new fields, possibly numerous, what has already been done for instance with respect not only to certain social rights,⁵² but also with respect to asylum⁵³ or criminal procedure⁵⁴ – all domains where it was considered justified to transfer certain powers to the Union because of the inefficiencies which could have resulted from a decentralized implementation of fundamental rights, entirely left in the hands of the Member States.

II. The intermediate view: a fundamental rights policy within the constitutional boundaries

There exists, therefore, the classical view, which Article 51 of the Charter of Fundamental Rights sought to crystallize; and there exist the building blocks for an alternative view, which would radically expand the scope of application of the fundamental rights recognized within the legal order of the Union, invest the Union with a mandate to realize them, and make the allocation of competences between the Union and the Member States subordinate to the need to ensure the effective protection of fundamental rights, rather than have this protection depend on the existing allocation of competences. A third view may also be defended. This view does not confine itself to the classical understanding of the function of fundamental rights within the constitutional structure of the Union; neither does it produce the far-reaching consequences the alternative view just presented may entail, which are feared by many and would definitively transform the European Union into an organization dedicated to the promotion and protection of human rights.

Even within the current constitutional structure, fundamental rights may fulfil a more positive role, and form the basis of an affirmative fundamental rights policy for the European Union. The reason for this is clear. Most of the provisions of the Charter of Fundamental Rights may in fact be implemented by the Union – more precisely, in most cases, the European Community, as long as the current division persists between the Union and the Community –, under the competences which have been conferred upon it by the Member States. Therefore

⁵¹ Opinion delivered in Case 159/90, *Society for the Protection of the Unborn Children Ltd.*, [1991] ECR 4685, esp. point 31 of the opinion (according to which the effectiveness of the free provision of services would require that the principle of freedom of expression be respected).

⁵² See Article 137 EC.

⁵³ See Article 63 EC.

⁵⁴ See Article 31, c) EU.

the principal question we are facing is whether, and to which extent, the Charter of Fundamental Rights will be relied upon by the Union to justify an expanded use of those powers, in order to fulfil the rights, freedoms and principles of the Charter.⁵⁵ The third, intermediate view advocated here, is based on the idea that the Charter may impose on the Union not only negative obligations – obligations to abstain from infringing fundamental rights – but also positive obligations – obligations to take measures in order to ensure that fundamental rights are effectively protected. Once it is recognized that the Charter of Fundamental Rights may be the source of positive obligations on the institutions of the Union or on the Member States when they implement Union law, deep consequences follow which, even within the existing constitutional strictures, may facilitate overcoming the apparent tension between the obligation to respect the Charter and the neutrality of the Charter on the existing allocation of competences.

This part of the article details this intermediate view and examines its implications. First, it examines the room which exists, in the current constitutional scheme, for a fundamental rights policy in the European Union. Second, it explains the contribution of the notion of positive obligations to our understanding of the Charter, leading to the conclusion that this notion may require the Union to seek to attain a high level of protection of fundamental when it acts. Third, it details certain advantages which could be gained from adopting such an approach. Fourth, it analyses certain limitations resulting from the principles of subsidiarity and proportionality, or from the definition of competences for the Union which are restricted to the adoption of minimal requirements. Fifth, it discusses why the identification in the international law of human rights of the level of protection of fundamental rights under Union law should be encouraged.

II.1. The powers to develop of fundamental rights policy for the Union

The intermediate view explored here is this. In order to facilitate compliance with the positive obligations derived from the Charter, the Union should be recognized implied powers to realize certain fundamental rights of the Charter, when these coincide with objectives the Union has to fulfil; although the fundamental rights policy of the Union should not lead to the transferral of supplementary competences to the Union, it may be based on the need for the Union to exercise the powers it shares with the Member States, where the decentralized implementation of fundamental rights produces suboptimal consequences; finally, an obligation to act to implement the rights of the Charter at the level of the Union may be imposed, in particular, where diverging approaches to fundamental rights risk creating an obstacle to the fundamental freedoms of movement recognized by Union law – currently, by the EC Treaty. Moreover, as the Member States are bound by the Charter in the implementation of Union law, they may be obliged not only to abstain from violating the rights of the Charter when they implement Union law, but also to take measures to ensure that fundamental rights of the Charter will be fully protected in the areas thus covered. The following paragraphs describe these consequences in further detail.

⁵⁵ G. de Búrca has argued that it is ‘simply inevitable (...) that the existence and incorporation of the Charter will influence the nature and interpretation of EU tasks and powers, although in subtler ways than the bald notion of “establishing new power” suggests’ (G. de Búrca, ‘Fundamental Rights and Citizenship’, in B. de Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, European University Institute, Robert Schuman Centre for Advanced Studies and Academy of European Law, 2003, p. 11, at p. 21). This is an adequate formulation for the point of view developed here.

Although the Union does not have among its objectives the realization of fundamental rights *in general* – an understanding which, although it remained to a certain extent implicit in Opinion 2/94,⁵⁶ now has been confirmed by the Draft Constitution⁵⁷ – certain fundamental rights nevertheless rank among those objectives and therefore could justify using the flexibility clause now located in Article 17 of the first part of the Draft Constitution. These include in particular: ‘combat[ing] social exclusion and discrimination’; promoting ‘social justice and protection’; pursuing ‘equality between women and men’ and ‘solidarity between generations’; and protecting children’s rights. For the realization of these values, the flexibility clause may apply, according to which ‘If action by the Union should prove necessary within the framework of the policies [of the Union] to attain one of the objectives set by the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall take the appropriate measures.’ This provision, which retains and somewhat enlarges Article 308 EC (ex-Article 235 of the EC Treaty), therefore makes it possible for the Union to adopt certain measures for the realization of the abovementioned objectives, provided of course there exists the political will to do so.

However, it will hardly be necessary, in most cases, to rely on the flexibility clause of the EC Treaty or, later, of the Constitution. Most of the rights, freedoms and principles of the Charter may be implemented by the Union in the exercise of the competences it already has received from the Member States. No systematic exposition of these possibilities is proposed here. However, the following table, relating provisions of the EC/EU Treaties to provisions of the Charter of Fundamental Rights, and offering a limited range of examples where the legal bases identified have served to implement fundamental rights of the Charter, should suffice to illustrate that there is room, even in the existing system of competences, for a fundamental rights policy of the Union based on the exercise of the powers it shares with the Member States.⁵⁸

Provision of the EC / EU Treaty	Article of the Charter	Examples
Article 13 EC	Article 21	Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

⁵⁶ The Court says in that Opinion that ‘No Treaty provision confers on the Community institutions any general power to enact rules on human rights’ (Recital 27), however the question whether Article 235 EC Treaty (now Article 308 EC) could be relied upon to promote human rights was left open (see Recitals 28 and 29 of the Opinion). See J.H.H. Weiler and S. Fries, ‘A Human Rights Policy for the European Community and Union: the Question of Competences’, in Ph. Alston, M. Bustelo and J. Heenan (ed.), *The EU and Human Rights*, Oxford, Oxford University Press, 1999, at pp. 159-160.

⁵⁷ See Article 3 of the Draft Constitution (listing the objectives of the Union without identifying the promotion of fundamental rights among them).

⁵⁸ The list presented in this table is not exhaustive; for instance, citizenship rights may also be developed by secondary legislation in other respects than freedom of movement; and Article 141 EC may serve to implement Article 23 of the Charter in work and employment.

		Proposal for a Council Directive implementing the principle of equal treatment between women and men in access to goods and services and provision of goods and services, (COM(2003) 657 final)
Article 18(2) EC	Article 45	Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Amended proposal: COM(2003)199 final)
Article 63 EC	Article 7 Article 18 Article 19	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air
Article 94	Article 30	Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses
Article 95 EC	Article 8	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
Article 137(2) EC	Article 31(2)	Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time
Article 31 EU	Article 48	Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union (COM(2003)75 final)

The question whether the Union *may* exercise such power is distinct, of course, from the question whether it may be under an *obligation* to exercise this power. Does the Charter impose such an obligation to act, and in which cases would such an obligation exist? Or, to phrase the question in terms more classical within human rights literature, may the Charter of Fundamental Rights impose positive obligations on the institutions of the Union?

II.2. Positive obligations derived from the Charter

It cannot be excluded *a priori* that the Charter may impose such an obligation on the Union institutions.⁵⁹ Article 51(1) of the Charter mentions that the institutions and organs of the Union and the Member States, to which the Charter is addressed, are obliged to ‘promote the application’ of the rights and principles contained in the Charter. The formulation suggests at least that the drafters of the Charter recognized that it may impose obligations beyond the purely negative duty to abstain from interfering without justification with these rights and principles.⁶⁰ This should not be seen as being in tension with the provision according to which the 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 51(2)). Indeed, as clearly recognized for instance by the Working Group II ‘Incorporation of the Charter/accession to the ECHR’ constituted within the European Convention, where the same question arose when the Group assessed the impact the accession of the Union to the ECHR would have on the division of powers between the Member States and the Union, the exercise of *already existing* powers in order to conform to fundamental rights does not amount to the transferral of new powers.⁶¹ Given the strong link which the drafters of the Charter have sought to maintain between that instrument and the European Convention on Human Rights, moreover, this reasoning per analogy seems perfectly justifiable. It is in line with the idea that, as the Charter of Fundamental Rights constitutes an instrument for the protection of human rights, it should be interpreted accordingly, and therefore should be seen as capable of imposing positive obligations where this appears to be required for the effective protection of those rights.

