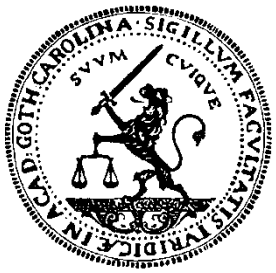

FACULTY OF LAW
Lund University

Henrik Holmström

Development of the Protection of Fundamental Rights within the European Union – an improved human rights agenda?

Master thesis
30 credits

Xavier Groussot
EU law

Spring 2011

Contents

Summary

The Treaty of Rome which established the European Economic Community contained no explicit references to the protection of fundamental rights. This thesis describes the emergence of an EU acquis covering the field of fundamental rights developed by the EU judiciary and legislators in close cooperation with the Member States and the Council of Europe. The objective of this essay is to present the added value of the development in this particular area of Union law. Thus, the starting point of the examination is the development of the case law by the European Court of Justice. The ECJ early established the existence of fundamental rights as general principles of Community law. Due to not least explicit criticism of the Community legal order expressed by national constitutional courts concerning fundamental rights issues in relation to the supremacy of Community law the Court developed a doctrine where fundamental rights were given a prominent position within the legal system of the Community. Fundamental rights, as safeguarded by national constitutions and the European Convention on Human Rights, were to be considered as general principles with an aura equivalent to the highest-ranking norms of the Community. As a response to the jurisprudence of the ECJ, the legislative powers of the Union gave the protection of fundamental rights its truly deserved attention by including references and specific provisions in the Treaty of Maastricht and the Treaty of Amsterdam, albeit to a large extent merely codifying the findings of the Court. *Pari passu*, and in the light of a rediscovered European human rights agenda farther institutional development of the protection of fundamental rights within the Union could be discerned. In connection to the new millennium an EU fundamental rights catalogue, the EU Charter of Fundamental Rights and an EU monitoring center for human rights, the Fundamental Rights Agency emerged. The Charter of Fundamental Rights was “solemnly proclaimed” in December 2000 whereas the Fundamental Rights Agency was established in March 2007. These two novelties are both examples of instruments unprecedented in the Union. The most recent development, yet with an utmost importance for the protection of fundamental rights, is to be found in the Treaty of Lisbon, signed in 2007 and entered into force in December 2009. The Treaty of Lisbon clarified the ambiguities concerning the legal status of the Charter, making it a legally binding document attached as a protocol to the Treaty. It furthermore called for an EU accession to the ECHR. Despite the clarifications and additions to the fundamental rights protection in the Union flowing from the Treaty of Lisbon, uncertainties concerning the scope, application and interpretation of the Charter still remain. It is for the ECJ to further clarify and specify the impact of the Charter and the rights contained therein. Equally unclear is the future EU accession to the ECHR. Accession, however, appears to be imminent. In that case, it would indeed clarify not only the relationship between the EU and the ECHR but also the content of the Charter as well as the nature of the protection of fundamental rights within the European Union.

Sammanfattning

När den Europeiska ekonomiska gemenskapen bildades genom Romfördraget fanns inga uttryckliga hänvisningar till skyddet för de grundläggande rättigheterna. Den här uppsatsen beskriver framväxten av regelverket för de grundläggande rättigheter som har utvecklats av EU:s rättsväsende och lagstiftare i nära samarbete med medlemsstaterna och Europarådet. Målet med denna framställning är att presentera mervärdet av denna utveckling för denna specifika del av EU-rätten. Initialt inleddes utvecklingen med att EU-domstolen tidigt fastställde att de grundläggande rättigheterna utgjorde en del av de allmänna principerna inom gemenskapsrätten. Domstolen utvecklade, inte minst på grund av uttrycklig kritik av gemenskapsrättens förhållande till de nationella grundläggande rättigheterna och principen om EU-rättens företräde framfört av nationella författningsdomstolar, ett förhållningssätt i vilket de grundläggande rättigheterna gavs en framträdande placering inom gemenskapens rättssystem. De grundläggande rättigheterna, vilka skyddas av såväl nationella författningar som Europakonventionen, kom att bli en del av de allmänna principerna och ansågs därmed i praktiken likställda till de högst rankade normerna i gemenskapens rättsordning. Till följd av domstolens rättspraxis garanterades de grundläggande rättigheterna ytterligare skydd genom införandet av specifka regleringar i såväl Maastrichtfördraget som Amsterdamfördraget, låt vara att dessa i stort enbart utgjorde kodifiering av domstolens tidigare utslag. Hand i hand med denna utveckling och i kölvattnet av en ”återupptäckt” agenda för mänskliga rättigheter i Europa kunde man urskilja ytterligare utveckling av skyddet för de grundläggande rättigheterna. I samband med millennieskiftet växte en katalog av de grundläggande rättigheter inom EU, ”Stadgan om de grundläggande rättigheterna” samt ett övervakningscenter för grundläggande rättigheter, ”Byrån för grundläggande rättigheter” sakta fram. Stadgan proklamerades högtidligt i december 2000 medan Byrån för grundläggande rättigheter grundades i mars 2007. Båda dessa nya verktyg saknade tidigare motstycke inom EU:s rättsordning. Den allra senaste utvecklingen på området, om än med yttersta vikt för skyddet av de grundläggande rättigheterna, Lissabonfördraget undertecknades 2007 och trädde i kraft i december 2009. Lissabonfördraget bidrog till ett klargörande av de tvetydigheter som rörde Stadgans rättsliga ställning genom att göra den rättsligt bindande. Vidare möjliggjorde Lissabonfördraget för en framtida anslutning av EU till Europakonventionen. Trots dessa förtydliganden återstår fortfarande en rad oklarheter rörarande Stadgans omfång, tillämpning och tolkning. Det är upp till EUD att fortsättningsvis avgöra vilken inverkan Stadgan och dess innehåll kommer att ha på EU-rätten. Det kvarstår även oklarheter rörande EU:s framtida anslutning till EKMR. Det verkar dock som att en anslutning är relativt nära förestående vilket i så fall, med allra största säkerhet, skulle klargöra inte bara förhållandet mellan EU och Europakonventionen utan även innehållet i Stadgan och skyddet för de grundläggande rättigheterna inom EU i stort.

”Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.”[1]

[1] Preamble, Charter of Fundamental Rights of the European Union

Abbreviations

CFI	The Court of First Instance
CoE	Council of Europe
EC	European Community
EC Treaty	European Community Treaty
ECJ	European Court of Justice
ECR	European Union Charter of Fundamental Rights
ECtHR	European Court of Human Rights
ECHR	The Convention for the Protection of Human Rights and Fundamental Freedoms
EEA	European Economic Area
EEC	European Economic Community
EU	European Union
EUMC	EU Monitoring Centre on Racism and Xenophobia
FRA	European Union Agency for Fundamental Rights
PACE	Parliamentary Assembly of the Council of Europe
SEA	Single European Act
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
ToA	Treaty of Amsterdam
UN	United Nations

1 Introduction

1.1 Background

The European Economic Community was established in the light of the intensified cooperation between European states short after the end of the Second World War. Its foundation was based mainly on economical aims and free trade among the participating Member States. Parallel to the development of the EEC the Council of Europe and the ECHR was created in order to promote the protection of fundamental human rights that, largely, had been neglected during the first 45 years of the 20th century. Thus, a clear division of powers could be noticed already from the inception of the two European institutions.

In the original Treaties of the Community no provisions concerning protection of human rights could be found. However, during the last 60 years this distinct division of powers between the Community and the CoE has become unclear and developed into a complex web of provisions and case law emerging from the two institutions and covering areas in the grey zone of each institutions mandate. The European Court of Justice has, in a number of cases, acknowledged fundamental rights as general principles of EU law. The Maastricht Treaty introduced the protection of fundamental rights in the Community Treaties. In the end of the last century the process of creating an EU Charter for the protection of fundamental rights was launched. However, the Charter did not receive full legal effect until the Lisbon treaty entered into force on the 1st of December 2009. The Lisbon treaty also decreed that the EU should accede to the ECHR. Additionally, prior to the entry into force of the TFEU an EU Fundamental Rights Agency was established.

This essay aims to clarify the development and the status of the protection of fundamental rights within the European Union and the relationship between the EU and the Council of Europe, mainly the ECHR, as well as the courts of the two institutions.

1.2 Purpose

A number of different questions arise when examining the protection of fundamental rights provided by the legal instruments in the EU. The purpose of this essay is initially to assess the case law, the different provisions and other legal documents that are relevant to the protection of fundamental rights and to examine the current and future state of this protection. This is a comprehensive task covering a vast area of jurisprudence, Treaty provisions as well as secondary law and institutional development. It would not be credible to, as a starting point for this thesis,

examine whether the protection of fundamental rights within the Union has developed and improved over the years. Simply by briefly glance at the protection in retrospective, one must contend that this area of Community law indeed has been enhanced. Therefore, in order to provide a logical structure to this thesis and to present an understandable essay the main question, from which a number of subcategories emerge, will be phrased:

"To what extent has the protection of fundamental rights within the European Union been strengthened over the recent past - what is the added value of the development in this field?"

Inevitably, issues concerning the development of fundamental rights as general principles of Community law by the ECJ, legislative developments, the establishment of the Fundamental Rights Agency, the proclamation of the Charter of Fundamental Rights and the relationship between the EU and the CoE/ECHR will form an integral part of this essay.

In the light of the recent development in the field, a core component of the current debate is the effect of the Lisbon Treaty which of course also will constitute a sizeable part of the thesis. This essay, however, is, by no means, supposed to constitute a fully comprehensive and exhaustive investigation of the development of the protection of fundamental rights within the EU. Rather, the aim is to give the reader a general knowledge over the important and decisive moments of the progress and improvement over the years, yet emphasizing on the latest development in the area and the specific parts of fundamental rights protection still being legally uncertain and unclear. Although specific examinations of certain parts of the fundamental rights protection will be carried out, I intend to present a holistic and widespread assessment providing for the reader a fair idea of the development as a whole. In the conclusions, the specific developments presented in the thesis will be reiterated, merely with the aim of assessing their value for the protection of fundamental rights and to enunciate a forecast of what is to expect from the future.

1.3 Method and disposition

To fulfil the purpose of this thesis a number of different sources will be considered. The case law of the ECJ and, in applicable cases, the ECtHR will play an integral part of the examination. Furthermore, authoritative literature is elementary for the assessment. Concerning the parts of the essay dissecting the current and future development, one must primarily rely on the literature consisting of up to date articles. The examination will also cover the genesis and drafting of such institutional novelties as the Charter of Fundamental Rights and the Fundamental Rights Agency. In these sections, I will first and foremost assess the primary sources at hand, published by the EU.

To be able to carry out an examination of this vast and complex area of EU law one must first familiarise oneself with the background of the protection of fundamental rights in EU law. Thus, Chapter 2 will provide this historical assessment concerning the earlier stages of protection of fundamental rights within the Community. The case law of the ECJ and the legislative development will be examined under this section. Furthermore, Chapter 3 will focus on the development of the Charter of Fundamental Rights and the Fundamental Rights Agency. In Chapter 4 the relationship between the EU and the CoE/ECHR and the ECJ and the ECtHR will be evaluated. Lastly, Chapter 5 will discuss the consequences of the Lisbon Treaty in relation the Charter of Fundamental Rights and to the future EU accession to the ECHR. The thesis will be concluded by a final analysis which will focus on the main questions set up in this introduction.

Since the Lisbon Treaty abolished the three-pillar structure, I will not be consistent in my references, but, when the situation requires, refer to the EU/Union law or to the Community/Community law. Furthermore, the term "fundamental rights" will almost exclusively be used in lieu of "human rights". This is in line with the language used by the Union when "human rights" commonly is used with regard to international law, while "fundamental rights" refers to national constitutions or rights deriving from constitutional law.[2]

A last clarification: the EU – ECHR relationship is indeed an integral part of the development of fundamental rights as general principles of EU law and not a process differentiated from others, however, in order to structure this thesis in a comprehensible way this relationship will be examined in a separate chapter, as mentioned above, Chapter 4.

1.4 Delimitations

Since the topic of this thesis has to be regarded as a vast and complex area of EU law some delimitations have to be considered beforehand. An examination of the *locus standi* of private parties is not within the scope of this thesis. Despite the very interesting aspects of several issues in this area, the thesis will not be constructed from a "citizen perspective" but rather present a retrospective approach describing a *raison d'être* for the present legal order. Neither will possible actions or sanctions of measures violating fundamental rights be discussed. As long as it is not of the utmost importance of this examination, no detailed discussions about the Constitutional Treaty will take place. The Constitutional Treaty did not reach acceptance from the Member States and was therefore not approved. There might however be some specific parts of the thesis where the Constitutional Treaty briefly is discussed, yet only in relation to more important issues. This thesis will not conduct any detailed examination of

[2] Kinzelbach & Kozma, *Portraying Normative Legitimacy: The EU in Need of Institutional Safeguards for Human Rights*, p. 606

specific fundamental rights or the substantial values therein but rather explain the institutional development of the EU framework nor will it claim to, in any way, examine the nature or the basic ideas behind human rights as such.

2 Protection of fundamental rights in the 20th century

2.1 Development of fundamental rights as general principles of EU law by the ECJ

The Treaties setting the structure for the cooperation between the participating states in the early stages of the Community contained no provisions at all concerning the protection of fundamental rights. The preamble of the Treaty of Rome, signed in 1957 and establishing the EEC, emphasises, *inter alia*, the importance of economic and social progress as well as the removal of all obstacles that could interfere balanced trade and fair competition.[3] However, the contracting parties also proclaimed a determination to preserve and strengthen peace and liberty. The reason for the omission of an explicit reference to fundamental rights is most likely to be found in the European political structure in the aftermath of the Second World War.[4] The CoE and the ECHR that preceded the Treaty of Rome had already set up a human rights agenda for a number of European countries. However, as the political agenda of the Community slowly expanded the impact on private economic life and commercial interest grew stronger.[5] This led to an increased need of protection in the field of fundamental property and commercial rights. In the light of this new development of Community law the ECJ acted as a prominent figure slowly by slowly establishing a new order within the Community in which fundamental rights enjoyed a far more extensive attention.

The initial proof of the existence of fundamental rights as part of general principles of Community law came in 1969. The ECJ had prior to that, in the *Stork*[6] case, denied itself any competence to protect fundamental rights in Community law. However, the ECJ stated that the provision at stake in the *Stauder*[7] case, a Commission decision concerning the sale of butter, "contained nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the court". The Court did not provide any additional information of the extent of these general principles nor the fundamental rights contained in them. Nevertheless, the mere finding of these general principles constituted a disruption in the prevailing jurisprudence of the Court and thus enabled the ECJ to further elaborate on the existence of the fundamental rights as

[3] Preamble, EEC Treaty, signed in Rome 25 march 1957
[4] Tridimas, *The General Principles of EU Law*, p. 300
[5] Craig & De Burca, *EU Law, text, cases and materials*, p. 381
[6] Case 1/58, *Friedrich Stork & Cie* v *High Authority of the European Coal and Steel Community*
[7] Case 29/69, *Erich Stauder* v *City of Ulm – Sozialamt*

general principles and to continuously explore the concept in order to specify the the principles. The constitutional traditions common to the Member States were, among other things, used as a tool in this examination. This is evident in the *Internationale Handelsgesellschaft*[8] case in which the ECJ confirmed the findings in earlier case law and developed what was established in the *Stauder* case. In the case, that was initiated by German traders who challenged the system of deposits established by Community agricultural regulations on the ground that in violated fundamental rights protected by the German Constitution, settled in 1970 the Court initially reconfirmed the doctrine of the supremacy of Community law by stating that the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of its constitutional structure. However, the Court continuously determined, with reference to the *Stauder* case, that the respect for fundamental rights forms an integral part of the general principles of law protected by the ECJ and that the protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community. Thus, the legal traditions of the Member States were to be used as merely providing inspiration to the general principles inherent in the Community legal order whilst at the same time respect the supremacy of Community law.[9] The development of the jurisprudence of the Court could hardly be considered as surprising. As noted by many, it is highly unlikely that the national parliaments of the founding Member States would have ratified a Treaty which was capable of, to a large extent, violating the fundamental rights contained in their own constitutions.[10]

The ECJ continued their quest of specifying the impact of fundamental rights within Community law by their conclusions in the *Nold*[11] case. The case concerned new regulations and terms of business in the coal sector authorized by the Commission. The applicant, a German company which, due to the legislation, lost its status as a direct wholesaler and thus the possibility to get direct supplies from the producer, argued that the decision of the Commission infringed on the right to property and the freedom to trade, both protected by the German Constitution. In its grounds, the Court first and foremost reiterated earlier case law and emphasized the importance of the constitutional traditions common to the Member States. Additionally, it pointed out yet another considerable source of law as an inspiration for the general principles; “fundamental rights are an integral part of the general principles of law the observance of which the Court ensures. In safeguarding these rights the Court is bound to draw inspiration from the constitutional traditions common to the Member States and cannot uphold measures which are incompatible with the fundamental rights established and guaranteed by

[8] Case 11/70, *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*
[9] Craig & De Burca, op. cit., p. 383
[10] Tridimas, op. cit., p. 302
[11] Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung* v *Ruhrkohle Aktiengesellschaft*

the constitutions of these states. Similarly, international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law."[12] Furthermore, the Court established that the rights at issue in the case could be subjects to limitations if a justification by the overall objectives pursued by the Community were to be found.[13] Limitations in the public interest are indeed included in the constitutional traditions common to the Member States and should therefore consequently form an integral part of the general principles.

The *Hauer*[14] case contained the first explicit reference to the ECHR. As in *Nold* the ECJ, *inter alia*, established that international treaties can supply guidelines which should be followed within the framework of Community law. Furthermore, the Court stated: "that conception was later recognized by the joint declaration of the European Parliament, the Council and the Commission on 5 April 1977 [further examined in Chapter 2.3 below], which, after recalling the case law of the Court, refers on the one hand to the rights guaranteed by the constitutions of the Member States and on the other hand to the European Convention for the Protection of Human Rights and Fundamental Freedoms".[15]

In *Internationale Handelsgesellschaft* the Court merely established the fact that the general principles of Community law derives from national constitutions and thus that fundamental rights contained therein are an integral part of the Community legal order. In the later rulings of *Nold* and *Hauer*, however, the ECJ was more overt to declare that any measure clearly incompatible with those fundamental rights protected by national constitutions could not be upheld.[16] This progressive approach was by many considered as a result of the defying attitude of the German Constitutional Court, Bundesverfassungsgericht, following *Internationale Handelsgesellschaft* and as an important step towards greater legitimacy for the Community polity. Even though the case law of the Court acknowledges the Member States constitutions as sources for the general principles, the contents of the rights might differ between Community law and national constitutions. However, the frequent references to the national constitutions in this early stage of the development of fundamental rights protection ought to suggest that, in this particular field, national law is more influential than in relation to other general principles within the framework of Community law.[17] This approach might also further enhance the legitimacy of the Community legal order. The relationship between the ECJ and the national courts in the field of fundamental rights has, as mentioned above, at times been considerably strained. The German Constitutional Court altered its

[12] Ibid., para 2
[13] Ibid., para 14
[14] Case 44/79, *Liselotte Hauer* v *Land Rheinland-Pfalz*
[15] Ibid., para 15
[16] Tridimas, op. cit., p. 303
[17] Ibid., p. 304

approach to Community fundamental rights after the *Solange II*[18] case where it considered that the ECJ, despite the lack of a fundamental rights catalogue within the Community, had reached a level that substantially coincided with the one granted by the German Constitution. Prior to that decision the Constitutional Court had reviewed the validity of specific Community acts in the light of German national fundamental rights.[19] Thus, the decision of the Bundesverfassungsgericht could indeed be considered as a proof of the strengthening of fundamental rights protection within the Community at the time being.

A more recent yet somewhat unavoidable issue of the protection of fundamental rights is the potential collision between fundamental rights and fundamental freedoms.[20] The problems arising from this issue have been made visible in a number of cases before the ECJ. The *Schmidberger*[21] case could however be regarded as a good example of the complexity relating to this issue. The colliding rights in the case were the free movement of goods provided by the Treaty and the freedom of assembly and association. The Court held that the different rights and freedoms were to be considered as of the equal constitutional ranking and furthermore established that they both could be subject to limitations. However, when weighing the rights and freedoms against each other in order to determine whether a fair balance was struck between them the ECJ came to the conclusion that the freedom of assembly and association could not, in the specific situation, be achieved through less restrictive measures than the ones taken by the Austrian authorities, as concerned in the case. Consequently, the *Schmidberger* case indeed gives a clear sign that the Court takes fundamental rights seriously and conducts itself not as the Court of an economic union but as the Supreme Court of a constitutional order.[22] Up until the *Schmidberger* ruling the Court most readily gave the benefit of the doubt to the free movement in question. The *Schmidberger* findings could nevertheless not be considered as a constant approach of the Court. A recent example of when the free movement prevails is the *Laval*[23] case where the Court had to balance the right to take collective action against the freedom to provide services. In the case the ECJ established that, although the right to take collective action must be recognized as a fundamental right, the exercise of that right may nonetheless be subject to certain restrictions.[24] The Court continued by stating that whilst the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, the exercise of such rights does not fall outside the scope of the provisions of the Treaty and must be reconciled with the requirements

[18] Case 2 BvR 197/83, Re Wunsche Handelsgesellschaft, p. 225
[19] Chalmers & Hadjiemmanuil et al, *European Union Law* , p. 237
[20] This issue will also be examined in Chapter 4
[21] Case 112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge* v *Republik Österreich*
[22] Tridimas, op. cit., p. 339
[23] Case 341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*
[24] Ibid., para 4

relating to rights protected under the Treaty and in accordance with the principle of proportionality. Finally the Court concluded that the fundamental nature of the right to take collective action was not such as to render Community law inapplicable to such action when assessing the particularities of the case. The recent case law covering collisions between fundamental rights and other fundamental principles of Community law, such as the fundamental freedoms, has gradually to a larger extent been referring to the EU Charter of Fundamental Rights. This will be further discussed in Chapter 5.1.

2.2 Member States as liable subjects

The discussion hitherto has focused solely on the development of the protection of fundamental rights in relation to Community acts. Case law of the ECJ has established that Community actions not respecting fundamental rights could be challenged. However, the ECJ finally had to face the question whether the Member States and national measures too could be subject of review on grounds of compatibility with fundamental rights as general principles of Community law. The ECJ developed a doctrine consisting of three different kinds of national measures that could be reviewed in order to decide their compatibility with fundamental rights[25];

(i) measures implementing Community acts,
(ii) measures which interfere with the fundamental freedoms but come within the scope of an express derogation provided for in the Treaties, and
(iii) other measures falling within the scope of Community law

The first explicit reference to this issue acknowledged by the ECJ was made in the *Wachauf*[26] case which concerned national legislation based on a Community Regulation governing the organization of the milk market. The crucial question of the case was whether the Member States were obliged to observe the right to property when implementing the Community policy. The ECJ reaffirmed its earlier case law and added when assessing the merits of the case: "it must be observed that Community rules (which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding) would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements".[27] This is a natural progression, as *Weiler* and *Lockhart* put it: "In areas where the national authorities act as the agents of the Community institutions, it would be

[25] Tridimas, op. cit., p. 320
[26] Case 5/88, *Hubert Wachauf* v *Bundesamt für Ernährung und Forstwirtschaft*
[27] Ibid., para 19

inconsistent and contradictory not to subject them to the requirements to observe fundamental rights".[28] Following this train of thought, the standard of fundamental rights that the Member States have to comply with is the Community standard, not the national standard that might vary from state to state, simply due to the fact that the Member States acts as agents of the Community. The ECJ continued, in a number of cases, to reiterate the responsibility of Member States to comply with fundamental rights when implementing Community law. It was, *inter alia*, established that this responsibility also applies when implementing directives. As stated by the Advocate General in the case of *Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v The Scottish Minister*[29]: "in several cases, the ECJ has held that the specific duties imposed by a directive on the Member States should be read in the light of the general principles of Community law, but has never declared those general principles to be binding as such on the States when they are adopting measures for the transposition of a directive. Yet, one would think that the choice of form and methods left to the States according to ex Article 249 EC (Article 288 TFEU) does not include the choice whether or not to violate fundamental rights, and vice versa, that respect for fundamental rights is an implicit part of the 'result to be achieved' under the directive. So, the extension of the *Wachauf* line to directives (and, indeed, to the application by Member States of external agreements concluded by the EC) would seem logical". He continued: "a directive intrudes, so to speak, into the internal legal order, where it becomes a rule of reference to which the transposing measures must conform. But it does not do so alone. It is inseparable from the norms to which it must, itself, conform, including, obviously, the general principles of Community law".[30]

The "ERT-measures" deriving from the ECJ findings in the *ERT*[31] case, which concerned a Greek television monopoly, applies to cases when Member States are taking measures and is seeking to justify them on the basis of an express derogation from a fundamental freedom. The Court found in the case that, where a Member State relies on Treaty provisions in order to justify rules which are likely to obstruct the exercise of a fundamental freedom, such justification, if provided by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus, an express derogation, as established by the Court, is not to be considered as defining the outer limits of Community competence.[32] The national rules in question in the case could, according to the ECJ, fall under the exceptions provided for in those

---

[28] Weiler & Lockhart, *Taking Rights Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence*, p. 74

[29] Joined cases C-20/00 and C-64/00, *Booker Aquacultur Ltd* (C-20/00) and *Hydro Seafood GSP Ltd* (C-64/00) v *The Scottish Ministers*, Opinion of Mr Advocate General Mischo delivered on 20 September 2001, para 53

[30] Ibid., para 57 - 58

[31] Case 260/89, E*lliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou* v *Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*

[32] Tridimas, op. cit., p. 325

provisions only if they were to be considered as compatible with the fundamental rights protected by the general principles.[33] The ECJ consequently stated that a measure that "falls within the scope of Community law" could be reviewed on fundamental rights grounds.[34] A given effect from the ERT doctrine is that compatibility with fundamental rights is a significant part of the assessment whether a national measure which interferes with fundamental freedoms is permitted or not under Community law.[35] Whether or not a national measure which falls within the scope of Community law violates fundamental rights is primarily for the national courts to decide. The ECJ could then, via the institute of preliminary rulings, further provide details in how the specific assessment is to be done. Contrary to measures implementing Community acts it has been argued that the fundamental rights standard in these cases should be based on the national standard of protection, mainly since the Member State in question do not act as a Community agent.[36]

The ECJ has in a number of cases identified other measures relating to the protection of fundamental rights that also could be considered as falling within the scope of Community law. In line with every other examination with intentions to scrutinize the issues of judicial review of Member States in these matters the question of how to define the concept of "the scope of Community law" quickly arises. This essay, however, does not claim to be holistic and comprehensive to the extent that this issue is to be thoroughly examined. It shall nevertheless be clarified that there are situations not belonging to the first two categories described above that indeed could call for judicial review of national measures. An example of this is the extension of the scope of ex Article 12 EC[37] (Article 18 TFEU) through ECJ case law which has allowed European citizens to invoke the article without connecting it directly to one of the economic freedoms. It is, through the jurisprudence of the ECJ, however clear that some national measures where no "Community element" is to be found are considered as purely internal situations.[38] In the *Demirel*[39] case the Court stated: "Although it is the duty of the Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention for the Protection of Human Rights and Fundamental Freedoms of national legislation lying outside the scope of Community law".[40] Regardless of the Court's intention to clarify the ambiguities it is

[33] Case 260/89, E*lliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou* v *Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, para 43
[34] Ibid., para 42
[35] Tridimas, op. cit., p. 326
[36] Ibid., p. 326
[37] "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality should be prohibited."
[38] Groussot, *Creation, Development and Impact of the General Principles of Community Law: Towards a jus commune europaeum?*, p. 388
[39] Case 12/86, *Meryem Demirel* v *Stadt Schwäbisch Gmünd*
[40] Ibid., para 28

often difficult to predict which situations that will be deemed as to lie outside or inside the field of application of Community law.[41] Nevertheless, the Court has in its case law, particularly in the early 2000s widened the scope of its fundamental rights jurisdiction, *inter alia*, through expanding the scope of application of fundamental freedoms as well as distinguishing substantial rights from the concept of European citizenship.[42] This issue in relation to the European Union Charter of Fundamental Rights will be further discussed in Chapter 3.2.2. Although the *locus standi* of private parties is not within the scope of this thesis or one of the core issues of this examination a brief reference to the possible beneficiary of the protection of fundamental rights will be made. It has, in fact, been argued that since most Community rights only can be exercised by EU nationals, fundamental rights protection is practically, or to a great extent, restricted to EU nationals and members of their families.[43] Article 12 EC, as mentioned above, which prohibits discrimination on grounds of nationality has been interpreted by the ECJ as referring to EU nationality only. Even if certain secondary legislation is designed to prohibit such discrimination and extending the scope of the provision to third-country nationals, it has to be considered that the content of Article 12 is much more limited than e.g. Protocol 12 of the ECHR which contains a prohibition of discrimination.[44] In the above described *Demirel* case the ECJ refused to rule on the fundamental rights compatibility of a national measure on the grounds that "there is at present no provision of Community law defining the conditions in which Member States must permit the family reunification of Turkish workers lawfully settled in the Community". *Van den Berghe* has argued that "the sometimes uncertain limits of the scope of Community law leads to an additional problem of legal certainty; with the progress of integration, the precise scope of Community law is subject to constant change and reinterpretation. Thus, in situations where they have been unable to obtain redress in national courts, individuals may not be in a position to know before which higher forum the remedy lies".[45]

2.3 Legislative and institutional confirmation of the ECJ jurisprudence

Corresponding with the development in the case law of the ECJ, the institutions of the Community began to refer, in different aspects, to the protection of fundamental rights. In 1977 the European Parliament, Council and Commission made a joint declaration on relating issues.[46] It was

[41] Craig & De Burca, op. cit., p. 401
[42] Tridimas, op. cit., p. 332
[43] Van den Berghe, *The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?*, p. 142
[44] Ibid.
[45] Ibid., p. 143
[46] Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the European Convention for the

declared that the Community institutions "stressed the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms". Furthermore it was emphasized that, in the exercise of their powers and in pursuance of the aims of the European Communities the rights were to be continuously respected. Even if the declaration itself did not have any legal importance *per se*, the symbolic value indicating the institutional support for the Court's acknowledgement of the principles deriving from the ECHR and the national constitutions shall not be underestimated.[47] During the 1980s, in the wake of the 1977 declaration, followed an additional number of non-binding acts covering the fundamental rights area. However, the protection of fundamental rights would become far more prioritized with the treaty amendments introduced by the TEU, ToA and the Nice Treaty.

The first time the protection of fundamental rights was mentioned in an official treaty was in the preamble of the SEA in 1986 which referred to "the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for Protection of Human Rights and Fundamental Freedoms and the Social Charter, notably freedom, equality and social justice". However, the appearance in the Maastricht Treaty of Article F (2) (which later became Article 6 (2) TEU) has to be regarded as a decisive moment for the development of the protection of fundamental rights within the Union. Article 6 (2) stated as follows: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law". This was merely a codification of ECJ case law (albeit lacking an explicit reference to Member States actions) but constituted at the same time a regulation which received the strongest protection there is at the top of the Community legal order hierarchy. Nevertheless, the legal significance of the article was at the time questioned. Article L TEU expressly excluded the provision from the jurisdiction of the ECJ, and hence the situation arose where individuals could bring alleged violations of fundamental rights before the Court based on the case law of the ECJ but not based on the explicit treaty provision.[48] This inconsistency was however corrected by the ToA, although only partially when "opening" Article F (2) to the jurisdiction of the ECJ "with regard to actions of the institutions".[49] The ToA also included yet another significant amendment in the Treaty. For the first time, the Union made protection of fundamental rights a central mission.[50] In, what was labeled as, Article 6 (1) TEU it was established that

---

Protection of Human Rights and Fundamental Freedoms, Official Journal C 103, 27 April 1977

[47] Craig & De Burca, op. cit., p. 403

[48] Lindfelt, *Fundamental Rights in the European Union – Towards higher Law of the Land?*, p. 78

[49] Alonso Garcia, *The General Provisions of the Charter of Fundamental Rights of the European Union*, p. 494

[50] Chalmers & Hadjiemmanuil et al, op. cit., p. 244

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. In accordance with the content of Article 6 (1), the ToA introduced a political enforcement mechanism in the event that a Member State would fail to observe the values contained in Article 6 (1). Thus, Article 7 TEU[51] enabled the Council to, when a Member State is found responsible for a serious and persistent breach of the principles enshrined in Article 6 (1) TEU, suspend some of the voting and other rights of that Member State. During the drafting process, it was emphasized that the article and the penalizing actions contained therein were to be used only in the most exceptional cases.[52] The enforcement process was intended to be a political one only involving the political institutions of the Union. Through the Nice Treaty, Article 7 was amended in order to provide for more detailed and fairer procedures. Also the possibility to act before a breach has occurred was added (materialized by Article 7 (1), see below). Additionally, the ECJ was given jurisdiction over the procedural provisions. However, the Court had jurisdiction only in relation to the procedural provisions which might suggest that the concept of "serious and persistent breach" was not to be subject to any judicial control and thus the political character of the enforcement process was maintained.[53] The amendments were adopted not long after the initial wording of Article 7 was decided. The reason to this was partly the development in Austria at the time where the far-right party FPÖ entered into government coalition.[54] This also had an impact on the future institutional developments in the Union further discussed in Chapter 3. A number of attempts was made by the European Parliament to investigate the application of Article 7. It has however been argued that the provision is unlikely to have any significant

[51] Article 7: (para 4 – 6 omitted)
"1.[added by the Nice Treaty] On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1), and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
2. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.
3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State."
[52] Tridimas, op. cit., p. 305
[53] Ibid.
[54] De Schutter, *The EU Fundamental Rights Agency: Genesis and Potential,* p. 96

application in practice but rather a symbolic value.[55] In an attempt to clarify the content of the provision the Commission presented a communication to the Council and Parliament in 2003. The Commission stated that the European Union first and foremost is a Union of values and of the rule of law. It further emphasized its conviction that, "in this Union of values", it will not be necessary to apply penalties pursuant to Article 7 of the Union Treaty.[56] In the European Parliament legislative resolution responding to the Communication of the Commission it was emphasized that "Union intervention pursuant to Article 7 of the EU Treaty must be confined to instances of clear risks and persistent breaches and may not be invoked in support of any right to, or policy of, permanent monitoring of the Member States by the Union". However, Article 7 triggered the future establishment of the EU Network of Independent Experts which is briefly discussed below, in Chapter 3.3.1.1, and in the long run also the progress resulting in the Fundamental Rights Agency, it too covered by this examination.[57] An additional provision, following the ToA, was Article 49 TEU[58] which listed respect for the fundamental rights set out in Article 6 (1) TEU as a condition of application for membership to the Union.