The question *when* positive obligations may be identified which impose on the institutions of the Union to adopt certain measures for the effective protection of the fundamental rights recognized in the Charter is more controversial than *whether* such positive obligations may in principle be derived from the Charter. It is submitted here that such a positive obligation exists where, in the absence of action at the level of the European Union, we may witness a ‘race to the bottom’ by Member States tempted to diminish the level of protection of

⁵⁹ Indeed, even before the adoption of the Charter of Fundamental Rights, it has been argued that the jurisprudence of the European Court of Justice may be read as affirming ‘that there is a positive duty of the institutions [of the Union] “to ensure the observance of fundamental rights”. In other words, they are obligated not simply to refrain from violating them, but to ensure that they are observed within the respective constitutional roles played by each institution’: Ph. Alston and J. H. H. Weiler, ‘An ‘Even Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights’, in Ph. Alston, M. Bustelo and J. Heenan (ed.), *The EU and Human Rights*, Oxford, Oxford University Press, 1999, p. 3, at p. 25. In the context of the discussion of the Charter, however, a more sceptical view has been expressed on the same point: see J. Kenner, ‘Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility’, in T. Hervey and J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective*, Oxford, Hart Publ., 2003, p. 1, at p. 19.

⁶⁰ Indeed, this explains the contradictory attitudes which were adopted vis-à-vis the Charter, which is ambiguous to the extent that it fulfils simultaneously a *limiting* function – it imposes certain constraints on the EU institutions and the member States implementing EU Law – and an *empowering* function – it serves to ‘promote the construction of a European political identity and mobilize European citizens around it’ (M. Poiarés Maduro, ‘The Double Constitutional Life of the Charter of Fundamental Rights’, in E. O. Eriksen, J. E. Fossum and A. J. Menendez (eds.), *The Chartering of Europe. The European Charter of Fundamental Rights and its Constitutional Implications*, Baden-Baden, Nomos Verlagsgesellschaft, 2003, p. 199). On this tension, see also – as it was reflected in the drafting process of the Charter – G. de Burca, ‘The Drafting of the European Union Charter of Fundamental Rights’, *European Law Review*, vol. 26, 2001, p. 126.

⁶¹ 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’.

fundamental rights within their jurisdiction⁶² – where, in other terms, the preservation of a high level of protection of fundamental rights appears to require an initiative from the Union. This is borrowed, *mutatis mutandis*, from the reasoning which guided the transferral of certain powers to the Union in the field of social rights, or in the field of asylum. In the former fields, the transferral of powers – or the exercise by the Union institutions of powers which had been transferred but had not been exercised yet, the Union having therefore not pre-empted the Member States – was justified by the need to avoid social dumping. With respect to asylum, the transferral of certain powers to the EU resulted from the need to limit the risk of secondary movements of asylum-seekers ‘shopping’ for the most favourable legislation from within the Member States of the EU, as it appeared that such movements could incite the Member States to restrict the advantages, procedural and material, afforded to asylum-seekers, in order to appear less attractive to potential candidates.⁶³ Would it not be justified to examine whether the same reasoning would not apply to other values embodied in the Charter of Fundamental Rights? Moreover, would the same reasons not lead us to the conclusion that, where the Union takes measures by which it seeks to implement the rights, freedoms and principles of the Charter, it should seek to achieve a high level of protection of fundamental rights, taking into account the developments within the international law of human rights?⁶⁴

II.3. The definition of a high level of protection of fundamental rights under Union law

Of course, the Member States are bound to respect the Charter of Fundamental Rights when they implement Union law. It is submitted, however, that Union law itself should stipulate the guarantees derived from the Charter, rather than leave it to the Member States to identify such guarantees when they act in the scope of application of Union law, under the control of the European Court of Justice. The Member States are under a *general* obligation to respect fundamental rights when they act in the field of application of Union law.⁶⁵ This is not a

⁶² On this risk, see C. Barnard, ‘Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware?’, *European Law Review*, vol. 25, 2000, p. 57. See also Lord Wedderburn, ‘Inderogability, Collective Agreements and Community Law’, *Industrial Law Journal*, vol. 21, 1992, p. 245.

⁶³ The development of minimum standards regarding the procedure for granting and withdrawing refugee status in the Member States is justified as follows in the Explanatory Memorandum which the Commission attached to the Proposal for a Council Directive which it submitted in this field: ‘Minimum Community standards [...] will help to limit secondary movements of asylum applicants as resulting from disparities in procedures in Member States. Henceforth, applicants for asylum will decide on their country of destination less on the basis of the procedural rules and practices in places than before. The continued absence of standards on the procedures for granting and withdrawing refugee status would have a negative effect on the effectiveness of other instruments relating to asylum. Conversely, once minimum standards on asylum procedures are in place, the operation of, inter alia, an effective system for determining which Member State is responsible for considering an asylum application is fully justified’ (Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM(2000) 578 final of 20.9.2000, OJ C 62 of 27.2.2001, p. 231).

⁶⁴ The wording is inspired of course by that of Article 95(3) EC, which states that the Commission shall base its proposals for the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market on ‘a high level of protection, taking account in particular of any new development based on scientific facts’, in the fields of health, safety, environmental protection and consumer protection.

⁶⁵ This concerns not only the provisions of the Charter of Fundamental Rights (Article 51(1) of the Charter), but also the fundamental rights which are part of the general principles of Union law and the respect of which the European Court of Justice controls on the basis of Article 220 EC, in all situations where the Member States implement European law (see, e.g., the judgment of 13 July 1989 in Case 5/88, *H. Wachauf*, (1989) ECR 2609 (Recital 19); or the judgment of 3 December 1992 in Case C-97/91, *O. Borelli SpA*, (1992) ECR 6313 (Recitals 14 and 15)), where they make use of an exception provided by the treaties (judgment of 28 October 1975, Case 36/75, *Rutili*, (1975) ECR 1219 (Recital 32); judgment of 18 June 1991, Case C-260/89, *ERT*, (1991) ECR I-2925 (Recital 43)) or by the case-law of the European Court of Justice (judgment of 26 June 1997, Case C-

substitute for ensuring, in each *specific* situation, that these rights will indeed be fully respected by the Member States in this framework. A positive obligation should be imposed on the Union legislator to ensure that where it intervenes, and thus extends the scope of application of EU law, it bases its intervention on a high level of protection of fundamental rights. Indeed, where an EU instrument defines instead a certain *minimal* level of protection of certain fundamental rights or creates for the benefit of the Member States certain exceptions, this may create the impression that provided they comply with that instrument or remain within the boundaries set by that exception, the Member States are acting in conformity with the requirements of fundamental rights⁶⁶ – an impression which, although in certain cases mistaken, may be difficult to dispel. Moreover, a *preventive* approach of the risks of fundamental rights being violated, above an approach which contents itself with the existence of a *post hoc* judicial control including a review of whether the Member States comply with fundamental rights when they act under Union law. Indeed, this latter approach results in subordinating the level of protection of fundamental rights to the scope of the powers of the European Court of Justice and the mechanisms through which these powers may be exercised. Three other considerations may be put forward to justify this insistence on a preventive approach, based on the imposition of a positive obligation on the Union legislator.

Favouring legal certainty

Such a preventive approach is favourable to legal certainty. This benefits, of course, the persons affected by EU law. But it also may benefit the Member States themselves. Indeed, where the EU instrument they implement is incomplete, insufficiently detailed or insufficiently protective of fundamental rights – implying that they should be complemented in that respect by the Member States themselves in the implementing measures they adopt –, the Member States are caught in a dilemma: either they implement EU law as faithfully as possible, without adding new exceptions to its provisions and without narrowing the scope of the instrument concerned; or, considering they are bound by fundamental rights in the implementation of EU law, the Member States fill in the lacunae EU law presents in this regard, at the risk of being accused of not complying with their obligation to fully implement its provisions.

The judgment delivered by the European Court of Justice on 6 November 2003 in the case of *Lindqvist*⁶⁷ provides an illustration. Mrs Lindqvist was charged with the breach of the Swedish legislation on the protection of personal data, adopted in implementation of Directive 95/46/EC, for publishing on her internet site personal data on a number of people working with her on a voluntary basis in a parish of the Swedish Protestant Church. Ms Lindqvist

368/95, *Familiapress*, (1997) ECR I-3689, (Recitals 18 and 19); judgment of 12 June 2003, Case C-112/00, *Schmidberger*, (Recitals 71 to 78)).

⁶⁶ For example, Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251 of 3.10.2003, p. 12), provides that ‘Member States may decide according to national law the conditions under which family members shall exercise an employed or self-employed activity. These conditions shall set a time limit which shall in no case exceed 12 months, during which Member States may examine the situation of their labour market before authorizing family members to exercise an employed or self-employed activity.’ (Article 14(2)). Arguably, in making use of this possibility, the Member States would be creating an indirect discrimination against women, as in the large majority of cases, the family members concerned by this clause will be women – wives joining their husbands –. However, the fact that this possibility is stipulated in the Directive may lead the national authorities to believe that imposing such a time limit before the family members may exercise an employed or self-employed activity, they will not be acting in violation of fundamental rights.

⁶⁷ Case C-101/01.

argued, however, that this Directive could be in violation of freedom of expression, as it does not define itself where the balance should be located between freedom of expression and the right to privacy. Answering the question of the Swedish national court, the European Court of Justice remarks that the Community legislature may not always be capable of deciding in advance on all the contentious situations which could present themselves. The Court then notes that the provisions of Directive 95/46/EC ‘are necessarily relatively general since it has to be applied to a large number of very different situations ... the directive quite properly includes rules with a degree of flexibility and, in many instances, leaves to the Member States the task of deciding the details or choosing between options’ (Recital 83). Therefore, although ‘in many respects, the Member States have a margin for manoeuvre in implementing Directive 95/46’, nevertheless ‘there is nothing to suggest that the regime it provides for lacks predictability or that its provisions are, as such, contrary to the general principles of Community law and, in particular, to the fundamental rights protected by the Community legal order’ (Recital 84). Recital 87 offers the most explicit recognition of the dilemma the Member States are facing when they are required to implement EU law having to reconcile its provisions, if necessary, with fundamental rights recognized within the EU legal order:

... it is for the authorities and courts of the Member States not only to interpret their national law in a manner consistent with Directive 95/46 but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law, such as *inter alia* the principle of proportionality.