The legislative developments briefly examined above marked the beginning of a new era within the Union protection of fundamental rights. The evident need of more measures to further enhance fundamental rights protection and the legitimacy of the Union was nevertheless emphasized by those in posses of the leading positions in the development process. The Expert Group on Fundamental Rights, assigned by the Commission, stated that "The Amsterdam Treaty may not have led to an explicit recognition of particular fundamental rights. It nevertheless marked a decisive step on the way to an ever clearer recognition of the principle of fundamental rights protection by the European Union".[59] It continued: "the role of the Amsterdam Treaty should certainly not be underestimated. It reiterates the commitment of the European Union to fundamental rights and invigorates the obligation to develop and implement policies securing protection of these rights. However, deficiencies and inconsistencies cannot be ignored. On the contrary, their existence should intensify efforts to achieve explicit and unequivocal recognition of fundamental rights."[60] The lack of political consensus during the drafting process of the ToA made it impossible to include any provisions calling for a fundamental rights catalogue and an

[55] Craig & De Burca, op. cit., p. 404
[56] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15 October 2003, p. 12
[57] Craig & De Burca, op. cit., p. 404
[58] "Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members."
[59] *Affirming Fundamental Rights in the European Union: Time to Act*, Report of the Expert Group on Fundamental Rights, Brussels, February 1999, European Commission, Employment, Industrial Relations and Social Affairs, p. 7
[60] Ibid., p. 10

accession by the Union to the ECHR.[61] However, a substantial debate regarding the institutional development and the approximation to the ECHR, supported by many voices throughout Europe, was, as continuously described by this thesis, imminent.

[61] Lindfelt, op. cit., p. 82

3 The EU Charter of Fundamental Rights and adjacent institutional development

3.1 Development and drafting of the Charter

3.1.1 Early development – why the need of a Charter?

In 1998 the fiftieth anniversary of the Universal Declaration of Human Rights occurred and a number of meetings and conferences were held to mark it.[62] The last years of the 20th century in Europe were also characterized by a rediscovered interest in the human rights agenda, partly examined above. A new approach to the protection of fundamental rights within the Union was launched in February 1999 in the report of the Expert Group on Fundamental Rights which was assigned by the Commission to review, *inter alia*, the possibility of including a fundamental rights catalogue in the next revision of the Treaties.[63] The report followed a number of other reports covering the field launched by the *Comité de Sages*[64] and stated that a comprehensive approach to the guarantee of rights was urgently required. It also emphasized the importance of making fundamental rights visible, tentatively by incorporating them into the Treaties.[65] Furthermore, the report established that, while judicial protection undoubtedly is a crucial element in the effective safeguarding of fundamental rights, it is by no means its only prerequisite.[66] It is also vital to establish rights which are genuinely justiciable, and which entail more than a passive obligation of non-violation. Hence, the recognition of fundamental rights should mainly be based on the ECHR which already constituted a bill of rights of Europe. The rights therein were therefore proposed to be incorporated into Union law in their entirety. However, clauses detailing and complementing the ECHR was suggested to be added. Lastly, the report

[62] De Burca, *The drafting of the European Charter of Fundamental Rights*, p. 128
[63] *Affirming Fundamental Rights in the European Union: Time to Act*, Report of the Expert Group on Fundamental Rights, Brussels, February 1999, European Commission, Employment, Industrial Relations and Social Affairs
[64] Which e.g. was responsible for drafting a new Human Rights Agenda for the European Union for the year 2000
[65] *Affirming Fundamental Rights in the European Union: Time to Act*, Report of the Expert Group on Fundamental Rights, Brussels, February 1999, European Commission, Employment, Industrial Relations and Social Affairs, p. 4
[66] Ibid.

reiterated the importance of inserting the enumeration of the rights into a specific part or under a particular heading of the Treaties. The place chosen should clearly illustrate the "paramount importance" of fundamental rights.

At the Cologne European Council in June 1999, the German Presidency, mainly inspired by the 1999 report, demonstrated its attraction to the idea of developing a Charter of Fundamental Rights that not only would make European fundamental rights visible but also act as a forum for debate about what type of rights that should be recognized.[67] Earlier, in a statement at the European Parliament session on 12 January 1999, the German Minister of Foreign Affairs, Joseph Fischer, commenced the German Presidency by determining the intention to run an elaboration of a European Charter of Fundamental Rights in order to strengthen the rights of the citizens of Europe and consolidate the legitimacy and identity of the Union.[68] The Cologne European Council finally agreed to establish a Charter of Fundamental Rights.[69] However, the decision of the Council to prepare a text compiling fundamental rights of the Union was in fact preceded by two other unsuccessful yet sincere attempts; in 1979 when the European Commission proposed an accession to the ECHR and in 1989 when the European Parliament constructed a comprehensive catalogue of fundamental rights.[70]

There are many reasons for why this third major attempt succeeded. Even though some perceived the Charter as a potential threat to economic growth and internal national interests or even as an unwanted step closer to a constitutionalization of Europe the benefits of a codified fundamental rights catalogue slowly began to appear.[71] According to *Bellamy* and *Schönlau* the growing sensitivity to rights issues within the Union at the time being had numerous reasons, most notable among these;[72]

- *(i)* the long-standing challenges of the ECJ from national courts regarding fundamental rights,
- *(ii)* the desire to uphold human rights standards when facing the rise of far-rights parties in Europe[73],
- *(iii)* the imminent enlargement of the Union to new Member States in Central and Eastern Europe, and
- *(iv)* the will to demonstrate the Unions commitment to principles of good governance.

Naturally, apart from purely political reasons proponents of a Charter containing fundamental rights based their arguments on the changing

[67] Chalmers & Hadjiemmanuil et al, op. cit., p. 247
[68] Lindfelt, op. cit., p. 104
[69] Chalmers & Hadjiemmanuil et al, op. cit., p. 247
[70] Peers & Ward, *The EU Charter of Fundamental Rights*, p. xvii
[71] McCrudden, *The Future of the EU Charter of Fundamental Rights*, p. 9
[72] Bellamy & Schönlau, *The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights*, p. 418
[73] E.g., at the time being the Austrian far-right party FPÖ entered into the Austrian ruling governmental coalition

structure of the Union.[74] New demands for the protection of fundamental rights emerged when the competences of the Union expanded into other fields of cooperation. Furthermore, the ongoing enlargement process was advocated as grounds when emphasizing the need of common principles and values among all the Member States in the Union.[75] One frequently used argument which also was emphasized by the Expert Group in their report of February 1999 was the constant need of clarity and visibility when guaranteeing fundamental rights and hence the need of a fundamental rights catalogue. This argument is closely connected to the other ones presented above, something that is evident when studying the statements of the Expert Group. The report stated, *inter alia*, that fundamental rights can only fulfill their function if citizens are aware of their existence and conscious of the ability to enforce them and it is therefore crucial to express and present fundamental rights in a way that permits the individual to know and access them, i.e. fundamental rights must be visible.[76] Furthermore, the report established that the current lack of visibility not only violates the principle of transparency, it also discredits the effort to create a "Europe of citizens". Additionally, clearly ascertainable fundamental rights stimulate ones readiness to accept the European Union and to identify oneself with its growing intensification and expanding remits. In terms of visibility, the report indeed acknowledged the fact "that most fundamental rights can be found in national constitutions and international treaties, and that an explicit enumeration of these rights by the European Union would therefore add very little".[77] Nonetheless, it is argued that "this does not justify a system of citations that conceals the fundamental rights and makes them thus incomprehensible to the individuals. Where rights are concerned, ways and means must be found to make them as visible as possible. This involves spelling rights out at the risk of repetition, rather than merely referring to them in general terms as contained in other documents". On the contrary, opponents of a Charter maintained arguing that there was no need for another fundamental rights catalogue simply for the reason that the citizens of Europe did not suffer from any deficit of judicial protection concerning fundamental rights.[78] Protection is guaranteed not least by provisions in national constitutions, in the ECHR and by the jurisprudence of ECJ. Yet another argument for not adopting a Charter was based on the fear of creating an inconsistency between different definitions and interpretations of the proposed Charter and of the ECHR.[79] [80] It is clear that the establishment of the Charter could and did constitute a topic of intense debate prior to its adoption. However, it is equally clear that many of the arguments put forward by opponents of a Charter have been objectively responded to. It is

[74] Lindfelt, op. cit., p. 101
[75] Ibid.
[76] *Affirming Fundamental Rights in the European Union: Time to Act*, Report of the Expert Group on Fundamental Rights, Brussels, February 1999, European Commission, Employment, Industrial Relations and Social Affairs, p. 11
[77] Ibid.
[78] Lindfelt, op. cit., p. 103
[79] Ibid.
[80] The relationship between the Charter and the ECHR is continuously examined in Chapter 4.1.1

indeed possible to consider the Charter of Fundamental Rights a valuable document even if it just represents consolidation of existing law.[81] First, as partly mentioned above, a Charter enhances transparency and the legal certainty of the concerned citizens. Furthermore, it could contribute to global democracy "as it provides a more consistent basis for the Union's external policy and can thus be seen as a step towards a democratic world order".[82] It is difficult, not to say impossible, to lead by example when the institutions of the Union lack in their own judicial protection of fundamental rights. This was e.g. emphasized in an earlier report presented to the *Comité des Sages*:[83] "the Union can only achieve the leadership role to which it aspires through the example it sets to its partners and other states".

It had earlier been proposed that the Union should develop a high profile human rights policy rather than a fundamental rights catalogue.[84] Nevertheless, the German Presidency chose to introduce the adoption of the latter. At the Cologne European Council it was agreed that the protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for its legitimacy.[85] The European Council found that "the obligation of the Union to respect fundamental rights had been confirmed and defined by the jurisprudence of the European Court of Justice and that there appeared to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens". Implicitly, the level of protection of fundamental rights within the Union as defined by the ECJ was established and the European Council's statement indicates that the intention was not to create anything new of substance rather than increasing the visibility of what already existed.[86] The Council believed that the Charter should contain the fundamental rights and freedoms guaranteed by the ECHR and the ones deriving from the constitutional traditions common to the Member States considered as general principles of Union law and discussed in Chapter 2 of this essay, i.e. the content of Article 6 (2) TEU. Furthermore, when drawing up the Charter, economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers should also be taken into account. Again, the Council limited the scope of sources from which the drafting body could get inspiration to documents and texts already in some way legally adopted as fundamental rights within the Union and thus reaffirmed the intention of simply making already existing fundamental rights visible. Additionally, the draft of the Charter was suggested to be a participatory process characterized by inclusiveness. A body composed of high level representatives of the Member States, the President of the European Commission as well as members of the European Parliament and

[81] Eriksen, *Why a Charter of Fundamental Rights in the EU?*, p. 354
[82] Ibid.
[83] Alston & Bustelo et al, *The EU and human rights*, p. 7
[84] Annexes to the Presidency conclusions (26/28), European Council decision on the drawing up of a Charter of fundamental rights of the European Union, I.64, Bulletin EU 6-1999
[85] Chalmers & Hadjiemmanuil et al, op. cit., p. 247
[86] De Burca, op. cit., p. 130

national parliaments was proposed. Other participants, among these representatives of the ECJ, of the Economic and Social Committee and the Committee of Regions, were to be invited as observers or as experts to give their views on specific issues during the process. The European Council also decided that the body should present a draft document in advance of the Council meeting in December 2000. However, it was not clear whether or, if so, how the Charter should be integrated into the Treaties nor how the question of its legal status was to be settled. The relatively short time span set up for the drafting process nevertheless indicated the desire to implement the ideas of the proposed Charter with dispatch.

3.1.2 The drafting process of the Charter – reaching legitimacy through openness, inclusiveness and transparency?

As planned, the work of the body entrusted to draft the Charter of Fundamental Rights, which renamed itself a "Convention", began already in December 1999 under the chairmanship of the former German President Roman Herzog.[87] Additionally, the fixed time limit set up by the Council required the Convention to finalize their work within a year. Despite the fact that the Charter according to many merely should represent a codification of existing law, issues with great political impact arose. These issues were evident already in the decision to establish the drafting process and concerned mainly the question whether the Charter should be a legally binding document or not and to what extent it should be applicable to the Member States.[88] Nevertheless, Herzog stated in his opening speech at the opening session of the body that "we are going to draft a text that will not be immediately binding as European law or Community law. Despite this, we should constantly keep the objective in mind that the Charter which we are drafting must one day, in the not too distant future, become legally binding". He continued "we should therefore proceed as if we had to submit a legally binding list, and we should not forget that our mandate is in principle to draft a list addressed to the bodies of the European Union, by which they will be bound".[89] Also the European Parliament supported the idea of drafting a legally binding catalogue of fundamental rights.[90] Issues concerning the legal status of the Charter will be continuously discussed in Chapter 3.2.

The drafting body consisted of sixty-two members, thirty national parliamentarians (for the first time officially included in the work of the Union), sixteen European Parliamentarians, fifteen representatives of Member States governments and one representative of the European

[87] Peers & Ward, op. cit., p. xvii
[88] De Burca, op. cit., p. 138
[89] Charte 4105/00, *Draft Charter of Fundamental Rights of the European Union* Body1, Annex I, p. 9
[90] Lindfelt, op. cit., p. 107

Commission.[91] Observers from the ECJ and the CoE also participated. This process in itself developed into a novel and innovative way of designing a drafting procedure compared to the usual method of intergovernmental negotiation. Additionally, the Council had decided that the hearings of the body as well as the documents submitted at the hearings were to be public. Documents, drafts and other material were continuously posted on a specially dedicated website.[92] This opportunity was utilized by e.g. representatives of civil society organizations who otherwise were not included or involved in the drafting process. As mentioned above, the European Council also emphasized that other European institutions like the Economic and Social Committee and the Committee of the Regions were to be invited to give their views on the procedure, and that an "appropriate exchange" of views should be held with the states which had applied for European Union membership. Moreover, at the Tampere Council in October 2009 prior to the launch of the drafting process, it was encouraged that "other bodies, social groups or experts" also should be invited to give their views.[93] The participatory drafting process, involving a vast majority of parliamentarians, could therefore meet the aim of securing a greater degree of popular legitimacy[94] especially since the normal procedure of amending the Treaties occasionally has been criticized for the lack of openness, inclusiveness and transparency.[95] Hence, a rather deliberate and open forum was created not directly submerged by the political pressure, at least not to the extent visible in other intergovernmental negotiations of great importance. However, it has been argued that certain participators of the process had a deeper impact than others. For instance, the Tampere European Council established the procedural rules and the functioning of the Convention's chair and three vice-chairs which, through that decision, has to be regarded as a small yet very influential group of four persons. The collective chair was given the mandate to propose a work plan for the body and "to perform other appropriate preparatory work". It has also been argued that the Secretariat to the Convention had a less obvious yet significant influence on the procedure.[96] Thus, it is almost impossible to rule out that this small number of persons involved in the core activities of the Convention had a major effect on the outcomes of the drafting procedure. Nevertheless, the process was by many entitled a "success" and the question arose whether the method used by the Convention should also be used in other drafting procedures, for instance when reorganizing the Treaties.[97]

It is evident that the task of the Convention to, within the timeframe, present a draft document containing a fundamental rights catalogue for the Union was a hard and difficult one. Since increasing the visibility and legal certainty of fundamental rights was one of the main arguments for

[91] Chalmers & Hadjiemmanuil et al, op. cit., p. 247
[92] Craig & De Burca, op. cit., p. 26
[93] De Burca, op. cit., p. 132
[94] Ibid., p. 131
[95] Ibid., p. 132
[96] Ibid., p. 134
[97] Lindfelt, op. cit., p. 110

establishing the Charter, the provisions of the catalogue had to be clear and simple as well as comprehensive and exhaustive. As in any other similar negotiation disagreement on specific substantial parts was unavoidable. The tensions in the drafting process are well illustrated by the debate over the preamble.[98] There were both proponents and opponents of the Charter having an own preamble. The proponents, Herzog and the Praesidium included, believed that the Charter with a preamble would have better possibilities to survive as a self-standing document. The opponents, however, argued that the Charter was created to become either a part of the Treaties or a mere political declaration and thus not in need of a preamble. When finally establishing the existence of a preamble, a tensed debate over its contents took part. It had earlier been decided that, to reach consensus in any matter during the drafting process, each of the four groups involved (national parliaments, national governments, European Parliament and the European Commission) had to agree to a certain proposal separately. Hence, a compromise was reached both in and between the four groups which finally lead to a consensus decision regarding the preamble. This search for unanimous decisions resulted in an overall absence of voting and thus led to a constant need for compromises regarding substantial matters throughout the drafting process.[99] Whether the Convention constituted a welcome innovative and groundbreaking new method of European policy making has been discussed above and has also been debated among the scholars.[100] It has been argued that even though the method used in the drafting process increased the overall level of deliberation in the EU, it is not possible to discern an increase in the democratic quality of the Union as a result of the Charter.[101] In line with this, detrimental effects may occur since the advocates of a deliberation process of the said kind tend to underestimate the complexity of democratic politics. True or not, since a procedure characterized by inclusiveness most likely will increase the diversity of views and interests, it will also make the need for compromises more likely.[102] Additionally, a common and frequently recurring complaint is that the EU and the decisions deriving from the Union are controlled by experts and technocrats. In line with the will to enhance legitimacy throughout the conventional process and in the charter document, the strong impact and presence of parliamentarians would most likely boost the confidence of the Union's action in the area of fundamental rights.