The question of sanctions for violations of EU law offers a particular example of the tension which may exist between the obligation to faithfully implement EU law and the requirements of fundamental rights. Member States, of course, are under an obligation to provide for sanctions in cases of violations of European law which are at once effective, dissuasive and proportionate to the gravity of the violation;⁶⁸ at the same time, both under Article 49 of the Charter (where sanctions of a criminal character are provided) and under the general principle of proportionality, these sanctions must not be excessive. The Court continues in *Lindqvist* (Recital 88):

Whilst it is true that the protection of private life requires the application of effective sanctions against people processing personal data in ways inconsistent with Directive 95/46, such sanctions must always respect the principle of proportionality. That is so *a fortiori* since the scope of Directive 95/46 is very wide and the obligations of those who process personal data are many and significant.

It is clear that, where an instrument such as Directive 95/46/EC provides for a specific level of sanctions which the implementing national regulations must prescribe in cases of violations of its provisions, or where it specifies the balance to be made between freedom of expression and the protection of privacy in the processing of personal data, not only will it be easier for the individual to know the extent of his or her rights under Union law – it will also ensure that

⁶⁸ One of the most prescient authors on this question has been J. Mertens de Wilmars, ‘L’efficacité des différentes techniques nationales de protection contre les violations du droit communautaire par les autorités nationales et les particuliers’ (General Report presented to the London Congress of the FIDE, London, 1980), *Cah. dr. eur.*, 1981, p. 379. See also, for the most exemplary contributions to this topic, D. Curtin, ‘Effective Sanctions and the Equal Treatment Directive: the von Colson and Harz Cases’, 22 *C.M.L.Rev.* 505 (1985); F. Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’, 56 *Mod. L. Rev.* 19 (1993); B. Fitzpatrick & E. Szyszczak, ‘Remedies and Effective Judicial Protection in Community Law’, 57 *Mod. L. Rev.* 434 (1994).

the Member States will know more precisely what limits they cannot exceed in implementing EU law, without having to rely on their own understanding of the requirements of fundamental rights.

One dimension of this argument is that the rights, freedoms and principles enumerated in the Charter of Fundamental Rights of the Union require, for their interpretation, to be linked to the existing international and European law of human rights, on which they depend for their interpretation.⁶⁹ A more proactive fundamental rights policy for the Union, and one which operates preventively by the definition of a high level of protection of fundamental rights in the instruments of the Union, would be all the more justified by the fact that the norms relating to fundamental rights are generally formulated in vague and general terms. The intervention of the European legislator offers an opportunity to examine, in a more specific and contextualized fashion, the requirements which derive from those norms. In the course of such a specification, the interpretation given to those norms by jurisdictions or by expert committees should be taken into account. This may be especially useful where their work risks being insufficiently known because of the specialized character of their task of clarification of the States' obligations. Such a specification, by the European legislator, of the obligations which are imposed on the Member States with respect to fundamental rights in the implementation of Union law, may limit the risk that these rights are violated by the national authorities, even where such violations are to be explained by the sheer lack of knowledge about the norms which regulate a particular question.

Preserving the unity of the area of freedom, security and justice

Leaving it to the Member States to ensure the protection of fundamental rights in the adoption of implementation measures – rather than imposing on the EU legislator to define the content of this protection – also creates the risk that the States will narrow the scope of EU instruments by invoking the need to offer that protection. Here, it is the European Court of Justice which is caught in a dilemma: either it accepts that the Member States justify by the need to protect fundamental rights the adoption or the maintenance of certain measures, which otherwise would appear to be in violation with the requirements of Union law, and in particular with the fundamental economic freedoms of the EC Treaty, but *limiting this to situations where the Member States would be violating their international obligations if the measures in question could not be adopted or maintained*; or the Court goes beyond this authorization, and recognizes that the Member States may adopt or maintain measures which create obstacles to the fundamental economic freedoms of the EC Treaty insofar as these do not create any discrimination and remain proportionate to the aim of realizing fundamental rights, *even beyond what it required from the States by the international agreements they are bound to respect*. Neither of these two attitudes is fully satisfactory. The first attitude implies that, although the Member States will not be forced to violate other international commitments to respect Union law, they will be in fact prohibited from realizing fundamental rights beyond the minimal levels at which they are set under those international commitments. This will lead to the accusation that Union law makes it more difficult for the Member States

⁶⁹ For the argument that human rights norms are the product of an ongoing dialogue between jurisdictions, both national and international, entrusted with their interpretation, leading to the progressive formation of a 'jus commune' in this field, see C. McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights', 20 *Oxford Journal of Legal Studies* 499 (2000); A.-M. Slaughter, 'A Typology of Transjudicial Communication', 29 *Univ. of Richmond L. Rev.* 99 (1995); A.-M. Slaughter, 'Court to Court', 92 *A.J.I.L.* 708 (1998); A.-M. Slaughter, 'Judicial Globalization', 40 *Virginia Journal of International Law* 1103 (2000).

to develop of fundamental rights policy, insofar at least as such policy interferes with the fundamental economic freedoms which are at the core of the internal market. The second attitude implies, instead, that the Member States may invoke fundamental rights to justify what are, in effect, protectionist policies: under the disguise of ensuring the protection of fundamental rights, States may create obstacles to the free movement of goods or the free provisions of services, for instance, or they may endanger the uniform application of EU Law throughout the Union.

The case of *Albany* provides an example.⁷⁰ In that case, the European Court of Justice considered that Articles 3(g), 5 and 85 of the EC Treaty (now, after amendment, Article 3(1)(g), 10 EC and 81 EC) do not prohibit a decision by the public authorities to make affiliation to a sectoral pension fund compulsory at the request of organizations representing employers and workers in a given sector, despite the apparent restriction to free competition this implies. The Court arrives at this conclusion after reading Article 85(1) of the EC Treaty in the context of the EC Treaty as a whole. The EC Treaty includes a number of provisions encouraging social dialogue and provides that the activities of the Community are to include not only a 'system ensuring that competition in the internal market is not distorted' but also a 'policy in the social sphere' (Articles 3(g) and (i) of the EC Treaty), which the Court found to be manifested, *inter alia*, by the conclusion of an Agreement on social policy.⁷¹ The Court considers that although 'certain restrictions of competition are inherent in collective agreements between organizations representing employers and workers', however, 'the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment'.⁷² Consequently, it considers that collective agreements between organizations representing employers and workers are to be excluded from the scope of application of Article 85(1) of the EC Treaty, provided at least management and workers seek through such agreements jointly to adopt measures to improve conditions of work and employment. Where the agreement has the nature of a collective agreement between management and labour (i.e., where it is the outcome of collective negotiations between organizations representing employers and workers) and has the purpose of improving the working conditions, including remunerations, it should be exempted from the prohibition imposed by Article 85(1) EC Treaty on agreements between undertaking which restrict competition.⁷³

In the context of the present study, two aspects of this case deserve to be highlighted. First, although the Court concludes that the collective agreement in question deserves to be exempted from the scope of Article 85(1) EC Treaty, it appears notably reluctant to identify a fundamental right at the source of this exemption. Whether or not there exists a 'fundamental right to collective bargaining' is examined in detail by Advocate general F. G. Jacobs in his Opinion of 28 January 1999. Although the Commission contended, in particular, that the right to collective bargaining on pay and other conditions of employment is a fundamental right, invoking Article 11 of the European Convention on Human Rights, Article 6 of the European Social Charter, Article 22 of the International Covenant on Civil and Political Rights and Article 8 of the International Covenant on Economic, Social and Cultural Rights, as well as Conventions (N° 87 and N° 98) of the International Labour Organization, the Advocate General arrives at the conclusion that 'solely Article 6 of the European Social Charter seems

⁷⁰ Case C-67/96, *Albany*, [1999] I-5751 (judgment of 21 September 1999).

⁷¹ OJ 1992 C 191, p. 91.

⁷² Case C-67/96, *Albany*, Recital 59.

⁷³ Case C-67/96, Recitals 61-63.

expressly to recognize its existence. However the mere fact that a right is included in the [European Social] Charter does not mean that it is generally recognized as a fundamental right. The structure of the Charter is such that the rights set out represent policy goals rather than enforceable rights, and the States parties to it are required only to select which of the rights'⁷⁴ (point 146). The other potential sources from which a fundamental right to collective bargaining are examined with care, but finally found to be no more conclusive: according to Advocate general F.G. Jacobs, although there is a fundamental right to form and join unions and a fundamental right to take collective action in order to protect occupational interests, there exists no fundamental right of trade unions and associations of employers to bargain collectively. This approach demonstrates a fear to identify too easily certain State practices as constituting the recognition of 'fundamental rights', which the Community would be bound to respect, and against the requirements of which even primary EC law would need to be balanced.

Second, both the Court in its judgment of 21 September 1999 and the Advocate General consider that the immunity of collective agreements from the scope of application *ratione materiae* of Article 85(1) of the EC Treaty depends on these collective agreements being concluded in good faith *for the sole purpose of improving the working conditions*. Any agreement which would seek to fulfil other objectives would be suspect. Advocate General Jacobs considers that 'account must be taken of agreements which apparently deal with core subjects of collective bargaining such as working time but which merely function as cover for a serious restriction of competition between employers on their product markets [...] it is necessary to delimit the scope of the collective bargaining immunity, so that the immunity extends only to those agreements for which it is truly justified [...] the collective agreement must be one which deals with core subjects of collective bargaining such as wages and working conditions and which does not directly affect third parties or markets'.⁷⁵ In *Albany*, the Court accepts that the collective agreement concerning the creation of a supplementary pension scheme managed by a pension fund to which affiliation may be made compulsory may be exempted since 'Such a scheme seeks generally to guarantee a certain level of pension for all workers in that sector and therefore contributes directly to improving one of their working conditions, namely their remuneration'.⁷⁶

It is telling that the exemption of collective agreements from the scope of Article 85(1) EC Treaty is not justified by a fundamental right to bargain collectively, although this right, at the very least, can be presented as a development of the right to form and join trade unions and the right to take collective action for the defence of industrial interests. Indeed, as collective bargaining is a tool by which trade unions may pursue their objectives, its recognition contributes to the effectiveness of the freedom to join trade unions; and taking collective action in most cases pursues the objective of imposing an agreement to the other party, so that the possibility to conclude a collective agreement may be seen, again, as an instrument which makes collective action more effective. The refusal to qualify the Dutch provisions at stake as pursuing the objective to fulfil fundamental rights therefore may be interpreted as a refusal to accept a reading of fundamental rights which goes beyond the content of these rights as they are already recognized in international law or, alternatively, under the common constitutional traditions of the Member States. Although this attitude is of course methodologically sound, the consequence is that States will only be able to invoke the need to ensure the protection of fundamental rights to justify restrictions to Union law where the measure they wish to defend

⁷⁴ Opinion of Advocate General M. F. G. Jacobs, Case C-67/96, *Albany*, point 146 of the opinion.

⁷⁵ Opinion of Advocate General M. F. G. Jacobs, Case C-67/96, *Albany*, points 192-193.

⁷⁶ Case C-67/96, *Albany*, Recital 63.

is necessary to ensure such protection, according to the stage of development fundamental rights have reached. The requirement in *Albany International* that the collective agreement, to be exempted from competition law, deals with ‘core subjects of collective bargaining’, serves the same purpose: to avoid that fundamental rights will be invoked where the real objective is to shield a sector or a practice from the purview of European law.

Avoiding the ‘race to the bottom’ in the protection of fundamental rights

A third advantage resulting from the definition of fundamental rights at the level of the Union rather than, in decentralized fashion, at the level of the Member States, will present itself where the temptation of the Member States is, rather than to enter into protectionist practices, to seek to gain a competitive advantage on the other Member States, for instance by lowering fiscal charges, or social or environmental requirements, to attract foreign capital or favour their local producers. This hypothesis concerns more specifically the fundamental social rights of workers and environmental rights, and only marginally and very indirectly the protection of health or social security. Here, a fundamental rights policy led by the Union will serve to avoid the ‘race to the bottom’ in those fields, which may result from interjurisdictional competition. But the same reasoning may affect other domains. As we have seen, in the absence of at least minimum standards set at EU level in the field of asylum, there may be temptation by each Member State to lower the level of protection of asylum-seekers arriving on its territory, to avoid becoming a magnet destination for potential candidates to asylum in the EU. The definition of common rules concerning the identification of the State responsible for processing the asylum claim is one solution to this difficulty,⁷⁷ but it is still only a partial solution as asylum-seekers may still choose by which route to arrive in the EU; a more satisfactory option is to define common standards, both with respect to the material conditions of reception of asylum-seekers⁷⁸ and with respect to the procedure of determination of their status.⁷⁹

The regulation of working time in the EU – the example chosen by C. Barnard, S. Deakin and R. Hobbs in another chapter of this volume – may illustrate the need to ensure a high level of protection of fundamental rights in the instruments adopted by the Union. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time⁸⁰ codifies the changes brought to Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organization of

⁷⁷ This was the main aim of the Dublin Convention of 15 June 1990 determining the Member State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, which has now been transcribed into Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50 of 25.2.2003, p. 1, and Commission Regulation No. 1560/2003 laying down detailed rules for the application of Regulation No. 343/2003, OJ L 222, p. 3. These regulations are adopted on the basis of Article 63(1), (a), stating that the Council shall adopt within a period of five years after the entry into force of the Treaty of Amsterdam – i.e., before 1 May 2004 – ‘criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States’.

⁷⁸ See the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States, OJ L 31 of 6.2.2003, p. 18. Recital 8 of the Preamble of the Directive states that ‘The harmonization of conditions for the reception of asylum seekers should help to limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception’.

⁷⁹ See, cited above, the Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM(2000) 578 final of 20.9.2000), and the revised proposal (COM(2002) 326 final of 18.6.2002). This instrument was finally agreed upon by the Council on 29 April 2004.

⁸⁰ OJ L 299 of 18.11.2003, p. 9.

working time,⁸¹ since that directive was adopted ten years ago. It lays down minimal requirements for the protection of the health and safety of the worker in the organization of work (Article 15 of the directive). The Preamble of Directive 2003/88/EC states that ‘In view of the question likely to be raised by the organization of working time within an undertaking, it appears desirable to provide for flexibility in the application of certain provisions of this Directive, whilst ensuring compliance with the principles of protecting the safety and health of workers’ (Recital 15). However, one cannot but be struck by the number of derogations which are permitted under this instrument (see Chapter 5 of the directive), either in a number of contexts ‘by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection’ (Article 17(2)), or even in certain circumstances by prior individual agreement of the worker (Article 22). The reporting procedures provided for by Article 24(2) of the Directive (the reports by the member States on the practical implementation of the Directive will indicate the viewpoints of the two sides of industry) should be an opportunity to assess whether the derogations authorized under the Directive have not, in fact, distracted from the goal of minimal harmonization, under Article 137(2) EC, to avoid a regulatory competition detrimental to the fundamental social rights of the workers. Indeed, as recalled by Advocate General Tizzano in this context, ‘the objective of ensuring a comparable minimal level of protection as between the various Member States (...) meets the requirement, dictated by the need to prevent distortion of competition, of avoiding any type of social dumping, that is to say, in the last analysis, ensuring that the economy of one Member State cannot derive any advantage from adopting legislation which provides less protection than that of the other Member States’.⁸²

Of course, in implementing the directive, the Member States are bound to respect Article 31(2) of the Charter of Fundamental Rights, and therefore also arguably Articles 2(1) and (3) of the European Social Charter on which this provision of the EU Charter of Fundamental Rights is based. Should these provisions be violated in the implementation of EU Law, the Commission would have all the more reason for assuming the role of guardian of the Treaties that is assigned to it by Article 211 EC since, by its very nature, such a violation infringes the unity of the internal market, within which competition must not be distorted.⁸³ However, again a preventive approach would have been more desirable. The Directive could have stated with more precision which requirements are imposed by Article 31(2) of the Charter of Fundamental Rights, and therefore which limits the States may not cross in using the exceptions provided for their benefit in the Directive. This would have represented a gain in legal certainty, and would have pre-empted the risk of deregulatory competition by the Member States and the industry, to which the Commission acting as guardian of the treaties and the European Court of Justice may only offer less effective answers – less effective, indeed, because they are reactive rather than preventive, operating *post hoc* rather than *ex ante*.

⁸¹ OJ L 307, 13.12.1993, p. 18. Directive 93/104/EC has been amended by Directive 2000/34/EC of the European Parliament and of the Council (OJ No. L 195, 1.8.2000, p. 41).

⁸² Opinions of Advocate General A. Tizzano of 8 February 2001, preceding ECJ, 26 June 2001, BECTU, C-173/99, here recital 45 of the opinions.

⁸³ See ‘Commission Communication on better monitoring of the application of Community law’, COM(2002)725 final, of 20/12/2002.

The example above illustrates the need for the EU legislator to prevent the risk of violation of fundamental rights occurring in the field of application of EU law, by seeking to adopt, whenever it acts, a high level of protection of fundamental rights. The development of the activities of the Union in the field of judicial cooperation in criminal matters offers an example where even this form of mainstreaming human rights may not be sufficient: here certain initiative from the Union may be required; it will not suffice, if and when the Union acts, to ensure that fundamental rights are protected – what may be necessary is for the Union to act. In its Communication to the Council and the European Parliament *Mutual recognition of Final Decisions in criminal matters*,⁸⁴ the Commission explains the search for EU rules on exclusive jurisdiction by the need to avoid ‘forum-shopping’, either by the offenders or by the victims, who may be tempted to bet on the differences between the material and procedural criminal laws of the Member States:

With the introduction of mutual recognition, the moment appears to have come for the existing system, by which a number of Member States could have jurisdiction for the same offence, to be complemented by rules clearly designating one Member State. The rules on jurisdiction should not only prevent positive conflicts of jurisdiction (where two or more Member States want to judge a certain matter), but also negative conflicts of jurisdiction (where no Member State wants to judge a certain matter).

Elsewhere in the same communication, the Commission proposes the following example as to why the mutual recognition of judicial decisions in criminal matters may call for criteria determining which State should have jurisdiction on certain offences:

For example, in Member State A, euthanasia is a crime, whereas in Member State B, it is legal if the person wishing to die gives his or her consent in a written statement. Both Member States under their national, non-coordinated rules have jurisdiction for the matter. A person having performed euthanasia covered by a written statement wishing to obtain immunity for this act in Member State A could see to it that he or she is prosecuted in Member State B, withholding the fact that the written consent has been obtained. Once the trial has begun, he or she would present the statement, and could be sure of an acquittal, which would then have to be recognized in Member State A.

In these passages, the search for EU rules on exclusive jurisdiction appears to be required to compensate for the differences between the Member States concerning the material definition of certain crimes, and the specific abuses this may lead to in a context where the interested persons may choose under the jurisdiction of which State they will face prosecution or seek reparation as victims. The temptation of ‘forum-shopping’, however, can also be countered by the approximation or harmonization of the criminal law. In the case of euthanasia for instance, the difficulty identified by the Commission would not occur if a legal basis could be identified in the EU Treaty to adopt a common definition of euthanasia and the conditions under which it may be decriminalized,⁸⁵ and if the Member States could agree on this matter, despite the diverging approaches they have adopted to this day.