The draft of the Charter was adopted by the Convention in October 2000 and approved by the Biarritz European Council the same month.[103] Lastly, it was "solemnly proclaimed", after considerable disagreement of its status, at the Nice European Council in December 2000 by the Council, Commission and Parliament and through political approval of the Member States.[104] The

[98] Bellamy & Schönlau, op. cit., p. 424
[99] Ibid., p. 426
[100] Ibid., p. 428
[101] Karolewski, *Pathologies of Deliberation in the EU*, p. 79
[102] Bellamy & Schönlau, op. cit., p. 428
[103] Chalmers & Hadjiemmanuil et al, op. cit., p. 248
[104] Craig & De Burca, op. cit., p. 26

final result of the drafting process and the work of the Convention will be further examined below.

3.2 Contents and legal status prior to the Lisbon Treaty

As emphasized above, the mandate given to the Convention when trusted the task of drafting the Charter was, first and foremost, to consolidate and make visible the existing obligations of the Union with respect to fundamental rights.[105] Therefore, the Convention was given specific sources of which the inspiration was to be based on. The main objectives of the codifying act were to enhance legal certainty, making fundamental rights visible and ensure EU legitimacy in the area of fundamental rights protection. However, the content as well as the legal status of the Charter remained unsatisfactory uncertain and ambiguous after its promulgation in December 2000. Was the Charter to become a document merely of symbolic value or was it about to develop into a legally binding text? Concerning the long term effects of the Charter, there were still proponents and opponents of its existence. *Eriksen* has argued that the Charter could be a means to resolve the tension in the Union between "sovereignty and human rights", mainly for four reasons:[106]

(i) the Charter indicates extended domains of competences for the EU and marks the Union as a polity,
(ii) the Charter enhances the legal certainty of the individual citizens since everybody is entitled to claim protection for the same interests and concerns, with the same content,
(iii) the Charter is a public document which has been shaped and interpreted by political actors and openly deliberated by representatives of national governments and national parliaments, thus politically and democratically decided, and
(iv) the Charter process represents a very important development in the constitutionalization of the EU and amplifies the Union's inherent supranational elements.

Another aspect emphasized during the drafting process was the external effect of the Charter. The document provides the legal basis for the Union's external policy actions and sets the same standards for them as for its internal affairs.[107] Of course, the impact of having a fundamental rights catalogue cannot be underestimated when discussing the EU relationship to third countries. In order to urge other countries to comply with the standards of human rights the Union has to take a leading position and present a credible internal framework. However, as long as the Charter's legal status

[105] Ibid., p. 413
[106] Eriksen, op. cit., p. 360
[107] Ibid., p. 370

did remain unknown, the EU could not, in its entirety, ignore accusations of applying double standards.

The Charter's deprived status as a document safeguarded by the Treaties, partly due to the lack of a reference to the Charter in Article 6 (2) TEU, was briefly about to change when new constitutional ideas were on the verge to become reality in the beginning of the 21st century. However, the difficulties arising related to the Constitutional Treaty naturally had a profound impact on the status of the Charter. In 2004 the Constitutional Treaty was drafted by the Convention on the Future of Europe.[108] With a number of amendments the Charter was incorporated as one of the three parts of the constitutional text. If the Constitutional Treaty would have been ratified as expected in 2005 the status of the Charter would not have remained uncertain. However, since the effort to establish a new treaty failed the Charter and its legal status stayed unclear until the Lisbon Treaty entered into force on 1 December 2009. The effects of the Lisbon Treaty will be examined in Chapter 5.1.

3.2.1 The rights contained in the Charter

The different rights and freedoms recognized in the Charter derives from the sources specified by the Council in the decision to draft a fundamental rights catalogue, i.e. fundamental rights and freedoms guaranteed mainly by the ECHR and by the constitutional traditions common to the Member States.[109] They are divided into six separate headings; Dignity, Freedoms, Equality, Solidarity, Citizen's Rights and Justice. The rights in the Charter are largely expressed in a different manner than the phrasing in the original sources. The rationale behind this is that some of the rights had to be adjusted to the needs of modern society. This is compatible with the view that the Charter should be an expression of contemporary values. In line with this, rights designed to meet the challenges of the current and future society, such as the protection of data and rights linked to bioethics, e.g. prohibition on reproductive human cloning can be found in the catalogue.[110] The importance of the expression of contemporary values was not least emphasized by the Commission who also stated, in its communication in connection to the proclamation of the text, that the Charter indeed meets the strong and legitimate contemporary demand for transparency and impartiality.[111] Another reason for changing the language of the rights in relation to their original wording was related to the fact that some rights derived from multiple sources and the need to consolidate the different sources therefore arose.[112]

[108] Craig & De Burca, op. cit., p. 412
[109] See Chapter 3.1.1
[110] Tridimas, op. cit., p. 358
[111] COM(2000) 644 final, *Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union*, para 2
[112] Chalmers & Hadjiemmanuil et al, op. cit., p. 255

"Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law."[113] The preamble of the Charter indicates the will of the drafters to emphasize the indivisible nature of human rights. The concept of indivisibility might suggest that no hierarchal status is prominent in the relationship between the different rights in the Charter. This would entail that the common predominance of civil and political rights in relation to social and economic rights would not prevail.[114] However, it is one thing to underline the indivisibility of human rights in a political context and a completely different one to capture the legal implications of the concept. Thus, a mere reference to indivisibility in the preamble of the Charter will not guarantee a "flat organization" of rights. However, no explicit distinction between the classic civil and political rights and rights of economic and social character is made. Also, the principle of universalism is endorsed in the document, i.e. all rights apply to all persons irrespective of their nationality or residence.[115] Nonetheless, e.g. political rights and rights of free movement that inevitably is linked to citizenship can be exempted from this general rule. A specific provision that has been questioned on grounds of deficiency is Article 21 (2) that prohibits any discrimination on grounds of nationality but only within the scope of application of the Treaties and without prejudice to the special provisions of those Treaties.[116] *Van den Berghe* suggests that, since Article 21(2) only is applicable to EU citizens, the failure of the Charter to extend the prohibition of discrimination on the ground of nationality to third-country nationals constitutes a considerable disadvantage. A connected discussion was held in Chapter 2.2.

Furthermore, the Commission stated in its communication regarding the Charter that "it is drafted clearly and concisely and it will be easy for all those to whom it is addressed to understand" and that this is a condition for the enjoyment of all the benefits of certainty as to the law that the Charter must offer in areas where Union law applies.[117] Critics have argued that this is not the case.[118] Some provisions are being considered so vaguely drafted and so open-ended in their limitation clauses that they give none or little guidance to their interpretation. The fact that several rights are not represented in the Charter, e.g. the right to decent pay, has led some to criticize the catalogue, especially since these rights might face an imminent risk of sinking into oblivion. Thus, it has been argued that the human rights protection in this aspect has been partially impaired by the existence of the Charter.[119] Finally, it should be added that the Charter contains a number of rights specific for the EU, e.g. the right to vote and to stand as a candidate at elections to the European Parliament (Article 39), the right to good

[113] Preamble, Charter of Fundamental Rights of the European Union
[114] Lindfelt, op. cit., p. 158
[115] Tridimas, op. cit., p. 358
[116] Van den Berghe, op. cit., p. 147
[117] COM(2000) 644 final, *Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union*, para 2
[118] Tridimas, op. cit., p. 358
[119] Chalmers & Hadjiemmanuil et al, op. cit., p. 256

administration (Article 41), the right of access to documents (Article 42) and freedom of movement and of residence within the Union (Article 45).

3.2.2 Articles 51 – 54 – the horizontal clauses

The final chapter of the Charter, Articles 51 – 54, is called General Provisions and contains a number of horizontal clauses which determines the scope of the Charter's application as well as the document's relationship to other sources of law. Primarily, these provisions exist for two specific reasons; firstly, in order to ensure that the Charter can be an integral part of the Union's legal order without threatening its coherence and secondly to control the supremacy of fundamental rights, i.e. to reach a fair balance between the improved protection and the discretion of the governments.[120] Naturally, the scope of the application, which is determined in Article 51[121], is one of the most important provisions in this section. Article 51 (1) establishes that the provisions of the Charter are addressed mainly to the institutions and bodies of the Union but also to the Member States yet only when they are implementing Union law. The fact that the Member States and not only the Union and its institutions as such are mentioned was appreciated by those who earlier had identified the lack of such an inclusion in Article 6 (2) TEU.[122] As long as the Charter did not constitute a legally binding document for the Member States, the problems of interpretation arising from this article was more of theoretic character than of a practical kind.[123] Issues were nevertheless noted by scholars at the time being. As discussed in Chapter 2, the ECJ has, under its case law, established that Member States are bound to respect fundamental rights when they, as Article 51 (1) confirms, implement Union law but also when they act within the scope of its application. This indicates a broader obligation for the Member States, developed by the ECJ, than suggested by the horizontal clause in the Charter. Thus, ECJ jurisprudence indicates that Member States should respect Union fundamental rights also when "endeavoring to derogate from or claim to fall outside the scope of Union law according to the justifications allowed by the same", the so called ERT-measures.[124] In the explanatory note from the Praesidium concerning the final draft of the Charter the article is further explained.[125] Although the explanatory note does not have any legal value *per se*, the intention of the explanatory comments was to clarify the provisions of the Charter. Concerning Article 51 (1) the document states that "as regards the Member States, it follows

[120] Tridimas, op. cit., p. 362
[121] "(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."
[122] Alonso Garcia, op. cit., p. 493.
[123] Tridimas, op. cit., p. 363
[124] Alonso Garcia, op. cit., p. 495
[125] Charte 4473/00, *Draft Charter of Fundamental Rights of the European Union*, p. 46

unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the context of Community law". Continuously, the explanatory note establishes that the ECJ recently confirmed this case law in the following terms: "In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules". Lastly, it is clarified that this principle naturally also applies to the national central authorities as well as to regional or local bodies, and to public organizations, when they are implementing Union law. This attempt to provide support for the interpretation of the said article has been criticized.[126] By using the phrasing "in the context of Union law" the task of differentiating national actions for the implementation of Union law and national actions falling within the scope of Union law will be complex. However, it is fair to believe that this concept developed in the Charter could cover a wider spectrum of situations than "implementation", interpreted in its strict sense.[127] As already discussed, rights protected by case law could, due to the ambiguity, nevertheless apply to a wider category of national measures than the rights protected solely by the Charter, thus making the provision ineffective. This could also cause implications when Article 51 interacts with other articles in the Charter. Article 53[128] prescribes, *inter alia*, that nothing in the Charter shall be interpreted as restricting fundamental rights recognized by Union law. Hence, when the above described situation occur, i.e. when rights in the Charter and in the case law of the ECJ do not correspond and there are rights contained in the Charter that are not recognized in case law, these rights will have a narrower scope of application.[129] This could indeed cause both confusion and inconsistency. However, it is possible that the ECJ in this case would endorse the specific right as a general principle of EU law and thus apply it to the wider scope of national activities. The wording and the explanatory elaboration of Article 51 (1) is to some extent disparaged by *De Burca*:[130] "this somewhat tedious tracing of the convoluted path taken by what might seem like a fairly innocuous "horizontal" clause, from its earliest and reasonably strict interpretation by the secretariat's guideline, through several broader intermediate formulations, and reverting ultimately to an even stricter version, illustrates an emergent reluctance to commit the Member States to observing the norms of the Charter other than in the cases which are most closely linked to the European Union where the Member States have little or no autonomy, i.e. in the actual implementation of European Union

[126] Tridimas, op. cit., p. 363
[127] Alonso Garcia, op. cit., p. 495
[128] "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."
[129] Tridimas, op. cit., p. 363
[130] De Burca, op. cit., p. 137

legislation". Furthermore, Article 51 (2)[131] states that the Charter does not establish any new power or task for the Union, or modify powers and tasks defined by the Treaties. The Charter will therefore not in any way convert the Union into a human rights organization; it is only applicable as long as the specific situation is within the scope of Union law and it is not in itself a basis for establishing secondary legislation.[132]

The scope and interpretation of the rights and principles contained in the Charter are further specified in Article 52. Additionally, the relationship between the content of the Charter and the treaty provisions as well as the provisions in the ECHR is to some extent clarified. The relationship between the Charter and the ECHR will be further examined in Chapter 4.1.1.

Limitations to the rights and freedoms of the Charter have to meet certain requirements, not that different to limitations of the provisions in the ECHR. One must regard it more a rule than an exception that constitutional fundamental rights are further specified with limitation clauses.[133] Any limitation:

(i) must be provided for by law,
(ii) must respect the essence of the rights and freedoms in question, and
(iii) can only be made if it is necessary and genuinely meet the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others, i.e. respect the principle of proportionality.

The wording is based on the case law of the ECJ.[134] The Court has earlier stated that it is well established in its case law that restrictions may be imposed on the exercise of fundamental rights provided that those restrictions in fact correspond with objectives of general interest pursued by the Union and, as stated in the *Karlsson*[135] case, "do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights". Unlike other documents of constitutional fundamental rights character, *inter alia* the ECHR, the Charter has a general provision of limitations rather than a model where specific provisions would be complemented by a specific limitation clause. In general, only a very small group of rights can be considered as absolute, i.e. the vast majority of rights are in some way relative. Examples of absolute rights are found in e.g. Article 4[136] or Article 49[137] of the Charter.[138]

[131] See footnote 121
[132] Tridimas, op. cit., p. 362
[133] Lindfelt, op. cit., p. 137
[134] Charte 4473/00, *Draft Charter of Fundamental Rights of the European Union*, p. 48
[135] Case C-292/97, *Kjell Karlsson and Others*, para 45
[136] "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 53[139] prescribes, as briefly discussed above, primarily that the provisions of the Charter are to be considered as the minimum standard and that all higher existing standards found elsewhere have to be respected. Thus, in situations where e.g. international instruments or national constitutions provide for a higher standard one would have to choose the standard offering the highest level of protection. This could cause confusion not least in relation to the principle of the supremacy of EU law and could as a result once again alter the relationship between EU law and national law.[140] Furthermore, the usefulness of the technique of comparing the level of protection has been questioned and deemed impracticable.[141] *Garcia* argues that, when interpreting Article 53, it would be hard if not impossible to make a comparison based on a greater or lesser degree of protection, mainly because when comparing different rights, more than often a discussion about values has to be held, i.e. about rights that are limited by the general interest. In order to make a fair comparison the values contained in the rights must be identical as a premise for the operation. Additional problems may arise when comparing a positive obligation with a negative obligation contained in the specific right.

Lastly, Article 54[142] of the Charter contains a prohibition of abuse of rights similar to the prohibition that is to be found in Article 17 ECHR and other international agreements. The intention of the article is to prevent anyone from using the provisions contained in the Charter to limit the enjoyment of rights in order to weaken the protection of the provisions. Hence, Article 54 can only be used in conjunction with a complaint against one of the provisions of the Charter and is therefore dependent on other provisions.