⁸⁴ COM(2000) 495 final of 25.7.2000.

⁸⁵ The Draft Constitution introduces more flexibility in this respect than the current Treaty on the European Union. Article III-172(1) of the Draft Constitution provides that ‘European framework laws may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with cross-border dimensions resulting from the nature or impact of such offences or from a special need to combat them on a common basis’. The Council of Ministers, acting unanimously with the consent of the European Parliament, may identify which crimes meet these criteria. One question which it will be facing is whether there is a ‘special need to combat on a common basis’ certain offences simply because, with the free

II.4. The limitations imposed by the principles of subsidiarity and proportionality and by the restriction of the powers of the Union to the imposition of 'minimal requirements'

For all these reasons, it is proposed that it should be verified whether, when it has intervened in particular field, the European legislator has indeed adopted all the measures which could reasonably prevent the risk of a violation of fundamental in the field in question; and that some form of monitoring of fundamental rights within the Union with a view to identifying the situation where an initiative from the Union may be required for the effective protection of fundamental rights, would be highly desirable. Is that asking from the Union more than it can deliver? Whenever it intervenes in a field where it does not have an exclusive power – and indeed, in most cases, the competences conferred upon the Union which it could use to implement the Charter are shared with the Member States – the Union may only act, in conformity with the principles of subsidiarity and proportionality, if and to the extent that the objectives of the action envisaged cannot be sufficiently realized by the Member States and can therefore, because of the scope or the effects of the action envisaged, be better realized at the level of the Union; and only insofar as its action does not exceed what is necessary to fulfil the objectives assigned to the Union.⁸⁶ Moreover, the principles of subsidiarity and proportionality regulate not only the content, but also the form of Union intervention, so that directives should be preferred to regulations, and framework directives preferred above more detailed directives.⁸⁷ But the interpretation of these principles must take into account the obligations imposed by the Charter of Fundamental Rights. It would be incorrect to consider that the institutions of the Union are violating these principles in ensuring more completely, in the instruments they adopt, that the Member States will respect the fundamental rights of the Charter in the course of their implementation.⁸⁸

Another obstacle to imposing such a preventive approach to the protection of fundamental rights within the legal order of the Union – whereby the Union is under an obligation to adopt instruments offering a high level of protection of fundamental rights – is that, in a number of fields where it has the required competence, the Union may only adopt minimal standards. This is the case in particular with respect to the rights of persons in need of international protection and with respect to the rights of workers. Articles 63(1) and (2) EC state that the

movement of persons and the free provision of services for instance, offenders and victims may be tempted by 'forum-shopping' in the absence of an approximation of the criminal laws of the Member States. For instance, is the fact that a citizen of the Union residing in France may seek euthanasia, as a medical service, to be performed in the Netherlands or in Belgium, rendering the criminalization of euthanasia in France possibly ineffective, sufficient to justify the need for common action in that field?

⁸⁶ The formulations of the Draft Constitution are very close to those of Article 5 EC: 'the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level' (principle of subsidiarity); and 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution' (principle of proportionality) (Article 9, (3) and (4) of the Draft Constitution).

⁸⁷ *Protocol (n° 30) on the application of the principles of subsidiarity and of proportionality*, annexed to the EC Treaty by the Treaty of Amsterdam, para. 6: 'The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Directives as provided for in Article 189 of the Treaty, while binding upon each Member State to which they are addressed as to the result to be achieved, shall leave to the national authorities the choice of form and methods'.

⁸⁸ Ph. Alston and J. H. H. Weiler, 'An "Even Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights', in Ph. Alston, M. Bustelo and J. Heenan (ed.), *The EU and Human Rights*, Oxford, Oxford University Press, 1999, p. 3, at p. 27.

Council shall adopt *minimum standards* on the reception of asylum seekers in Member States, with respect to the qualification of nationals of third countries as refugees and on procedures in Member States for granting or withdrawing refugee status,⁸⁹ and for giving temporary protection to ‘displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection’.⁹⁰ This constitutes an important limitation on the possibility for the Council to implement Article 18 of the Charter of Fundamental Rights, which relates to the right of asylum.

Similarly, with a view to promoting employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources and the combating of exclusion, and ‘having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers’,⁹¹ the Community may adopt directives imposing ‘*minimum requirements* for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States’,⁹² in fields such as the improvement in particular of the working environment the protection of workers’ health and safety, the definition of working conditions, social security and social protection of workers, the protection of workers where their employment contract is terminated, the information and consultation of workers, the representation and collective defence of the interests of workers and employers, the conditions of employment for third-country nationals legally residing in Community territory, and the integration of persons excluded from the labour market.⁹³ Again, the restriction implied by the notion of minimum requirements may constitute an obstacle for the effective implementation of Article 27 (workers’ right to information and consultation within the undertaking), Article 28 (right of collective bargaining and action), Article 30 (protection in the event of unjustified dismissal), and Article 31 (fair and just working conditions) of the Charter.

Moreover, although Article 31 e) EU provides for the possibility of common action to improve judicial cooperation in criminal matters, the harmonization of the criminal law is limited to the progressive adoption of ‘measures establishing *minimum rules* relating to the constituent elements of criminal acts and to penalties in the fields of organized crime, terrorism and illicit drug trafficking’. Therefore, although this may lead to the adoption of acts – in particular under the form of Framework Decisions – which will ensure a better protection in particular of rights enumerated under Articles 2 (right to life), 3 (right to the integrity of the person), 4 (prohibition of torture and inhuman or degrading treatment or punishment), to the extent at least that these rights are threatened by the development of organized crime, the Member States retain the possibility to provide for incriminations which go beyond the definition of the constituent elements of criminal acts contained in Union law. The choice which was made for the approximation of criminal laws instead of their harmonization therefore results in a situation where certain differences, which may at times appear significant, will continue to exist between the Member States, and may lead to certain obstacles to judicial cooperation in criminal matters.⁹⁴ This difficulty should be relativized,

⁸⁹ Article 63(1), (b), (c) and (d) EC. On 29 April 2004, the Council has adopted on the basis of this provision a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status.

⁹⁰ Article 63(2), (a) EC.

⁹¹ Article 136, al. 1, EC.

⁹² Article 137(2)(b) EC.

⁹³ Article 137(1), (a) to (h), EC.

⁹⁴ See generally A. Weyembergh, *L’harmonisation des législations: condition de l’espace pénal européen et révélateur de ses tensions*, éd. de l’ULB, Brussels, 2004.

however, as Article 31, c), EU in any event forms another legal basis by which the approximation of the national laws in the field of criminal law, both substantive and procedural, may progress.

II.5. The identification in the international law of human rights of the level of protection of fundamental rights under Union law

In the proposal which is made, the definition of a high level of protection of fundamental rights under Union law should be paired with a more systematic indexation of Union law to the international law of human rights: the instruments which protect human rights in international and European law, and which are binding on at least some of the Member States, should be taken into account by the Union in the adoption of its legislations. This would present a number of advantages.

Such an alignment of Union law with international and European human rights law would limit the risk of situations occurring where the Member States would be facing conflicting obligations under Union law, on the one hand, under international agreements concluded in the field of human rights to which they are parties, on the other hand. Under the current constitutional scheme, such conflicts are not satisfactorily dealt with. With respect to the undertakings the Member States have taken before their accession to the Union, Article 307 EC provides that the rights and obligations arising from agreements concluded before the date of their accession, 'between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty'. This implies that the requirements of EC law shall be set aside to facilitate the compliance by the Member State concerned with the commitments it has made previously in the international legal order. This is in compliance with general public international law: for the third States with which a State acceding to the Union has concluded previous agreements, whether in a bilateral or in a multilateral context, the Treaty providing for the accession to the Union is a *res inter alios acta*, which may not be opposed to them.⁹⁵ However, this solution presents a number of limitations, and cannot be said to suffice for a harmonious coexistence between Union law and pre-existing international obligations.

First, Article 307 EC obviously concerns only European Community law, and there is no equivalent clause in the Treaty on the European Union. Although specific instruments adopted within this latter Treaty may specify that they are without prejudice of the international agreements concluded by the Member States, in particular or pre-existing bilateral agreements with third States, this remains an *ad hoc* solution, and situations of conflict may still occur. Of course, concerning specifically pre-existing obligations in the field of human rights, Article 6(2) EU ensures in principle that a Member State will not be obliged to comply with an instrument adopted within the Union when this would lead to a violation of fundamental rights.⁹⁶ However it is uncertain whether any pre-existing undertaking of a Member State presenting a relationship to human rights will be considered to be covered by this clause, or – beyond a literal interpretation of that provision – by the general principles of Union law which secondary legislation must comply with. Differences of opinion may occur, moreover, about

⁹⁵ See the reference made by the European Court of Justice to Article 30(4), b), of the Vienna Convention on the Law of Treaties of 23 May 1969 in the judgment of 5 November 2002 : Case C-466/98, *Commission v. the United Kingdom of Great Britain and Northern Ireland*, [2002] ECR I-9427, Recital 24.

⁹⁶ See, for instance, in the Framework Decision of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, of 18.7.2002, recitals 12 and 13 of the Preamble and Article 1(3) of the Framework Decision.

the precise scope of the obligations of the Member States both under Union law and under the treaties they have concluded in the field of human rights, and in certain cases no authoritative reading will emerge, with the result that uncertainties will persist. For instance, although the Protocol on asylum for nationals of Member States of the European Union, annexed to the Treaty of Amsterdam, states that it ‘respects the finality and the objectives of the Geneva Convention of 28 July 1951 relating to the status of refugees’,⁹⁷ the dominant opinion is that the solution of the Protocol, defining the Member States as safe countries of origin ‘for all legal and practical purposes in relation to asylum matters’ – an appreciation which results in principle in the inadmissibility of asylum claims emanating from nationals from other Member States –, is in fact in violation of the Geneva Convention of 28 July 1951.⁹⁸ Although the Draft Constitution provides, in effect, for an extension of Article 307 EC to all Union law,⁹⁹ it retains the solution of this provision, which may underestimate the difficulty of evaluating precisely to which extent the pre-existing agreements may justify a State in limiting its obligations under Union law, where the interpretation of those agreements is contested.

Another reason why the solution offered by Article 307 EC to the situation of conflict between pre-existing international obligations of the Member States and their obligations under EC Law is not fully satisfactory, is that the recognition of the primacy of those pre-existing international obligations is purely transitory. Indeed, Article 307 al. 2 EC provides that: ‘To the extent that such [pre-existing] agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude’. Therefore the Member States may be obliged to denounce a pre-existing international agreement where it appears that it creates a situation of conflict with their obligations under EC Law.¹⁰⁰ This may result in a progressive erosion of the commitments made by the Member States under international instruments in the field of human rights, to the extent at least that these instruments impose obligations which go beyond the guarantees considered to be binding upon the Union under Article 6(2) EU and the general principles of Union law recognized by the European Court of Justice – or, once the Charter of Fundamental Rights will have been made binding, which exceed the minimal level of protection offered by the Charter. The capacity for the Member States to comply with the international instruments they have concluded in the field of economic and social rights, in the framework of the Council of Europe or of the United Nations, may be particularly endangered in this regard, considering the reluctance of the European Court of Justice to include social rights within the general principles of Union law

⁹⁷ Declaration No.48 to the Treaty of Amsterdam moreover states that ‘The Protocol on asylum for nationals of Member States of the European Union does not prejudice the right of each Member State to take the organizational measures it deems necessary to fulfil its obligations under the Geneva Convention of 28 July 1951 relating to the status of refugees’.

⁹⁸ See A. Bribosia and A. Weyembergh, ‘Le citoyen européen privé du droit d’asile’, *Journal des tribunaux-Droit européen*, 1997, p. 204; by the same authors, ‘Extradition et asile: vers un espace judiciaire européen?’, *Revue belge de droit international*, 1997, p. 87. Belgium made a declaration annexed to the Treaty of Amsterdam under which it states that, ‘in accordance with its obligations under the 1951 Geneva Convention and the 1967 New York Protocol, it shall, in accordance with the provision set out in point (d) of the sole Article of that Protocol, carry out an individual examination of any asylum request made by a national of another Member State’. This illustrates the fragility, under the Geneva Convention, of the presumption established by the Protocol – a fragility of which, as this Declaration shows, the drafters were fully aware.

⁹⁹ See Article III-341 of the Draft Constitution.

¹⁰⁰ Case C-62/98, *Commission v. Portugal*, [2000] ECR I-5171. See P. Manzini, ‘The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law’, *E.J.I.L.*, vol. 12, n° 4, September 2001, p. 781.

the respect of which it guarantees, and the absence of any formal link between the provisions of the Charter of Fundamental Rights recognizing social rights and the relevant instruments of international law (such as the Revised European Social Charter or the International Covenant on Economic, Social and Cultural Rights), in the way such a link is made between the rights and freedoms borrowed from the European Convention on Human Rights and the corresponding provisions of this instrument.

To avoid such negative consequences, it would be advisable to seek inspiration from the clause creating such a link between the Charter of Fundamental Rights and the ECHR. Article 52(3) of the Charter provides that ‘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’. *Mutatis mutandis*, the same solution should prevail for those rights, freedoms or principles of the Charter which are inspired by other international instruments for the protection of human rights, particularly in the field of social and economic rights where the risk of conflicts between the obligations imposed under Union law and their other international commitments is highest. This would greatly limit the potentiality that such conflicts will arise: in most cases where a State would apparently have to choose between its commitments under international instruments for the protection of social and economic rights and compliance with Union law, a reading of the Charter of Fundamental Rights in accordance with those instruments would pre-empt that conflict, by excluding a reading of the requirements of Union law – or the adoption of European legislation – which would contradict those instruments.

Another advantage of this systematic indexing of the reading of the Charter on the international law of human rights would reside in the gain of legal certainty this represents. Many of the provisions of the Charter are relatively vague and general. A number of provisions of the Charter are to be read ‘in accordance with the rules laid down by Union law and national laws and practices’ and Article 52(6) of the revised version of the Charter states in this respect that ‘Full account shall be taken of national laws and practices as specified in this Charter’: what remains from the obligatory character of the Charter – the ‘essence’ of the right guaranteed, perhaps – remains debated.¹⁰¹ Under Article 52(4) of the Charter of Fundamental Rights as revised by the European Convention, where the 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’ – however, how precisely those traditions may be identified (they are not to be assimilated with the text of the national Constitutions) and when such ‘constitutional traditions’ present a sufficient degree of

¹⁰¹ By way of comparison, although Article 12 ECHR guarantees the right to marry and to found a family ‘according to the national laws governing the exercise of this right’, the European Court of Human Rights considered that the right to marry ‘is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired’ (*Christine Goodwin v. the United Kingdom*, Appl. No. 28957/95, judgment of 11 July 2002, § 99; *I. v. the United Kingdom*, Appl. No. 25680/94, judgment of 11 July 2002, § 79; see also the *F. v. Switzerland* judgment of 18 December 1987, Series A No. 128, § 32). Similarly, whilst the Community Directive on the Organization of Working Time (Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, OJ L 307 of 13.12.1993, p. 18) refers to national law and practices concerning the ‘conditions for entitlement’ – meaning that the Member States have some latitude in defining the arrangements for the enjoyment of paid leave –, the Member States nevertheless may neither negate such an entitlement nor affect its scope : such were the conclusions arrived at by Advocate General A. Tizzano in his Opinion delivered on 8 February 2001 in the case of *BECTU*, where Article 31(2) of the EU Charter of Fundamental Rights is used as a ‘substantive point of reference’ (para. 28 of the opinion).

convergence to be considered ‘common’ to the Member States, remains undefined. The uncertainties resulting from these formulations may be reduced by a systematic reference to the corresponding norms from European and international human rights law.

Finally, an interpretation of the Charter in accordance with the corresponding provisions of international and European human rights instruments would prepare the accession of the European Union to those instruments. Although both the European Community and the European Union are to be considered as having an international legal personality,¹⁰² and although such legal personality will be formally recognized to the Union in the Constitution,¹⁰³ there still lacks any general reflection within the institutions of the Union as to the accession of the Union to the international instruments in the field of human rights to which the Member States are parties. Indeed, the common view is that, in the absence of a general power of the Community or the Union in the field of fundamental rights,¹⁰⁴ the limits imposed on the exercise of the international powers of the Community or the Union are an obstacle to their accession to international instruments for the protection of human rights.¹⁰⁵ However, even under the present definition of the external powers of the Union / Community, the accession to a number of international instruments in the field of human rights protection may be envisaged, from the point of view of Union law: just like the *acquis* of the European Community in the field of data protection has been deemed sufficient for the accession of the Community to the convention concluded on this question in the framework of the Council of Europe,¹⁰⁶ similarly the *acquis* of EC Law in the field of equal treatment between women and men and in the field of non-discrimination on grounds of race or ethnic origin would appear sufficient to identify a power of the Community to accede to the United Nations Conventions on the Elimination of All Forms of Discrimination against Women (CEDAW)¹⁰⁷ and on the Elimination of All Forms of Racial Discrimination (CERD).¹⁰⁸ The Communication which the Commission presented on 24 January 2003 to the Council and the European Parliament,

¹⁰² The Treaty of Rome attributes such an international legal personality to the European Community: see Article 281 EC (ex-Article 210 of the EC Treaty). With respect to the Union, this personality derives from the competence which it has since the entry into force of the Treaty of Amsterdam on 1 May 1999, at Article 24 EU, to conclude international agreements with States or international organizations. Such an agreement binds the Union as such, and not only the Member States who act together in the framework of the EU Treaty: indeed, the State which abstains from voting within the Council when the Council concludes an international agreement can make a formal declaration in which case ‘it shall not be obliged to apply the decision, but shall accept that *the decision commits the Union*’ (Article 23(1), al. 2, EU). The existence of such a competence to conclude international agreements suffices to create the international legal personality. There is no requirement of a formal attribution of such personality, for instance in the Act constituting the international organization. See ICJ, opinion relating to the reparation of damages incurred in service of the United Nations, 11 April 1949, Reports, 1949, p. 174.

¹⁰³ Article 6 of the Draft Constitution.

¹⁰⁴ *Accession of the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/94, ECR I-1759, Recital 20.

¹⁰⁵ Comp. with Article 7(2) of the Draft Constitution for Europe, providing that ‘The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution’.

¹⁰⁶ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, of 28 January 1981 (E.T.S., No.108). The Amendments to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data authorizing the accession of the European Communities have been adopted by the Committee of Ministers of the Council of Europe at its 675th meeting, on 15 June 1999. All the States parties should notify their acceptance of these amendments before these can enter into force. Only once they have entered into force, will it be possible for the European Communities to accede to the Convention.

¹⁰⁷ UN Gen. Ass. Res. 34/180 of 18 December 1979. All the 25 Member States of the EU have ratified this instrument.

¹⁰⁸ UN Gen. Ass. Res. 2106 A(XX) of 21 December 1965. All the 25 Member States of the EU have ratified this instrument.

‘Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities’,¹⁰⁹ fits into this evolution. Nor can we exclude that, in the areas covered by the Revised European Social Charter of 3 May 1996¹¹⁰ or the Geneva Convention on the status of refugees of 28 July 1951, the exercise by the Union/Community of its powers – which it shares with the Member States – could lead to recognize it a power to accede to these instruments.