3.2.3 Legal status and the reactions of the EU legislators and judiciary

It is, when assessing the content and impact of the fundamental rights catalogue, important to continuously contemplate the aims and goals for the establishing of the Charter in the first place. It was throughout the founding and drafting process emphasized that legal certainty would improve if the Union were to adopt a fundamental rights catalogue. However, given the fact that the Charter was not legally binding, it had to co-exist with, *inter alia*, the case law of the ECJ and the ECtHR. It has been argued that this,

---

[137] "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed."
[138] Lindfelt, op. cit., p. 140
[139] See footnote 128
[140] Lindfelt, op. cit., p. 176
[141] Alonso Garcia, op. cit., p. 508
[142] "Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein."

along with the fact that no one really could predict its importance, would reduce, rather than improve, legal certainty.[143] The Commission's take on the question of where the Charter would be positioned in the web of EU law was relatively evident in their communication corresponding with the proclamation process; "the Charter, by reason of its content, its tight drafting and its high political and symbolic value, ought properly to be incorporated in the Treaties sooner or later. For the Commission, this incorporation is not a question to be addressed in theoretical or doctrinal terms. It must be addressed in terms of legal effectiveness and common sense. It is therefore preferable, for the sake of visibility and certainty as to the law, for the Charter to be made mandatory in its own right and not just through its judicial interpretation. In practice, the real question is when and how it should be incorporated in the Treaties".[144] In the Laeken Declaration on the Future of the European Union in 2001 the European Council declared that "thought would have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights".[145] It was also emphasized that "the question ultimately arises as to whether this simplification and reorganization might not lead in the long run to the adoption of a constitutional text in the Union". However, the task of clarifying the uncertainties of the Charter's legal status was ex officio initiated by the European judiciary.[146] During the first two years of its existence, the Charter was mentioned on at least twenty occasions by Advocates General. Advocate General *Tizzano* made an initial reference in the *BECTU* case in 2001;[147] "the Charter of Fundamental Rights of the European Union has not been recognized as having genuine legislative scope in the strict sense. In other words, formally, it is not in itself binding. However, without wishing to participate here in the wide-ranging debate now going on as to the effects which, in other forms and by other means, the Charter may nevertheless produce, the fact remains that it includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments." He continued: "Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave [at issue in the case] constitutes a fundamental right." Despite the fact that the ECJ still had not made any specific reference to the Charter, some national constitutional courts promptly referred to it as an authoritative source of fundamental rights.[148] A similar trend could be discerned in the case law of the CFI which in a number of rulings referred to the substantive provisions of the Charter.[149]

---

[143] Tridimas, op. cit., p. 359
[144] COM(2000) 644 final , *Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union*, para 11
[145] *Presidency Conclusions of the Laeken European Council*: Annex I: Laeken Declaration on the future of the European Union, in Bulletin of the European Union 2001, No 12, pp. 19-23.
[146] Chalmers & Hadjiemmanuil et al, op. cit., p. 248
[147] Case C-173/99, *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, para 27
[148] Chalmers & Hadjiemmanuil et al, op. cit., p. 249
[149] Tridimas, op. cit., p. 360

Due to mainly political reasons, the ECJ however relinquished to make any specific reference to the Charter but acknowledged the substance of the contained rights in a number of rulings, *inter alia* the *Dutch Biotechnology* case.[150] *Tridimas* has identified three, among others, possible types of references to the Charter likely being made by the EU judiciary[151];

(i) a reference to the Charter being made using it as a supplementary argument to support a proposition of law,
(ii) a reference to the Charter being made using it as an integral part of its reasoning as one of the principal arguments when seeking support for the results reached or
(iii) a reference to the Charter being made as the primary or only argument in the reasoning.

None of the references made by Advocates General and the CFI briefly described above belonged to the third category. Not only the judicial power of the Union but also the legislative and institutional power was inspired by the Charter despite the uncertainties of its legal status. In 2001 the Commission decided to conduct a form of compatibility review with regard to the Charter.[152] Among other actions, this involved considering the compatibility between any legislative proposal somehow connected to the protection of fundamental rights and the content of the Charter. In 2005 this decision was followed up by a communication from the Commission.[153] In this document it was, *inter alia*, established that it has become current practice to refer to the fundamental rights secured by the Charter in interdepartmental consultations.[154] Furthermore, the Commission has in certain cases referred to compatibility with the Charter in the explanatory memoranda to its legislative proposals mainly regarding issues in the area of freedom, security and justice. Moreover, in many other cases a recital to the Charter has been the only evidence of respect for fundamental rights. Additionally, regular references to the Charter have also been made by the European Ombudsman.[155] [156] In 2006, six years after the proclamation of the Charter, the first explicit reference from the ECJ to the Charter was made. In a case between the European Parliament and the Council concerning Directive 2003/86 (the so called Family Reunification Directive) which determines the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of

[150] Chalmers & Hadjiemmanuil et al, op. cit., p. 250
[151] Tridimas, op. cit., p. 360
[152] Craig & De Burca, op. cit., p. 417
[153] COM(2005) 172 final , *Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposal*
[154] Ibid., para 2
[155] Craig & De Burca, op. cit., p. 417
[156] The European Ombudsman was established in 1995 with the protection of fundamental rights as a key activity. The institution is included in Article 43 of the Charter: "Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role."

the Member States the ECJ stated the following:[157] "while the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognized not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the ECHR, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court and of the European Court of Human Rights". In this case it is evident that the ECJ considered that the legislator had acknowledged the importance of the Charter in the preamble to the Directive and therefore that the Directive observed principles recognized not only by the ECHR but also in the Charter.[158] Given the situation the ECJ could for that reason refer more directly to the Charter. In the *Reynolds Tobacco*[159] case the ECJ confirmed the findings of the CFI and reiterated that "the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has, moreover, been reaffirmed by Article 47 of the Charter." It was further established that, "although this document does not have legally binding force, it does show the importance of the rights it sets out in the Community legal order". In the *Unibet*[160] case the ECJ once again confirmed the importance of the Charter as a legal source, again when referring to Article 47: "the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union". Yet another case that concerned the Charter and that received a fair amount of attention was the *Laval*[161] case in which the ECJ validated the existence of the Charter and the principle of proportionality when restricting a fundamental right, as prescribed by the jurisprudence of the Court and the Charter itself.

Even though the explicit references to the Charter from the ECJ were relatively absent, not least during the first years after its proclamation, the Court continued to fulfill its commitment of defining the EU protection of fundamental rights. Some had feared that the Charter would constitute a repressive development diminishing the creativity of the ECJ.[162] However, facts show that the Charter was strengthening rather than reducing the interpretative and creative ability of the Court. In the cases *Omega*

[157] Case C-540/03, *European Parliament* v *Council of the European Union*, para 38
[158] Wouters & Verhey et al, *European Constitutionalism beyond Lisbon*, p. 69
[159] Case C-131/03, *R.J. Reynolds Tobacco Holdings, Inc. and Others* v *Commission of the European Communities*, para 30
[160] Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd* v *Justitiekanslern*
[161] C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, also discussed above in Chapter 2.1
[162] Cartabia, *Europe and Rights: Taking Dialogue Seriously*, p. 8

Spielhallen[163] and *Schmidberger*[164] fundamental rights prevailed over European economic freedoms and thus justified the restriction imposed on them. Subtle influences of the Charter can be found in e.g. the *Omega* case.[165] Also, since the Charter was approved plaintiffs tend to use human rights more and more often as crucial arguments in their proceedings before the ECJ.[166] *Cartabia* acknowledges that the Charter seems to have strengthened the position of the ECJ "from two aspects: on the one hand it has produced a legitimizing effect and on the other a hermeneutical effect". The legitimizing effect can, *inter alia*, be found in the behavior of the EU judiciary (Advocates General, the CFI and the European Ombudsman etc.) as discussed above. The mere fact that the Charter was invoked a number of times and appeared in decisions of various actors created "an aura of legality".[167] Also, the major EU institutions constantly referred to the Charter as if it was a legally binding document. Furthermore, the loosely formulated content of the Charter and its character as interacting in a system alongside the Member States constitutions widened the discretionary power of the ECJ thus stimulated its creativity. A common view prior to the establishment of the Charter was that a fundamental rights catalogue would nourish the idea of enhanced European constitutionalism. In a response to the judiciary post-Charter development *Cartabia* establishes that "the Court does not even hesitate to impose dramatic changes in the Member States policies and legislation. The result is that diverse cultures and traditions on these subjects are receding to give room to the European constitutional standard fostered by the European Court of Justice. The practical effects of the Charter of Fundamental Rights as interpreted by judges are supported by a widespread legal thought that fosters the development of common European values – a "*jus commune europeum*"".[168]

3.3 The EU Fundamental Rights Agency

3.3.1 History and background

The first initiative to create an institution in the Union to monitor and evaluate actions related to the protection of fundamental rights was taken in 1998 when a number of recommendations were presented in the report covering the human rights agenda in the Union prepared for the *Comité des Sages*.[169] [170] This monitor centre was proposed to improve the coordination

[163] Case C-36/02, Omega *Spielhallen- und Automatenaufstellungs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn*
[164] C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge* v *Republik Österreich*, also discussed above in Chapter 2.1
[165] Cartabia, op. cit., p. 8
[166] Ibid., p. 14
[167] Ibid., p. 15
[168] Ibid., p. 19
[169] Kinzelbach & Kozma, op. cit., p. 605
[170] Alston & Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights*

of the fundamental rights policies pursued by the Member States.[171] The final product that emerged from that embryo initiative, The Fundamental Rights Agency of the European Union, did formally start to exist on 1 March 2007 and came to replace the EU Monitoring Center for Racism and Xenophobia which was established in 1997. However, during the nine years since the first initiative was made the structure and objective had fundamentally changed.

The aim of the Agency is described in Article 2 of the establishing regulation:[172] "The objective of the Agency shall be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights."

The scope of the mandate of the Agency was somewhat controversial prior to its establishment as well as during the drafting process but was limited to collection of information, formulating opinions, highlighting good practices and publishing thematic reports.[173] To that end, the founding process of the Agency will be further examined below.

3.3.1.1 FRA founding process – a troublesome way to consensus

The above mentioned report prepared for the *Comité de Sages* originally contained a number of proposals and ideas to improve human rights policies, some realized and some disposed. One proposal urged for an EU monitoring center for human rights in order to improve coordination of fundamental rights policies.[174] According to the report, a monitoring center would encourage the EU to adopt a more preventive approach to human rights since systematic, reliable and focused information is the starting point of a clear understanding of the nature, extent, and location of the problems that exist and for the identification of possible solutions.[175] Initially, the findings of the committee with regard to the proposal of a monitoring center, which largely corresponded with the report, were not well received by the EU institutions.[176] During the Cologne European Council in June 1999 the question of a new monitoring body received almost no attention due to the launching of the work on the drafting of the Charter of Fundamental Rights.

[171] De Schutter, op. cit., p. 94
[172] Council Regulation 168/2007, *Establishing a European Union Agency for Fundamental Rights*, Article 2
[173] Craig & De Burca, op. cit., p. 404
[174] De Schutter, op. cit., p. 93
[175] Alston & Weiler, op. cit., Chapter 13
[176] De Schutter, op. cit., p. 94

Although no agency was set up or even thoroughly debated at the time being the need of monitoring fundamental rights remained and this need was emphasized by e.g. the European Parliament, not least due to the proclamation of the Charter of Fundamental Rights.[177] The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs recommended to the European Parliament in its meeting on 5 June 2000 that a network should be set up consisting of legal experts which are authorities on human rights and jurists from each of the Member States, to ensure a high level of expertise and enable the Parliament to receive an assessment of the implementation of each of the rights laid down in the Charter, taking account of developments in national laws, the case law of the Court of Justice of the European Communities and the European Court of Human Rights and any notable case law of the Member States national and constitutional courts. The European Parliament acknowledged the recommendation on 5 July 2001.[178] Thus, an EU Network of Independent Experts was set up in September 2002.

The development of the protection of fundamental rights within the EU up to this point gave birth to what can be described as a new culture of fundamental rights protection; the Charter of Fundamental Rights, Article 6 and 7 TEU and the Network of Independent Experts along with the general principles of EU law being the main contributors. The Commission had earlier proposed an establishment of a permanent form of monitoring of compliance with fundamental rights by the Member States to provide the institutions of the EU with the information they require to fulfill the tasks of Article 7 TEU.[179] Thus, the Network of Independent Experts was suggested to form the basis of such agency. However, this proposal did not receive support from the European Parliament that e.g. emphasized that intervention pursuant to Article 7 TEU must be confined to instances of clear risks and persistent breaches and may not be invoked in support of any right to, or policy of, permanent monitoring of the Member States by the EU since this could differ from the general principle of confidence.[180] The Parliament, however, also stated that the Member States as well as candidate countries must continue to develop democracy, the rule of law and respect for fundamental rights and, when necessary, implement or continue to implement corresponding reforms and that it does not stand in the way of greater use of the services of the EU Monitoring Center for Racism and Xenophobia. If appropriate, the role of the EUMC could be revised in order to provide independent and objective scrutiny on a broader basis.

Finally, all the relevant and important institutions involved in the development of fundamental rights protection within the EU supported the

[177] Ibid., p. 97
[178] (2000/2231(INI)), *European Parliament resolution on the situation as regards fundamental rights in the European Union*, para 9
[179] De Schutter, op. cit., p. 99
[180] (COM(2003) 606 — C5-0594/2003 — 2003/2249(INI)), *European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based*, para. 11

establishment of a fundamental rights agency. At the European Council meeting in December 2003 the proposal that the Union should establish a "human rights agency" in Vienna by extending the mandate of the EUMC was presented. However, the issue was far from settled though an agreement on the tasks and structure of the Agency as well as its relationship with other bodies and organizations had not yet been reached.[181]

3.3.1.2 Tasks and structure – contemplating the Paris Principles and the EU framework

In order to define and clarify the tasks and structure of the proposed Agency the Commission presented a public consultation document on 25 October 2004.[182] The document proposed, *inter alia*, that the tasks of the Agency, which should be set up by an instrument of secondary legislation, must not encroach on the powers conferred on the EU institutions by the Treaties. Like any other Union agency, it should be a European public-law entity, separate from the Union institutions and possessing its own legal personality. It should carry out highly specific technical, scientific or administrative tasks defined in the instrument setting it up and should have no decision-making powers. Its task should thus be to provide support for the institutions, the Member States, the members of civil society and individuals.[183] Due to the character of the document as part of a consultation process a wide spread communication and input from various stakeholders was encouraged.[184] Thus, the result of the public consultation reflected the views of a wide range of actors. The outcome was a number of proposals on how to structure the Agency presented by the Commission for a Council decision on 30 June 2005.[185]

Already in the public consultation document the Commission had made a reference to the so called "Paris Principles" approved by the UN.[186] It was stated that the national institutions for the protection and promotion of human rights, set up by some Member States on the basis of UN principles, could serve as a source of inspiration when establishing the Agency. However, simply transposing these examples should be avoided given the specificity of the EU. According to those principles, it was further established, the institutions must have consultative, informative and monitoring functions and be able in to particular formulate opinions and draw up studies and reports as well as education and information schemes. Thus, one inevitable question to be solved is whether the agency should be

[181] De Schutter, op. cit., p. 100
[182] COM(2004) 693 final, *Communication from the Commission, The Fundamental Rights Agency*
[183] Ibid., p. 4
[184] De Schutter, op. cit., p. 102
[185] COM(2005) 280 final, *Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights Proposal for a Council Regulation empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union*
[186] COM(2004) 693 final, *Communication from the Commission, The Fundamental Rights Agency*, p. 4

based on the UN sanctioned principles of construction of an institution similar to a national human rights institution and how the EU practice on establishing agencies should be applied. The Paris Principles, regulating national human rights institutions, were adopted by the UN General Assembly in 1993.[187] The principles determine and define a national human rights institution as a "body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights".[188] The principles relate to the status of national institutions and provide international minimum standards for an effective national human rights institution. They require, *inter alia*, that national human rights institutions have independence and competence to promote and protect human rights, a broad-based mandate clearly set forth in a constitutional or legislative text, pluralism in membership and staff, members appointed through an official act for a specific duration established in the act, sufficient resources to fulfill their mandates and perform their functions, accessibility to victims and potential victims of human rights violators and a methodology of cooperation with government, non-governmental and privates sector organizations and individuals, nationally and internationally. In terms of activities, the principles, *inter alia*, call for national institutions to submit reports concerning the promotion and protection of human rights, to promote and ensure the harmonization of national legislation, regulation and practices with international human rights instruments to which a State is a party and their effective implementation, to assist in the formulation of human rights education programs and to take part in their execution as well as to publicize human rights. As mentioned above, using the Paris Principles as a source of inspiration but at the same time acknowledging the specificity of the Union was advocated early in the preparation process. First of all, by applying a foundation common to the principles it would allow the Agency to be a part of a network of existing national human rights institutions and thus benefitting from their reports and recommendations.[189] It was furthermore examined whether the Agency should be conceived as a national human rights institution for the Union itself or merely as an institution based on the existing network of institutions within the Union and acting as a forum where the existent institutions could exchange their experiences and cooperation.[190] The latter approach was applied by the EUMC which only could perform its task of monitoring racism and xenophobia by closely cooperating with national focal points in the Member States.[191] In the proposal made by the Commission in June 2005 there are indicators of structural regulations deriving from both approaches and not clearly distinguishing any of them as a foundation for the future agency.[192] It was argued that the Paris Principles and an Agency constructed as an EU

[187] UN Resolution 48/134, *National institutions for the promotion and protection of human rights*
[188] Handbook for National Human Rights Institutions (Professional Training Series No. 12, United Nations New York and Geneva 2005, p. 31
[189] De Schutter, op. cit., p. 103
[190] Ibid.
[191] Alston & De Schutter, *Monitoring Fundamental Rights in the EU*, p. 92
[192] De Schutter, op. cit., p, 104 ff.

human rights institution would present difficulties when facing the specificity of the Union and the framework of EU law.[193] However, it was clear that opinions and conclusions made by the Agency never could be regarded as binding upon the institutions. Furthermore, there were many similarities between the proposed Fundamental Rights Agency and other agencies set up in order to provide necessary expertise within the EU. The idea of conceiving the Agency as a network of national human rights institutions faced problems though there was no uniformity among the Member States in the set up of national institutions.

Naturally, when defining the tasks and structure of the Agency the framework of EU law also had to be assessed and considered. A key issue was to establish the mandate and power of the Agency. The ECJ had earlier established a restrictive approach on the delegation of powers to agencies, such as the proposed Fundamental Rights Agency. For instance, in a case that concerned the so called Administrative Commission of the European Communities on Social Security for Migrant Workers, the Court stated that article 211 EC[194] does not allow a body as the one in question to be empowered by the Council to adopt acts having the force of law.[195] Thus, the Administrative Commission, whilst enjoying a mandate to provide aid to other social security institutions responsible for applying Community law in this particular field, could not be regarded as being delegated the power to require these institutions to use certain methods or interpretation when they apply Community law, nor could a decision by the Administrative Commission be regarded as binding to a national court. The Court had prior to that, through the so called "Meroni" doctrine, established that the consequences resulting from a delegation of power are very different depending on whether it involves clearly defined executive powers the exercise of which can therefore be subject to strict review in the light of an objective criteria determined by the delegating authority, or whether it involves a discretionary power implying a wide margin of discretion which may, according to the use of which is made of it, make possible the execution of actual, as in the case, economic policy.[196] Furthermore, the Court stated that a delegation of the first kind mentioned above cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility. The Commission has traditionally adopted a strict reading of this relevant case law from the ECJ.[197] However, with an extended possibility to delegate certain tasks to specific agencies, the Commission could focus on its core activities and leave particular issues in the hands of experts in the field. However, the lack of any clear and

[193] ibid.
[194] Which regulates the powers and mandate of the European Commission
[195] Case 98/80, *Giuseppe Romano* v *Institut national d'assurance maladie-invalidité*, para 20
[196] Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA* v *High Authority of the European Coal and Steel Community*, p. 152
[197] De Schutter, op. cit., p. 108

extensive framework regarding the establishment of agencies and the fact that the new Fundamental Rights Agency was to be built upon the already existing EUMC indicated a mandate for the new agency mainly consisting of information gathering tasks.[198]

Nothing in the founding regulation[199] confers a mandate to the Agency to supervise compliance with fundamental rights, neither of Member States nor of the EU institutions or bodies. As established above, Article 2 of the regulation states that the objective of the Agency should be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights. The independence, the broad-based mandate and the competence to both promote and protect human rights, all strongly advocated by the Paris Principles when establishing the tasks of a human rights agency, were consequently to a large extent not reflected in the founding regulation. The FRA was given no authorization to decide for itself what issues to focus on.[200] Instead, Article 5 of the regulation states that the Council shall, acting on a proposal from the Commission after consulting the European Parliament, adopt a Multiannual Framework for the Agency. The framework shall cover five years, determine the thematic areas of the Agency's activity and be in line with the Union's priorities. Moreover, Article 4(2) of the regulation establishes that the conclusions, opinions and reports adopted by the Agency may concern proposals from the Commission under Article 250 TEU or positions taken by institutions in the course of legislative procedures but only where a request by the respective institution has been made. These activities, however, should not deal with the legality of acts[201] or with the question of whether a member state has failed to fulfill an obligation under the Treaty[202]. The restrictions of the Agency's mandate were a product of the practice of the EUMC in combination with a concern of the EU institutions that their legislative process would be disrupted by the work of the Agency.[203] This, however, does not preclude that the institutions might use the expertise of the Agency in cases where serious doubt is expressed concerning the legality and compliance with fundamental rights. Furthermore, the Agency has no competence to receive or consider individual complaints.[204] One reason for not allowing the Agency to monitor the Member States was to preserve the political character of the

[198] Ibid.. p. 110
[199] Council Regulation 168/2007 *Establishing a European Union Agency for Fundamental Rights*
[200] De Schutter, op. cit., p. 111
[201] Within the meaning of Article 230 TEU concerning actions for annulment of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.
[202] Within the meaning of Article 226 TEU.
[203] De Schutter, op. cit., p. 111
[204] Kinzelbach & Kozma, op. cit., p. 609

mechanism in Article 7 TEU.[205] Other motives will be discussed in Chapter 4.1.3 when examining the relationship between the Agency and the CoE. However, some due regard was taken in relation to the Paris Principles in the founding regulation. *Inter alia*, a reference was made in the preamble[206] in which it is stated that each Member State should appoint one independent expert to the Management Board. By having regarded the Paris Principles, the composition of that Board should ensure the Agency's independence from both Community institutions and Member State governments and assemble the broadest possible expertise in the field of fundamental rights. Lastly, the limited scope of the Agency's competences has been criticized. E.g. *Kinzelbach* and *Kozma* have argued the Union has missed the chance to develop an institution with genuine monitoring competences when setting up the FRA and that the Agency has to be considered a mere rhetoric instrument rather than an institutional structure that could gain legitimacy and ensure consistency on fundamental rights policies.[207] When facing inconsistent decisions, following no clear criteria but rather political considerations, a detrimental effect on the legitimacy of the Union could be the result.

3.3.2 Inception - the work and impact of the FRA

The FRA achieves its objectives in three ways, by collecting and analyzing objective, reliable and comparable data on a variety of fundamental rights issues within the EU, by networking with partner organizations and ensuring that the research carried out by the FRA is relevant to their needs and by communicating its evidence-based advice to partner organizations and the general public and raising awareness of fundamental rights.[208] The Agency continuously presents their findings and activities in an annual report, as decided in the founding regulation[209], in which the development of the institution also briefly is discussed.

The first Multiannual Framework, determining areas of action, adopted by the Council enables the Agency to focus its work on nine specific fields; [210]

(i) racism, xenophobia and related intolerance,
(ii) discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities,
(iii) compensation of victims,

[205] Ibid.
[206] Council Regulation 168/2007 *Establishing a European Union Agency for Fundamental Rights*, Recital 20
[207] Kinzelbach & Kozma, op. cit., p. 617
[208] http://www.fra.europa.eu/fraWebsite/about_fra/what_we_do/what_we_do_en.htm
[209] Council Regulation 168/2007 *Establishing a European Union Agency for Fundamental Rights*, Article 4 (1) (e)
[210] European Union Agency for Fundamental Rights, Annual Report 2008, p. 1

(iv) the rights of the child, including the protection of children,
(v) asylum, immigration and integration of migrants,
(vi) visa and border control,
(vii) participation of the EU citizens in the Union's democratic functioning,
(viii) information society and, in particular, respect for private life and protection of personal data, and
(ix) access to efficient and independent justice.

The annual reports cover, *inter alia*, legal developments and good practices in the area of fundamental rights in the EU. In the annual report of 2009 the FRA, for the first time, had to assess its work under the new legal basis and mandate given by the regulation establishing the Agency.[211] The Chairperson of the Management Board and the Director of the FRA stated in the foreword that the area of racism, xenophobia, anti-Semitism, Islamophobia and related discrimination still constituted the largest single thematic area of the report since the heritage of the EUMC and the past expertise in the area still influenced the work of the Agency.[212] However, "as the Agency gains both staff and experience in the various fields of fundamental rights, future annual reports will gradually evolve to provide an overview of the diverse areas of its mandate". Consequently, the annual report of 2010 emphasized the institutional development of the Agency and the progress being done in the area of all its substantial tasks.[213] This, being the latest report of the FRA encompasses the full range of fundamental rights issues covered by the scope of the Agency's mandate and covers all the broader thematic areas of the Multiannual Framework briefly discussed above.

Among other activities, also covered by the mandate of the Agency, continuously progressing are the FRA research projects and surveys. Examples of ongoing projects are "European Union Minorities and Discrimination Survey", "Racism and Ethnic Discrimination in Sport in the EU and preventative initiatives", "The asylum seeker perspective: access to information and effective remedies" and "Accessing efficient and independent justice – a legal and sociological analysis". A core activity, albeit often dependent on requests from other EU institutions[214], is the composition of opinions, especially those relating to proposed EU legislation. Although it is not the most frequent task on the agenda of the FRA, there have been occasional requests of opinions since the work of the Agency was launched. Based on the findings of its data collection and analysis, the FRA shall deliver advice and opinions about respecting fundamental rights when implementing European Union law.[215] Since 1 March 2007, when the new Agency was set up, the FRA has presented six

[211] European Union Agency for Fundamental Rights, Annual Report 2009, p. 1
[212] Ibid.
[213] European Union Agency for Fundamental Rights, Annual Report 2010 – Conference edition, p. 1
[214] See Chapter 3.3.1.2
[215] http://fra.europa.eu/fraWebsite/research/opinions/opinions_en.htm

Opinion Papers of the said kind. The vast majority of these were requested by other EU institutions. Upon a request made by the European Parliament's Committee on Employment and Social Affairs, the FRA made a contribution to the European Parliament hearing on the progress made in equal opportunities and non-discrimination in the European Union on 20 November 2007. Furthermore, on 28 October 2008 the Agency presented an opinion on the Commission's proposal for a Council framework decision on the use of Passenger Name Record requested by the French Presidency. As a part of the public consultation launched by the Commission on the issue of body scanners the FRA on 27 July 2010 contributed with an opinion. The latest opinion presented by the FRA was on 23 February 2011 as a response to the request made by the European Parliament concerning the draft Directive regarding the European Investigation Order in criminal matters. Even if the possibility for the FRA to intervene in the legislative process is limited[216] it is fair to say that the Agency, at least occasionally, has exercised its mandate given by e.g. 4 (1) (d)[217] and Recital 13[218] of the founding regulation and thus exploited the opportunity to, to some extent, affect the legislative process and the impact of fundamental rights protection therein.

[216] See above and Chapter 3.3.1.2

[217] "[To meet the objective set in Article 2 and within its competences laid down in Article 3, the Agency shall:] formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission"

[218] "The Agency should have the right to formulate opinions to the Union institutions and to the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission, without interference with the legislative and judicial procedures established in the Treaty. Nevertheless, the institutions should be able to request opinions on their legislative proposals or positions taken in the course of legislative procedures as far as their compatibility with fundamental rights are concerned."

4 The EU and the Council of Europe – a relationship of mutual comity?

4.1 The relationship between the EU and the European Convention on Human Rights

The relationship between the Union and the ECHR was, mainly in the jurisprudence of the ECJ, continuously defined as the process of establishing fundamental rights as general principles of Community law took place. The case law of the Court, including cases such as *Hauer* as well as the Joint Declaration of 5 April 1977 of the European Parliament, Council and Commission did all contribute to clarify the nature of the interface between the two of the most influential institutions in Europe. [219] This chapter aims to briefly describe the development of the relationship as well as the ECHR impact on the recent institutional development of the protection of fundamental rights in the EU, the Charter of Fundamental Rights and the Fundamental Rights Agency. Since this issue, to some extent, already has been covered by other chapters in this thesis only additional relevant facts will be presented in this chapter.

Prior to the *Hauer* case a reference, yet limited in its application, was made by the ECJ to the ECHR. In the *Rutili*[220] case the Court established that certain specific provisions in Community law were "a specific manifestation of the more general principle" enshrined in the ECHR.[221] The *Johnston*[222]case also acknowledged the special importance of the ECHR by stating; "principles on which the ECHR is based must be taken into consideration in Community law".[223] However, the *Hauer* case did, as mentioned in Chapter 2, establish that fundamental rights as general principles of Community law are based on, *inter alia*, the provisions and content of the ECHR. Subsequently, references to the ECHR were made in numerous documents of the Community, not only in the case law of the Court. The main codifying response on the ECJ jurisprudence was to be found in the legislative development in the Maastricht Treaty confirming the importance of ECHR. In Article F (2) an explicit reference to the ECHR was made.[224] However, the fact that two different courts had potential jurisdiction over the same cases and based it upon the same set of rules and

[219] See Chapter 2
[220] Case 36/75, *Roland Rutili* v *Ministre de l'intérieur*
[221] Ibid., para 32
[222] Case 222/84, *Marguerite Johnston* v *Chief Constable of the Royal Ulster Constabulary*
[223] Ibid., para 18
[224] See Chapter 2.3

traditions could constitute an imminent risk of differential interpretation and thus cause inconsistency and confusion. For instance, in the *Hoechst*[225]case the ECJ concluded that the inviolability of the home in regard to the business premises of an undertaking was not recognized as a fundamental right within Community law. The ECJ reached its conclusion from the fact that "there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities."[226] The ECtHR however, subsequently held in three cases that Article 8 of the ECHR, which contains the right to respect for private life, indeed was wide enough to include both the home when used for business purposes and professional premises.[227] As this thesis has recurrently emphasized the case law of the ECJ gave the provisions of the ECHR the effect as general principles of Union law yet did not formally bind the EU. However, the result was much the same as if the Union was bound by the ECHR, even though the ECJ had no legal obligation what so ever to follow the case law of the ECtHR.[228] Nevertheless, there are specific situations where the ECHR will apply but Community law will not. In the *Koua Poirrez*[229]case the ECJ found that the specific claim of the applicant did not fall within the scope of the law on the free movement of workers because "the legislation regarding freedom of movement for workers cannot be applied to the situation of workers who have never exercised the right to freedom of movement within the Community".[230] The case concerned an Ivory Coast national, adopted by a French national when he was 21 years old, who suffered from a severe physical disability since the age of seven. The French authorities later refused to award him a disabled adult's allowance on the ground that he was not a French national and there was no reciprocal agreement between France and the Ivory Coast in respect of this benefit. A number of years later the case was brought to the ECtHR whereupon the Strasbourg Court reached a different verdict than the ECJ granting the applicant damages for discrimination on the grounds of nationality.[231] The evolving case law of the courts has, however, developed actions and measures in the event of any discrepancy between the two independent systems. It has to be considered that the two jurisdictions are in a relationship of cooperation and not in one of confrontation.[232] The ECJ even started to directly refer to cases ruled by the Strasbourg Court and has been doing so more and more frequently over the latest years.[233] Also the ECtHR increasingly refers to the case law of the

[225] Joined Cases 46/87 and 227/88, *Hoechst AG* v *Commission of the European Communities*
[226] Ibid., para 17
[227] *Chappell v. United Kingdom*, Application no. 10461/83; *Niemetz v. Germany*, Application no. 13710/88; and *Funke and others v. France*, Application no. 10828/84
[228] Ovey & White, *The European Convention on Human Rights*, p. 516
[229] Case 206/91, *Ettien Koua Poirrez* v *Caisse d'allocations familiales de la région parisienne, substituée par la Caisse d'allocations familiales de la Seine-Saint-Denis*
[230] Ibid., para 12
[231] *Koua Poirrez v. France*, Application no. 40892/98
[232] Tridimas, op. cit., p. 343
[233] E.g. Case 185/95, *Baustahlgewebe GmbH v Commission of the European Communities*, para 29

ECJ. Naturally, this development helps to create a uniform human rights standard in Europe.[234] Notable among the principles accepted in Community law deriving from the ECHR and originally directly referred from the Convention are, *inter alia*, the right to privacy, freedom of speech and freedom of assembly.

One of the first rulings where the ECtHR clarified the relationship between the EU and the Convention was the *Matthews*[235] case. The applicant, a British citizen, was a resident of Gibraltar. In April 1994 she applied to be registered as a voter in the elections to the European Parliament. She was however denied, though Gibraltar was not included in the Community Act on Direct Elections of 1976. The applicant therefore claimed that the absence of elections in Gibraltar to the European Parliament was in violation of her right to participate in elections. The ECtHR first established that acts of the Community as such cannot be challenged before the Court because the Community is not a contracting party.[236] Furthermore, it was concluded that the ECHR does not exclude the transfer of competences to international organizations provided that ECHR rights continue to be "secured", thus, the responsibility of Member States therefore continues even after such a transfer. The provision at stake was part of an international treaty concluded by the Member States of the Union and the alleged violation could not, as deriving from an act of primary law, be challenged before the ECJ. The ECtHR therefore held that the United Kingdom, along with all other Member States of the EU, was responsible the violation.[237] Through the *Matthews* case the ECtHR implicitly endorsed the idea of European integration by pursuing an agenda fully conformed to that of the ECJ.[238] However, European integration, and even constitutionalism, is in this respect welcome as long as it complies with the protection of fundamental rights. In the *Bosphorus Airways*[239] case, which was settled in the Grand Chamber of the ECtHR, the Court had to consider the EU secondary legislation with the ECHR. It has been regarded as the most important statement regarding the relationship between the ECtHR and the ECJ.[240] The case concerned an Irish seizure of an aircraft in compliance with the Council Regulation 990/93 imposing sanctions against Serbia and Montenegro. The Court began to conclude that it would be incompatible with the purpose and object of the ECHR that state parties could absolve completely from their responsibilities deriving from the Convention.[241] It furthermore drew conclusions from the *Matthews* case stating that the state is considered to retain ECHR liability in respect of treaty commitments subsequent to the entry into force of the ECHR. However, the ECtHR continued to examine the extent to which an action of a state can by justified

[234] Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts*, p. 380
[235] *Matthews v. United Kingdom*, Application no. 24833/94
[236] Ibid., para 32
[237] Ibid., para 33 - 35
[238] Tridimas, op. cit., p. 349
[239] *Bosphorus Hava Yollari Turizm v. Ireland*, Application no. 45036/98
[240] Tridimas, op. cit., p. 350
[241] *Bosphorus Hava Yollari Turizm v. Ireland*, Application no. 45036/98, para 154

by its compliance with obligations flowing from its membership of an international organization to which it has transferred part of its sovereignty. It was stated: "State action taken in compliance with such legal obligations is justified as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides".[242] The ECtHR thus established the *Bosphorus* doctrine; if an equivalent protection is considered to be provided by the organization, the presumption will be that a State has not departed from the requirements of the ECHR when it does no more than implement legal obligations flowing from its membership of the organization.[243] Nevertheless, the presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In these cases, "the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights". The Court found that the measure taken by the Irish authorities to seize the aircraft in question indeed constituted compliance with the state's legal obligation flowing from its EU membership and that the protection of the applicant's ECHR rights was not manifestly deficient, thus the relevant presumption of ECHR compliance by Ireland was not rebutted.[244] Consequently, the case clarified many ambiguities concerning the relationship between the two jurisdictions, the principles deriving from the case are reiterated below;[245]

- *(i)* the ECHR does not prohibit state parties from transferring sovereign powers to an international or supranational organization,
- *(ii)* a state party remains responsible for acts or omissions of its organs regardless if it is a consequence of national law or of the obligation to comply with international agreements,
- *(iii)* such state action taken in compliance with such international agreements is justified as long as the relevant organization protects human rights in a manner which can be considered to be at least equivalent to that provided by the ECHR (e.g. the EU),
- *(iv)* the state is presumed to comply with the requirements of the ECHR if such an equivalent standard is found,
- *(v)* the state, however, remains fully responsible under the ECHR for all acts falling outside its strict international obligations, and
- *(vi)* the above mentioned presumption can be rebutted if it is considered that the protection of ECHR rights, in a particular case, is manifestly deficient.