More fundamentally perhaps, it may be worth questioning the adequacy of the classical case-law of the European Court of Justice concerning the extent of the external powers of the Community, where the question of accession to an international instrument protecting human rights is posed. By acceding to such instruments, the States parties undertake to respect certain minimal standards for the benefit of the persons under their jurisdiction, which implies in the first place that they will not adopt any measures which derogate from these standards. Insofar as the undertaking is purely negative (formulated as an obligation to *abstain from*), it is irrelevant whether or not the Party has the competence to take measures which implement the given standard. It is only where the undertaking is also to adopt certain measures – to fulfil positive obligations (to *act*) – that the question of competences may play a role: as mentioned above, there will be a question of imposing positive obligations on the Union only if, and to the extent that, the Union has been attributed certain competences which it could exercise to comply with such positive obligations. The accession of the Union to international instruments adopted in the field of human rights must not necessarily have an impact on the extent of its competences. Quite to the contrary, such an accession must in principle be considered neutral from the point of view of the division of competences between the Union and the Member States.¹¹¹ Although this neutrality could be expressed through a specific clause inserted in the accession protocols,¹¹² it results fundamentally from the very principle of attributed competences, according to which the Union could not exercise competences which are not attributed to the Union by the Member States, even for the sake of better complying with obligations the Union has contracted on the international plane.

If the accession to the international instruments for the protection of human rights cited above may only be envisaged at a later stage, for reasons ideological rather than because of legal obstacles, at least it is important immediately to articulate better the fundamental rights recognized within the Union and the international law of human rights. This option is the only one which preserves the possibility, in the future, of the Union acceding to the relevant international instruments, without this creating too important difficulties or requiring important modifications in the EU secondary legislation to ensure that it will be fully compatible with the international commitments of the Union. This constitutes the last, but perhaps not the least powerful, argument in favour of a reading of the Charter of Fundamental Rights in accordance with the existing *acquis* in international and European human rights law.

¹⁰⁹ COM(2003)16 final.

¹¹⁰ ETS, n° 163.

¹¹¹ *Mutatis mutandis*, Article 28 of the International Covenant on Economic, Social and Cultural Rights for instance, adopted by the Gen. Ass. of the United Nations on 16 December 1966 (Res. 2200 A (XXI)), states that ‘The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions’. This provision however cannot be construed as having the effect to invest the federative entities within each State with competences which these entities are denied under the constitutional organization of the State.

¹¹² Such a clause could seek inspiration from Article 7(2), 2nd sentence, of the Draft Treaty establishing a Constitution for Europe, which says that the accession of the Union to the European Convention on Human Rights ‘shall not affect the Union’s competences as defined in the Constitution’. It could also be formulated along the lines of Article 51 of the Charter of Fundamental Rights.

III. The Open Method of Coordination for the Implementation of the Charter of Fundamental Rights

The intermediate view defended above should be seen as an attempt to define the components of a fundamental rights policy for the Union, within the boundaries set by the current constitutional scheme. The Union has certain powers which it may exercise for the fulfilment of fundamental rights. It may be argued that, in certain cases, the Union will be under an obligation to exercise these powers. Such an obligation, we have seen, may be said to exist either where a decentralized implementation of fundamental rights would create the risk of a 'race to the bottom', or where it would lead to the creation of new obstacles in the internal market or to the cooperation between the Member States in the emerging area of freedom, security and justice. Where the Union does act, moreover, the choice of a high level of protection of fundamental rights in the instruments it adopts presents a number of advantages, some of which were discussed in the previous section. The existing standards in the international and European human rights instruments provide the required baseline from which to identify whether the Union does indeed opt for a sufficiently high level of protection; we have seen at last that reliance on those standards presents certain side advantages which may not be neglected.

Beyond its symbolic significance as a solemn statement of fundamental values, the Charter will be endowed with a legal significance as a catalogue of rights contained in the Constitution. The question is whether it also will be recognized a political significance, as identifying the goals which the Union ought to achieve and opening the way for the emergence of a fundamental rights policy in the EU.¹¹³ There are signs that this significance is progressively being recognized. For instance, the European Social Agenda – as presented by a Communication of the Commission of 30 June 2000¹¹⁴ and as approved by the Nice European Council in December 2000¹¹⁵ – mentions the importance of the Charter of Fundamental Rights for the future development of social policy in the Union and, indeed, borrows much of its terminology from the Charter of rights. However, the effectiveness of the Charter as a guide for policy-making in the Union may require that adequate institutional mechanisms are set up. In December 2003, the European Council has decided that an EU Human Rights Agency shall be created in Vienna, resulting from the enlargement of the EU Monitoring Centre on Racism and Xenophobia operational since 1998.¹¹⁶ This should be seized as a unique opportunity to launch a process of open coordination between the Member States for the implementation of the Charter of Fundamental Rights.¹¹⁷

The Open Method of Coordination, as referred to in the EC Treaty under the Titles concerning Employment¹¹⁸ and Social Policy,¹¹⁹ represents a mechanism through which the

¹¹³ See J. H. H. Weiler, 'Editorial Comments: Does the European Union Truly Need a Charter of Rights?', *European Law Journal*, vol. 6, 2000, p. 95, at p. 96.

¹¹⁴ COM(2000) 379 final.

¹¹⁵ OJ C 157 of 30.5.2001, p. 4.

¹¹⁶ Council Regulation (EC) n° 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151 of 10.6.1997, p. 1.

¹¹⁷ See also N. Bernard, 'A 'New Governance' Approach to Economic, Social and Cultural Rights in the EU', in T. Hervey and J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights. A Legal Perspective*, Oxford, Hart Publ., 2003, p. 245, esp. at pp. 263-267.

¹¹⁸ See Article 129 EC, al. 1: 'The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, may adopt incentive measures designed to encourage cooperation between Member States and to support their action in the

exercise the Member States make of their competences can be monitored, both with a (negative) view to limiting the risk that they will exercise those competences in a way which does not sufficiently take into account the externalities they may produce on the other States, and with a (positive) view of promoting innovative solutions to problems faced by all the States, and for the treatment of which they could learn from one another. This form of coordination, in other terms, does not imply a transferral of supplementary powers at the level of the Union, but at the same time it avoids the disadvantages that are linked to the decentralized approach to employment policies and social policies: that the Member States act as free riders in the internal market – for instance, develop policies which amount to social dumping –; and that, in the absence of any exchanges between the States as to their respective practices, the States do not benefit from the experiences each of them launches, whether these experiences are evaluated as failures or as successes. It is important to note that the risks associated with the decentralized implementation of fundamental rights are distinct from the risk that the minimal requirements set by fundamental rights are not complied with by each Member State, considered separately. A judicial supervision of the Member States' activities is sufficient to ensure that they will not violate the fundamental rights which they are bound to respect – including, where they act in the scope of application of Union law, the Charter of Fundamental Rights. Such a judicial, *post hoc* monitoring will be insufficient, however, to ensure that the different rhythms at which Member States proceed to fulfil fundamental rights do not result either in the creation of obstacles to the internal market or to the cooperation in the area of freedom, security and justice, or in situations in which each State will be under an incentive to lower the level of protection of fundamental rights under its jurisdiction, for instance to ensure that undertakings located on its territory will not be at a competitive disadvantage vis-à-vis undertakings situated elsewhere in the Union. What we require therefore is a mechanism comprising regular exchanges of information on the fundamental rights policies pursued by each Member State, to ensure that where such situations emerge the Union may take an initiative, either by the adoption of a binding legal instrument in the exercise of its attributed powers, or by the adoption of a non-binding recommendation to the State the mode of implementation of fundamental rights of which is at the source of the problem identified.

It is proposed here that the future EU Human Rights Agency – perhaps with the assistance of the EU Network of Independent Experts¹²⁰ – should systematically examine the evolution of fundamental rights in the Member States to identify the situations where diverging trends could imperil the unity of the internal market or create incentives for the Member States to

field of employment through initiatives aimed at developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting innovative approaches and evaluating experiences, in particular by recourse to pilot projects'.

¹¹⁹ Under Article 137(2)(a), the Council 'may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonization of the laws and regulations of the Member States' with a view to achieving the objectives of 'the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion', 'having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers' (Article 136 EC).

¹²⁰ The Communication of the Commission to the Council and the European Parliament, 'Respect for and promotion of the values on which the Union is based', COM(2003) 606 final, of 15.10.2003, mentions that the Network has 'an essential preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded'.

practice ‘rights dumping’ – lowering the level of protection of certain fundamental rights, especially the fundamental social rights of employees, to gain a competitive advantage in the single market. Where such a risk appears, the added value of a form of open coordination at the level of the Union would consist in identifying ways in which it may be prevented from realizing. In certain cases – where the initiatives by one State recreate obstacles between the national economies –, this will require identifying ways in which such a conflict can be lessened or altogether avoided. In other cases – where there appears a tendency to ‘race to the bottom’ in the protection of fundamental rights –, it will be necessary to examine whether the EU should not have to use the powers it has at its disposal to impose a harmonization at least at a minimal level, by the setting of a ‘floor’ obligatory on all states, to limit the impact of regulatory competition. In the absence of such powers, at a minimum, recommendations may be addressed to the Member States which could be tempted to act as free riders in the internal market. Such recommendations, despite their formally non-binding character, will exert on these states a certain political pressure and could reinforce the position of the actors at national level who oppose the lowering of standards in the protection of fundamental rights.