The ECtHR established, by, *inter alia*, highlighting the references in the SEA and the TEU, that the protection of fundamental rights by Community

[242] Ibid., para 155
[243] Ibid., para 156
[244] Ibid., para 158
[245] Tridimas, op. cit., p. 350

law could be considered to be, and at the relevant time was, equivalent to that of the ECHR system.[246] The *Bosphorus* formula is only applicable where the Community law at issue could be challenged before the ECJ. It does not apply where, as in the *Matthews* case, the compliance of primary law with the ECHR is at issue.

In conclusion, it is safe to say that, since both courts seem to gradually expand their jurisdiction, there are an increasing number of situations of which both the ECJ and the ECtHR will have jurisdiction. Nevertheless, this does not automatically mean an increased number of difficulties though both courts, with respect for the other, seem willing to avoid substantial conflicts. Moreover, each court pays great attention to the jurisprudence of the other and thus appears motivated not to be the one providing a lesser standard. The cooperation between the courts is nevertheless not based on a legal duty to cooperate, but merely on comity.[247] Thus, either court can unilaterally end this cooperation at any moment. An EU accession to the ECHR has therefore been considered a desirable step in order to clarify the relationship and provide for a clear legal basis for the cooperation between the ECJ and the ECtHR.

4.1.1 The accession debate

Inevitably, the case law of the ECJ confirming the Union approach of the ECHR as an influence and a basis for the general principles of EU law led to a debate whether or not the Union should accede to the ECHR.[248] By an initiative of the European Commission a sincere accession debate was held in the early 1990s. The Council responded to the development by asking the ECJ for an Opinion, a possibility given by ex Article 228 EC (Article 218 TFEU).[249] The question to the Court was phrased: "Would the accession of the European Community to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 be compatible with the Treaty establishing the European Community?" The Court concluded first and foremost that no Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.[250] The ECJ therefore turned to ex Article 235 EC (Article 352 TFEU).[251] However, in its findings the ECJ

[246] *Bosphorus Hava Yollari Turizm v. Ireland*, Application no. 45036/98, para 165
[247] Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts*, p. 381
[248] Ovey & White, op. cit., p. 517
[249] Opinion 2/94 of the European Court of Justice
[250] Ibid., para 27
[251] Ex Article 235 EC (Article 352 TFEU): "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative

established that the proposed modification of the system for the protection of fundamental rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235 EC. It could be brought about only by way of Treaty amendment.[252] It was therefore held that, as Community law at the time stood, the Community had no competence to accede to the ECHR.[253] It has been expressed that the response of the ECJ was legally correct as to the timing and the question asked.[254] Thus, the power of the protection of fundamental rights through the general principles of Union law was preserved. Others have argued that the reasoning of the Opinion is not wholly convincing.[255] The main argument in favor of competence put forward by several Member States as well as the Commission was that the respect of fundamental rights is an integral part of all Community policies and objectives. However, in the response the Court practically ignored to discuss this argument. According to *Tridimas* the issue of accession to the ECHR at the time being should not be viewed as an issue of competence but rather as an issue of compatibility.[256] However, during the intense accession debate there were many arguments put forward for why an EU accession to the ECHR was considered desirable even though the Union gradually had enhanced the status of fundamental rights.[257] The Union, and in particular its judicial institutions, had continuously encountered criticism of its role as a fundamental rights protector and, *inter alia*, had met concerns that its fundamental rights discourse was an attempt to gain influence of Community law over areas of primary concern to the Member States. Moreover it was emphasized that the Court had "manipulated the rhetorical force of the language of the rights" and in particular favored "market rights" instead of protecting values that could be considered genuinely fundamental. It was also argued that the Court had become to deferential, deficient in its role of requiring Member States to observe fundamental rights principles in areas covered by Community law. Lastly, it was considered the ECJ should not be modeled as a European Human Rights Court, since no such mandate was given to it neither in its function nor in its purpose, while the ECtHR, on the other hand, was specifically entrusted by the Member States to monitor fundamental rights compliance. Additionally, an accession by the EU to the ECHR would give the signal that the Union is prepared to accept external control over its judicial system.[258] Thus, an individual could bring a complaint against the Union before the ECtHR. Since all Member States of the EU have ratified the ECHR and accepted the judicial control of the ECtHR, an accession by the EU would ensure consistency of the fundamental rights protection in Europe and, since the ECJ would be legally

---

procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament"

[252] Opinion 2/94 of the European Court of Justice, para 35

[253] Ibid., para 36

[254] Ovey & White, op. cit., p. 518

[255] Tridimas, op. cit., p. 354

[256] Tridimas, op. cit., p. 355

[257] Craig & De Burca, op. cit., p. 419

[258] Lindfelt, op. cit., p. 263

bound by the case law of the ECtHR, the risk of a divided interpretation in fundamental rights case law would be eliminated. Lastly, an EU accession to the ECHR would hardly change anything with regard to the substantial protection.[259] In a report presented to the Parliamentary Assembly of the Council of Europe, PACE, composed by Jean-Claude Juncker, the Prime Minister of Luxemburg, concerning the relationship between the CoE and the EU it was stated:[260] "EU accession to the ECHR will not affect the division of powers between the EU and its Member States provided for in the Treaties. Nor will one organization – the European Union – be in any way subordinated to the other – the Council of Europe. Accession will, however, subject the EU institutions to that external monitoring of compliance with fundamental rights which already applies to institutions in the Council's member states. Accession will also allow the EU to become a party in cases directly or indirectly concerned with Community law before the European Court of Human Rights. This will allow it to explain and defend the contested provisions. The binding effects on the EU of any decision by the Court that the ECHR has been violated will also be strengthened, and the execution of judgments by the EU, when this is a matter for it, will be guaranteed. On a technical level, contacts between experts in the two organizations have already answered most of the questions raised concerning the practical implications of EU accession to the ECHR. The methodology adopted for accession must preserve the integrity of the EU legal system. Efforts to clarify these questions are continuing without any serious problems". Subsequently, as the Lisbon Treaty entered into force thus through the instrument proposed by the ECJ in Opinion 2/94, a treaty amendment, the debate over an accession to the ECHR came to an end. This will further be discussed in Chapter 5.2.

4.1.2 The EU Charter of Fundamental Rights and the European Convention on Human Rights

On 25 January 2000 the PACE adopted a resolution on matters relating to the EU Charter of Fundamental Rights.[261] The resolution first and foremost welcomed the EU initiative to strengthen the protection of fundamental rights but raised concerns to the risks of having two sets of fundamental rights catalogues which could weaken ECtHR.[262] The resolution resulted in three conclusions by the PACE; [263] the Union should

(i) incorporate the rights guaranteed in the ECHR and its protocols into the Charter of Fundamental Rights and to do its utmost to

[259] Christensen, *Judicial Accommodation of Human Rights in the European Union,* p. 232
[260] Juncker , *Council of Europe – European Union: "A sole ambition for the European continent"*, p. 4
[261] Resolution 1210 (2000) PACE, *"Charter of fundamental rights of the European Union"*
[262] Ibid., para 4 - 5
[263] Ibid., para 10

safeguard the consistency of the protection of human rights in Europe and to avoid diverging interpretations of those rights,

(ii) pronounce itself in favor of accession to the ECHR and to make the necessary amendments to the Community treaties, and

(iii) make sure that when referring to social rights the revised European Social Charter of the Council of Europe will be taken into account.

Another concern raised by the CoE was that a Charter might intrude on the principle that there should be no dividing lines in Europe, not least in relation to fundamental rights protection which, more than anything else, require a united front.[264] The future relationship between the Charter and the ECHR was not only an important issue for the CoE, it was throughout the Charter Convention also observed by the drafters.[265]

In the Charter preamble the ECHR is established as a considerable source of inspiration: "this Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from [..] the European Convention for the Protection of Human Rights and Fundamental Freedoms". The scope of the rights in the Charter is considerably wider than the rights protected in the ECHR.[266] Even though the rights are supposed to be based on the articles of the ECHR, there are, in many cases intriguing differences in the wording. The explanatory note concerning the final draft of the Charter contains a list of rights in the Charter which are the same, both in meaning and in scope, as the corresponding rights in the ECHR.[267] It also contains a list of Charter rights with a wider scope than in the ECHR. However, concerns were raised asking whether these lists were to be given a more authoritative status once the legal status of the Charter was clarified.[268] A fair question to ask is why the Charter Convention did not chose to phrase the provisions of the Charter identical to the phrasing in the ECHR. It has been argued that the will to modernize and accommodate the rights to a modern, contemporary society was one of the main reasons.[269] Many of the rights contained in the ECHR were written short after the Second World War. Also by rephrasing the wording, the statement that the Union is an autonomous legal order in relation the ECHR was made. This has also been covered by the discussion in Chapter 3.2.

As also mentioned in Chapter 3.2.2, the relationship between the Charter and the rights of the ECHR is regulated in Articles 52 and 53 of the Charter. Article 52 (3)[270] establishes that, in so far as the Charter contains rights

[264] Peers & Ward, op. cit., p. xx
[265] Lindfelt, op. cit., p. 144
[266] Ovey & White, op. cit., p. 519
[267] Charte 4473/00, *Draft Charter of Fundamental Rights of the European Union*
[268] McCrudden, op. cit., p. 19
[269] Lindfelt, op. cit., p. 147
[270] Article 52 (3): "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by

which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights should be the same as those laid down by the said Convention. The provision, however, should not prevent Union law providing more extensive protection. At the same time as the provision establishes a minimum standard limited by the ECHR, the Union is free to provide a higher level of protection and hence safeguarding the autonomy of EU law. A problem may arise where different rights conflict and one is given an extended protection while the protection of the other right is intruded. However, when contemplating this problem in conjunction with Article 53[271] it is reasonable to believe that the Charter does not allow situations where a higher protection of a specific right is offered at the expense of another right. Furthermore, if the ECHR should be amended in the future, these amendments will automatically become the minimum standard for the protection of fundamental rights within the Union.[272] Also, any limitation of the Charter proposed by legislation has to comply with the same standards as those which apply to the ECHR. When establishing the meaning and scope of a number of rights in the ECHR the ECJ would probably need to interpret the provisions in the light of the ECtHR case law. However, the provision does not provide any explicit reference to the case law of the ECtHR. The question therefore arises whether the ECJ, after the legal status of the Charter is clarified, is legally bound by the jurisprudence of the Strasbourg court. This will be examined in the Chapter 5.1.

4.1.3 The EU Fundamental Rights Agency and the Council of Europe – "No point in reinventing the wheel"

The question of the nature of the relationship between the CoE and the newly established FRA is indeed a relevant and important one, not least since the mandate of the two institutions and their role of monitoring fundamental rights may be perceived as relatively similar. The FRA has already been examined in Chapter 3.3 of this thesis, hence this subchapter will only assess its relationship to the CoE.

Naturally, the CoE did contribute with its views during the founding and drafting process of the FRA and was indeed very careful in monitoring the implementation of the Agency. The initial reaction of the CoE to the decision to establish a Fundamental Rights Agency in the EU was clearly

---

the said Convention. This provision shall not prevent Union law providing more extensive protection"

[271] Article 53: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions"

[272] Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts*, p. 382

defensive.[273] It was early in the debate emphasized that a clear distinction between the proposed FRA and the monitoring bodies of the CoE had to be made, mainly through differentiation between "advisory monitoring" such as collection and analysis of data entrusted the FRA and "normative monitoring" such as monitoring as evaluation of compliance with certain standards, much alike the mandate of the CoE bodies. The most frequent recurring issue in relation to this question was to avoid duplication of the work being done by the CoE in order not to undermine the efforts of the CoE monitoring bodies and diminish their authority.[274] This was thoroughly debated by the PACE and resulted in a resolution on the matter.[275] The resolution, adopted in 2005, first established the status of the CoE on the area of fundamental rights protection and thus confirmed its normative role as well as the active monitoring of compliance with the standards set up by the Council.[276] It was furthermore stated that "such monitoring is carried out by several well-established independent human rights bodies with recognized expertise and professionalism, both on a country-by-country basis (including through country visits and on-the-spot investigations) and, increasingly, also thematically" and that the CoE, through these mechanisms, monitors compliance with all the human rights obligations of its Member States including the, at the time, twenty-five Member States of the European Union. In this monitoring role it "identifies issues of non-compliance, addresses recommendations to Member States and, in the case of the ECtHR, issues judgments binding on states parties whenever these standards are not respected". Moreover, the resolution confirmed that, given the supranational nature of the EU and the recent expansion of competencies within the Union "including in such broad and human-rights-sensitive areas as justice and home affairs, it is not only legitimate and understandable but also desirable and necessary that human rights be given their rightful place in the EU's legal order".[277] The PACE did consider an establishment of an EU Fundamental Rights Agency a helpful contribution provided that the Agency would fill a gap and thus present some added value.[278] However, it was argued that creating institutions with mandates which overlap with those of existing ones "can easily result in the dilution and weakening of their individual authority, which in turn will mean weaker, not stronger, protection of human rights, to the detriment of the individual". [279]A harsh yet clear and precise statement from the PACE urged that "there is no point in reinventing the wheel by giving the Agency a role which is already performed by existing human rights institutions and mechanisms in Europe. That would simply be a waste of taxpayers' money". Thus, a suitable role for the proposed Agency, according to the PACE, would be to collect and provide, to the institutions of the Union, information about fundamental rights which is relevant to their activities and trough those activities

[273] De Schutter, op. cit., p. 112
[274] De Schutter, op. cit., p. 112
[275] Resolution 1427 (2005) PACE, *"Plans to set up a fundamental rights agency of the European Union"*
[276] Ibid., para 4
[277] Ibid., para 8
[278] Ibid., para 10
[279] Ibid., para 11

contribute to mainstreaming standards of fundamental rights in the EU decision making processes.[280] Another argument for avoiding duplication was the generally accepted thesis that there should be no dividing lines in a Europe, united under the fundamental rights flag.[281] Following this approach, the PACE concluded that the Agency, *inter alia*, should[282]:

(i) have a mandate limited to the scope of application of Union law, thus monitor fundamental rights within situations that are applicable under the supervision of the ECJ and within the application of the EU Charter of Fundamental Rights,
(ii) work on a thematic, not a country-by-country basis, focusing on specified themes with a special connection to EU policies,
(iii) include not only the ECHR but also the other human rights instruments of the CoE in its reference instruments, and
(iv) include the CoE in the management structures of the Agency (a cooperation agreement between the CoE and the Union was proposed to be concluded)

In relation to the two different concepts of monitoring, mentioned above, one has to conclude that the Agency via its scope of mandate provided by the founding regulation was entrusted with mainly advisory monitoring tasks rather than normative monitoring tasks. It could however be complicated to in detail define the division between these two types of assignments, as *De Schutter* puts it: "even mere fact-finding, after all, necessarily consists in highlighting certain situations and thus putting pressure on the actors concerned to remedy any deficiencies found to exist".[283] This, along with the fact that nothing explicitly precluded the Agency to, in their thematic reports, include conclusions and opinions on individual Member States or on specific events or measures, could constitute a basis for duplication. As mentioned in Chapter 3.3 the objective given to the Agency by the founding regulation was limited to providing the relevant institutions, bodies, offices and agencies of the Union and its Member States when implementing Union law with assistance and expertise relating to fundamental rights. This could however also intrude on the activities of the CoE bodies. Member States, even when they implement Union law, has to comply with and fully respect their international obligations such as the instruments of the CoE. The bodies of the CoE, however, continuously examine whether its state parties comply with their obligations even where the states act only to fulfill their obligations under Union law. It is plausible to believe that the impact of potential duplication in this aspect would depend on the status which the conclusions made by the CoE monitoring bodies will have in the findings of the Agency.[284]

[280] Ibid., para 13
[281] Also discussed in relation to the EU Charter of Fundamental Rights, Chapter 4.1.2
[282] Resolution 1427 (2005) PACE, *"Plans to set up a fundamental rights agency of the European Union"*, para 14
[283] De Schutter, op. cit., p. 117
[284] De Schutter, op. cit., p. 120

The initial Commission proposal regarding the mandate of the Agency included a possibility for the FRA to provide information and analysis on issues concerning third countries which the Union had concluded particular association agreements with, e.g. the countries covered by the European Neighborhood Policy.[285] As a response to this possibility, the CoE once again raised its concerns that the FRA would duplicate the work of the CoE monitoring bodies and stated that this could not be justified by claiming a sufficiently close link to the activities of the EU. In a Recommendation concerning the FRA the PACE later stated: "the Agency should have no mandate to undertake activities concerning non-European Union member states. Should such a mandate nevertheless be considered absolutely necessary, it should be strictly confined to candidate countries and limited to issues arising from the accession process".[286] Partly due to the concerns of the CoE, the geographical remit of the Agency was narrowed down, only covering a limited number of third countries with candidate or pre-candidate status.[287]

Following the Memorandum of Understanding between the CoE and the EU adopted in 2007[288], which was given due regard by the founding regulation, it was decided that the FRA should take into account both the human rights instruments provided by the CoE as well as the findings of the CoE monitoring bodies in any monitoring of individual Member States by the EU. Article 6 (2)(b) of the regulation establishing the FRA[289] establishes that the Agency shall, in order to achieve complementarity and guarantee the best possible use of resources, take account, where appropriate, of information collected and of activities undertaken, in particular by, *inter alia*, the CoE, by referring to the findings and activities of the monitoring and control mechanisms of the CoE. Furthermore, it was established in Article 12 that the Management Board of the Agency should be composed of persons with appropriate experience in the management of public or private sector organizations and, in addition, knowledge in the field of fundamental rights, including one independent person appointed by the CoE. Lastly Article 9 stated that the Agency should, in order to avoid duplication and in order to ensure complementarity and added value, coordinate its activities with those of the CoE, particularly with regard to its Annual Work Programme. It was further established that the Union, to that end, shall enter into an agreement with the CoE for the purpose of establishing close cooperation between the CoE and the Agency.