There is no need here to anticipate on the debate which will be launched when the Commission will make its first proposals on the structure and tasks of the EU Human Rights Agency. But it may be useful to identify the main implications of the introduction of an open method of coordination to bring political life into the Charter of Fundamental Rights. Imagine that, at regular intervals, for instance on an annual basis, States were to report on their achievements in the realization of fundamental rights and identify their objectives and the means and timeframe for implementing them by the presentation of national action plans. An evaluation of these reports and action plans would examine the impact of the policies followed on the other Member States, with which they share a common area of freedom, security and justice. It would question which initiatives, if any, should be taken at the level of the Union, either under the form of normative proposals, or under the form of recommendations adopted by the Council. Three shifts would appear to be implied by such a procedure:

III.1. The search for equilibrium in the conciliation of economic freedoms and fundamental rights

A first shift, I would submit, concerns our understanding of the relationship between the ‘fundamental’ economic freedoms constitutive of the internal market and the fundamental rights of the Charter. The introduction of the open method of coordination in the field of fundamental rights should not fall into the trap of being a means through which to impose the primacy of the ‘Economic Constitution’ of the Union on its ‘Political Constitution’. Instead, its guiding principle should be to lessen the conflict between the rules of the internal market and the capacity of the Member States to protect fundamental rights under their jurisdiction. This has implications at the micro-level of our understanding of the relationship between the two sets of rules in conflict. We should move from a situation where the fundamental rights protected by the Member States are seen as potential obstacles to economic freedoms, where they are invoked by the States to justify restrictions to the free movement of goods, the free provision of services, or – for instance – rules relating to competition, to a situation where economic freedoms are balanced against fundamental rights. In the current understanding of the relationship between these two sets of guarantees, the fundamental rights which are preserved at the level of the Member States are most often framed as derogations to the economic freedoms, especially the free movement of goods, the free provision of services,

and free competition.¹²¹ In the new understanding proposed here, instead, what would be sought are means of preserving both values – market freedoms and fundamental rights –, without one value being sacrificed to the other. Indeed, the very fact that the Charter of Fundamental Rights includes both economic freedoms¹²² and other, non-market, fundamental rights, implies the need for such a non-hierarchical approach, without any relationship of priority between the two sets of rights or freedoms. In each situation of conflict, we should search for one equilibrium point in which any further restriction imposed to one of the values in conflict would not be compensated for by the gain it represents for the preservation of the other value.

I will be pardoned if I picture this as a form of Pareto optimum in the balancing of fundamental rights. Not all solutions to such conflicts are equivalent. On the contrary, there should be, for each situation of conflict, one solution from which any deviation would entail more losses than gains for the two values considered together, which are both equally worthy of respect. This solution may rightly be called idealistic, insofar as it presupposes, for its workability as a method, that the limitations brought to each right can be calculated, and the balancing process thus reduced to a mathematical formula. But even despite the implausible character of such a reduction, the notion of this equilibrium remains useful to guide the actors – and the judge – in the process of balancing. In fact, the very fact that such an operation is not mathematical – i.e., that the balancing of rights in the search of the equilibrium point which is the least restrictive of the rights in conflict considered together – is what confers to this vision its main advantages. It encourages a contextualized approach of the need to reconcile the conflicting requirements of market freedoms and fundamental rights, as well as mutual learning and, in connection with this, a dynamic view of the competences attributed to the Union for the furtherance of fundamental rights. It requires the implication of the stakeholders involved in the search for the most adequate ways of combining market freedoms with fundamental rights, and rewards imaginative approaches to this process of adjustment. The following paragraphs explain why.

II.2. A procedural and dynamic understanding of the question of competences

The assertion that a decentralized implementation of fundamental rights, where these are defined at the level of the Member States without any attempt to harmonization at the level of the Union, may produce suboptimal effects, is equivalent to saying that the power which the Member States may attribute to the Union, is not necessarily power which is subtracted from the Member States. The relationship is not one of communicating vases. On the contrary, it has been written, ‘power is increased to mutual benefit by the very fact of action in common’, so that arguments about the allocation of power cannot be framed as arguments about ‘who wins and who loses’.¹²³ The mutual observation of the Member States which would be made

¹²¹ See above, section I.1., b).

¹²² In particular, Article 15 of the Charter recognizes the freedom of every citizen of the Union to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. The Charter does not guarantee as such a ‘right to free competition’ as could be derived from Articles 81 and 82 EC. However, Article 16 of the Charter recognizes the freedom to conduct a business, and the explanations to the Charter of Fundamental Rights (both the original explanations of the Presidium and the revised explanations accompanying the revised version of the Charter to be inserted in the Treaty establishing a Constitution for the Union) refer to the objective of ensuring that competition within the Union is free and undistorted.

¹²³ St. Weatherwill, ‘Competence’, in B. de Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, European University Institute, Robert Schuman Centre for Advanced Studies and Academy of European Law, 2003, p. 45, at p. 46.

possible by an open form of coordination should permit, precisely, to identify – with respect to particular rights – where, preferably, the implementing measures should be adopted.

The decentralized implementation of fundamental rights may present certain advantages. It may favour experimentation in each Member State of original solutions, most suitable to the local context. However, in many cases, which is unavoidable in a single area, decisions in one State will affect the other States: whether these externalities are positive or negative, some form of coordination would be required, either to limit the negative consequences or to avoid that States benefiting from positive externalities free ride on the efforts of others.¹²⁴ Moreover, even where local experimentation is deemed to be an objective more desirable than better coordination, experimentation in one jurisdiction is useful only to the extent that the other jurisdictions may learn from it, which requires a form of shared evaluation. The goal of the exchange of information and best practices in an open form of coordination, therefore, is both to avoid opportunistic attitudes by States – whose loyal cooperation with one another would seem to require, indeed, that they ‘take account of the effects of their actions on the Union and on other Member States’¹²⁵ – and to favour mutual learning, by the evaluation, performed in common, of the experiences launched by each State. Of course, such a mutual observation may lead to the conclusion that some form of action may and should be taken at the level of the Union. But this is perfectly compatible with the principle of subsidiarity, insofar as the objective to be fulfilled cannot adequately be achieved by Member State action alone, and where the scale of effects of the proposed measure favour Community action.¹²⁶

Such an understanding of the allocation of competences between the Member States and the Union is *procedural*, in the sense that rather than identifying *a priori* where the competences should be exercised, the answer to this question should depend on the evaluation, in each case, of the advantages of a decentralized approach, in comparison to the advantages of an intervention at the level of the Union. The choice made by the European Convention to define shared competences as the norm¹²⁷ is an important step in that direction. But there still would appear a need to identify a mechanism through which the exercise, respectively by the Union and the Member States, of the competences they share could be allocated on a basis most efficient from the point of view of the realization of fundamental rights. Moreover, the solution arrived at concerning the exercise of competences should not be set once and for all. Instead, it should be revisable and *dynamic*, according to our understanding of the requirements of fundamental rights and the level best suited for their implementation.

III.3. Input- and output-participation

¹²⁴ St. Weatherwill notes: ‘...in some circumstances, made more common by transnational economic integration, a decision taken by one bloc of citizens may have serious negative consequences for another, politically more remote bloc of citizens. So localized decision-making may be neglectful of the full constituency of interests affected by those decisions. [...] This suggests a formula for allocating competence that will be based on ability to deliver the most efficient and most representative (of all affected interests) decisions’ (‘Competence’, cited above, at p. 48).

¹²⁵ St. Weatherwill, ‘Competence’, cited above, at p. 56.

¹²⁶ Ph. Alston and J. H. H. Weiler, ‘An “Even Closer Union” in Need of a Human Rights Policy: The European Union and Human Rights’, in Ph. Alston, M. Bustelo and J. Heenan (ed.), *The EU and Human Rights*, Oxford, Oxford University Press, 1999, p. 3, at p. 27.

¹²⁷ See Article 13(1) of the Draft Constitution (‘The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles 12 [exclusive competence of the Union] and 16 [areas in which the Union may take supporting, coordinating or complementary action]’).

The participation of stakeholders, especially non-governmental organizations and other civil society organizations, in the formulation at the national level of policies relating to fundamental rights would be encouraged by the introduction of an open method of coordination in the domain of fundamental rights at the level of the Union. States could be encouraged or even obliged to involve those stakeholders in the preparation of their reports and national action plans.¹²⁸ Moreover, the dynamism of these actors would ensure that, even when they take the non-compulsory form of recommendations, the acts adopted at the level of the Union will be followed upon, and that national administrations will be pressured to pay them the required attention.

As it clearly appears from the excerpts of the 1955 Ohlin Report cited at the beginning of this chapter, the reflection the ILO Group of Experts proposed on the ‘social aspects of economic co-operation’ was based on an anticipation concerning both the capacity for the concerned actors (the unions in particular) to exert sufficient pressure at the national level to limit the risks of a race to the bottom in the field of social legislation, and the preservation of certain minimum international standards by conventions concluded within the International Labour Organization and the Council of Europe. In the broader field of fundamental rights, similar expectations can be made. Indeed, the open method of coordination could have the effect of empowering civil society organizations seeking to improve the protection of fundamental rights at the national level: not only would the adoption of recommendations at the level of the Union influence the balance power between those organizations and the executive, but moreover – and, in the long term, more importantly – the systematic comparisons between the States and their respective achievements in the realization of fundamental rights could importantly contribute to improving the knowledge of these organizations, thus contributing to their capacity to influence the national debate and equip them with the cognitive resources they require. In that sense, the participation of the organized civil society in the preparation of the national action plans (input-participation) as well as in the follow-up of the recommendations addressed to the State by the Union (output-participation), although it is based on a presumption that these actors have valuable perspectives to offer, may also be seen as a self-fulfilling prophecy: it is to the extent that participation is widened and that the exchange of information is effectively practiced – not only between the States but also within each State, between the State apparatus and the civil society – that participation will be seen as justified, by the capabilities progressively developed by the actors.

¹²⁸ See the role already played, in many Member States, by the national institutions for the promotion and protection of human rights, set up in accordance with the Paris Principles adopted by the United Nations General Assembly in Resolution 48/138 (1993): *Opinion n°1-2004 of the EU Network of Independent Experts in Fundamental Rights on the role of the national institutions for the protection and promotion of human rights in the Member States of the Union*, www.europa.eu.int/comm/justice_home/cfr_cdf/doc/avis/2004_1_en.pdf