[285] COM(2005) 280 final, Article 3 (4)
[286] Recommendation 1744 (2006) PACE, *"Follow-up to the 3rd Summit: the Council of Europe and the proposed fundamental rights agency of the European Union"*, para 11 (3)
[287] De Schutter, op. cit., p. 122
[288] Memorandum of Understanding between the Council of Europe and the European Union, CM(2007)74
[289] Council Regulation 168/2007*Establishing a European Union Agency for Fundamental Rights*

5 Effects of the Lisbon Treaty

On 13 December 2007 the Lisbon Treaty, the new Treaty of the Union, was officially signed by the Heads of the Member States. However, it took almost two years before it, on 1 December 2009, entered into force. This represented the culmination of many years of discussion concerning the future of the Union and thus, unlike the failed Constitutional Treaty, the consensus of all EU Member States. This Chapter will assess the effects of the Lisbon Treaty on the protection of fundamental rights within the Union. The examination will focus on the Charter of Fundamental Rights and the future possible EU accession to the ECHR, which both received its much desired attention in the provisions of the new Treaty.

5.1 Consequenses of giving the Charter of Fundamental Rights full legal effect – the future of the Charter

In the Constitutional Treaty the Charter was given a prominent position as the second part of the Treaty. The Lisbon Treaty, however, did not use the method of incorporation. Instead, Article 6 TEU was amended and changed providing for the necessary adjustments in order to ensure the Charter's legal status and the Charter itself was added as a protocol to the TFEU. Article 6 (1) states: "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions". Thus, the Charter was finally legally binding and guaranteed the same legal value as the Treaties as part of the primary law of the Union. The dynamic and flexible, yet to some extent unpredictable, protection of fundamental rights developed by the ECJ as general principles of Union law and described throughout this thesis was therefore transformed into a more traditional protection of rights, not unlike the constitutions of the Member States. Simultaneously, the protection of fundamental rights was made farther visible which undoubtedly enhanced the legitimacy of the Union. As the horizontal provisions of the Charter prescribe, Article 6 (1) reaffirms that the Charter does not extend the competences of the Union as defined in the Treaties. Accordingly, it is addressed only to the institutions, bodies, offices and agencies of the Union and to the Member States, when they are implementing Union law. This is, as discussed above, also stated in Article 51 of the Charter. Article 51 (2) furthermore establishes that the

Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Even though the Charter is legally binding it does not enjoy the position as the exclusive legal source for the protection of fundamental rights. Certainly, the ECHR and its relation to the Charter will still be an important issue. Moreover, the UN Universal Declaration of Human Rights and the European Social Charter should still be possible to invoke before the Union judiciary. It is however reasonable to believe that the Charter would remain the primary source of the fundamental rights contained within Union law.

Compared to the initial wording of the Charter, the text adopted as a protocol to the TFEU was amended[290] with e.g. Article 52 (5) which states: "the provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality". Despite the regulation in Article 51 (2) it has been argued that this might lead to an extension of the field of application of Union law.[291] It is also possible that the Court, when asked for a preliminary ruling, might examine certain issues where its competence otherwise would be limited or precluded. As discussed in Chapter 2.1 and 3.2.3, references to the Charter by the EU judiciary became more and more frequent over the years that followed its proclamation. The ECJ used the Charter as support for its argumentation and interpretation of the protection of fundamental rights. It was often used in close connection to the Court's application of other fundamental principles of EU law, e.g. the fundamental freedoms. This development is most likely to continue in an even larger scale after the Charter became legally binding. One specific area where the case law of the Court will not merely constitute a duplication of the ECHR but also confer added value to the protection of the fundamental rights is to be found in the relationship between the rights contained in the Charter and the fundamental freedoms guaranteed on the single market. The fair balance test between the rights and the freedoms has been illustrated in this thesis by e.g. the *Schmidberger* and the *Laval* cases and is, after the entry into force, a natural part of a coherent and legally binding acquis of Union law. Since the Charter in itself will constitute an integrated part of the EU legal system clarification on certain issues relating to this will likely be made.

[290] Moreover, *inter alia*, a provision stating that the official explanations to the Charter, "Explanations relating to the Charter of Fundamental Rights (2007/C 303/02)", earlier discussed in Chapter 3, "shall be given due regard by the courts of the Union and of the Member States". This is established in Article 52 (7). The explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter. They were updated under the responsibility of the Praesidium of the Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52) and of further developments of Union law.

[291] Hette & Öberg, *Domstolarna i Europeiska Unionens konstitution*, p. 104

With the legal status clarified and by giving the Charter the same legal value as the Treaties, not only the ECJ but also national courts are explicitly given the mandate to use the Charter as a considerable legal source and the competence to interpret its contents, albeit only in matters covered by the scope of application defined in Article 51.[292] However, as the scope of EU law is extending more and more situations will be deemed as falling within the Charter's field of application. Additionally, in the new Article 6 (3) TEU it is, as in the former Article 6 (2), referred to the ECHR and the constitutional traditions of the Member States: "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law". This might be regarded as an indication of a desired continuity of the legal development of the protection of fundamental rights.[293] A significant difference between the implementation of the Charter and the ECHR is that, while the ECtHR only can act when an applicant has exhausted all national remedies, a national court can ask the ECJ for a preliminary ruling in a pending case concerning the Charter. Thus, when Union law is applicable, a national court does not have to base its findings on a forecast of a likely ECtHR decision. This could indeed have a positive effect on the coherence and legal certainty of fundamental rights protection taken into consideration that the Charter now constitutes a constitutional basis for the application of Union law within the Member States.

The question of whether the ECJ, while now legally bound by the Charter, at the same time is obliged to follow the case law of the ECtHR has been briefly discussed in Chapter 4 but will in more detail be examined here. First and foremost, the Charter does not offer a waterproof method for avoiding divergences between the two systems. A dissatisfactory situation might occur if or when the ECJ is confronted with an issue on which the ECtHR has not yet ruled.[294] The Luxembourg Court might then adopt an interpretation which the ECtHR do not endorse in a later judgment. Article 52 (3) does not provide any explicit reference to the case law of the ECtHR. Therefore, it is of the utmost importance to recognize the importance of the ECtHR jurisprudence within the ECHR system. It has been argued that since the ECHR established the ECtHR and because of the fact that the ECtHR interprets the rights contained in the ECHR already from the outset one has to assume that the case law of the Strasbourg Court forms an integral part of the meaning, interpretation and scope of the guaranteed rights.[295] Since the text of the ECHR is more than 50 years old and due to the fact that it has been interpreted as a living instrument by the ECtHR it is likely that the drafters of the Charter wanted more than just a mere reference to the document as such.[296] Then again, an industrious ECJ acceptance of

[292] Hette & Öberg, op. cit., p. 102
[293] Bernitz, *EU:s nya rättighetsstadga – Hur kommer den att tillämpas?*, p. 76
[294] Van den Berghe, op. cit., p. 147
[295] Lenaerts & Smijter, *The Charter and the Role of the European Courts, Maastricht Journal of European Law*, p. 90
[296] Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts*, p. 384

the ECtHR case law would bind the Luxembourg Court to every act of its "counterpart" and thus automatically incorporate any single step of fundamental rights protection taken by the ECtHR into Union law. As mentioned above, Article 52 (7) of the Charter states that its official explanations "shall be given due regard". In the explanations it is established that the reference to the ECHR in Article 52 (3) covers both the ECHR and the Protocols to it and that "the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights and by the Court of Justice of the European Union."[297] However, since the interpreter of the Charter only has to give due regard to the case law of the ECtHR, there are nothing in these explanations that implies a will to let the ECJ be strictly bound by the ECtHR jurisprudence. During the drafting of the Charter, there were several attempts to include a reference to the ECtHR case law in the text.[298] It was however impossible to agree on such reference. Neither the wording of the provision nor the history of the drafting support the fact that the ECJ is to be bound by the case law of the Strasbourg Court. Additionally, the unpleasant situation might occur where the ECJ, bound by the both its own jurisprudence and the ECtHR case law, has to face conflicting and contradictory duties deriving from similar cases yet two different sources. In conclusion, it is reasonable to believe that the ECJ is not bound by the ECtHR case law when interpreting rights that correspond to those of the ECHR.[299] If that was the intention of the drafters, it would most likely have been explicitly mentioned. However, in order to maintain consistency and coherence in the protection of fundamental rights in Europe, the ECJ should as often as possible respect and take into account the findings of the ECtHR. Perhaps would an EU accession to the ECHR provide for an even more coherent system. This will be examined in Chapter 5.2 below.

A legally binding Charter was not a desirable development for all Member States of the Union. Both United Kingdom and Poland made efforts to avoid to be bound by the Charter or at least to limit its impact.[300] Both countries finally achieved what was called an "opt out" from the Charter.
The Protocol on the Application of the Charter to Poland and the United Kingdom states: (Article 1 (1)) "the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms", (Article 1 (2)) "in particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as

[297] Explanations relating to the Charter of Fundamental Rights (2007/C 303/33)
[298] Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts*, p. 385
[299] Ibid., p. 387
[300] Griller & Ziller, *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?*, p. 244

Poland or the United Kingdom has provided for such rights in its national law", (Article 2) "to the extent that a provision of the Charter refers to national law and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognized in the law or practice of Poland or of the United Kingdom". The Protocol later was extended to cover also the Czech Republic which joined the position of Poland and the United Kingdom.[301] It has been argued that, since the Charter simply is established to make fundamental rights more visible, only confirms fundamental rights guaranteed by the ECHR and the constitutions of the Member States and thus merely constitute a codification of rights already recognized as binding law, the opt out could hardly have any legal effect.[302] For example, Article 1 (2) of the Protocol excludes that the provisions of Chapter IV, on solidarity, of the Charter create justiciable rights for the Member States in question. One right guaranteed in this section is to be found in Article 28 of the Charter, the right of collective bargaining and action. At the same time this specific right is excluded by the Protocol, the case law of the ECJ confirms the right to take collective action. In the *Viking*[303] case the Court held that the Charter "reaffirmed" the right contained in the general principles of EU law[304]: "it must be recalled that the right to take collective action, including the right to strike, is recognized both by various international instruments which the Member States have signed or cooperated in", "although the right to take collective action, including the right to strike, must therefore be recognized as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices". The Protocol has due to its ambiguities been seen as merely clarifying specific provisions yet not legally adding anything new in particular, again since the Charter according to many only represents already existing binding law and does not change anything substantial.[305] However, it could be regarded as highly unfortunate that three Member States has negotiated such unilateral reservations.[306] Although it has to be considered as a compromise of political character in order to facilitate the ratification of the TFEU, it might be detrimental not least to legal certainty and the legitimacy of the Union.

[301] Presidency Conclusions – Brussels, (15265/1/09 REV), ANNEX I
[302] Griller & Ziller, op. cit., p. 245
[303] Case 438/05, *International Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti*
[304] Ibid., para 43 - 44
[305] Griller & Ziller, op. cit., p. 248
[306] Bergström & Hette, *Lissabonfördraget – En grundlag för EU?*, p. 106

5.2 Consequenses of providing the competence to acceed to the European Convention on Human Rights – is accession imminent?

In addition to what was established concerning the Charter in Article 6 (1) TEU a reference to the Union accession to the ECHR was included by the Lisbon Treaty in Article 6 (2): "the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties". An accession to the ECHR required, as established in Opinion 2/94 a Treaty amendment, a condition thus fulfilled. Moreover, the wording of Article 6 (2) indicates that the Lisbon Treaty not only provides the legal basis for an accession but also puts the Union under an obligation to accede to the ECHR. Meanwhile, a new Article 59 (2) of the ECHR was introduced by Protocol 14 of the Convention in order to facilitate an EU accession.[307] In an additional Protocol annexed to the TEU and the TFEU the specifics of a future accession was further clarified.[308] The agreement relating to the accession should make provision for preserving the specific characteristics of the Union and Union law and should ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions.[309] Article 1 of the Protocol mentions, *inter alia*, the Union's possible participation in the control bodies of the ECHR. Thus, the EU legal order in general and the EU judiciary in particular are indeed, to some extent, to be subjects of an external review in relation to the protection of fundamental rights.[310] It is safe to say that, by allowing judicial review of

[307] Protocol 14 ECHR, Article 17: "Article 59 of the Convention shall be amended as follows: 1. A new paragraph 2 shall be inserted which shall read as follows: "2. The European Union may accede to this Convention.""

[308] Protocol no 8 Relating to Article 6 (2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms

[309] Protocol no 8: Article 1: "The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the 'European Convention') provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:
(a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;
(b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate. "
Article 2: "The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof."

[310] Bergström & Hette, op. cit., p. 109

acts of the Union, the legitimacy of EU will enhance. It is, however, doubtful whether the actual protection of fundamental rights will be increased. Furthermore, Article 3 of the Protocol provides: "Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union." Article 344 TFEU, in turn, establishes that the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. Thus, the accession agreement must not alter the content of the dispute settling provisions of the Treaties.

One important issue is whether the mutual comity between the two courts will change after an EU accession, i.e. will the respect characterized by the *Bosphorus* presumption persist? Once the EU has acceded to the ECHR, the ECtHR will, as mentioned above, be provided a legal basis for reviewing alleged fundamental rights violations by the EU and its institutions, including decisions of the ECJ. By applying the *Bosphorus* presumption, the EU would enjoy a far more privileged treatment than the other parties to the ECHR, thus the acts of the ECtHR would indeed favor the Union. Also, the justification for the comity expressed in the presumption was that the relationship between the ECJ and the ECHR was not clarified.[311] This is not the case after an accession. Therefore, the ECtHR might indeed relinquish from their former case law once an accession is complete and thus discard the *Bosphorus* presumption. As examined in Chapter 5.1 of this thesis the Charter of Fundamental Rights does not bind ECJ to the case law of the ECtHR, at least not *per se*. However, could an accession constitute an instrument legally binding the ECJ to the jurisprudence of the Strasbourg court? In Opinion 1/91 the ECJ stated as following: "where, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice, inter alia where the Court of Justice is called upon to rule on the interpretation of the international agreement, in so far as that agreement is an integral part of the Community legal order".[312] The prerequisites contained in the Opinion are fulfilled in the situation of an EU accession to the ECHR. Nevertheless, *Lock* has argued that, under international law, only the decisions rendered in proceedings to which the EU is a party are binding on it and therefore when considering that the rationale behind the dictum in Opinion 1/91 is to be found in international law, the ECJ is only bound by an interpretation of an international agreement rendered in cases where the EU was a party to the proceedings.[313] Article 46 ECHR applies the same logic: "the High Contracting Parties under-take to abide by the final judgment of the Court in

[311] Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts*, p. 396
[312] Opinion 1/91 of the European Court of Justice, para 3
[313] Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts*, p. 397

any case *to which they are parties*". Thus, the outcome would be that the ECJ is only bound by those decisions to which the EU is a party, i.e. if the Strasbourg Court acknowledges any EU violation the ECJ will be bound by the findings when interpreting the ECHR provisions at stake in a case concerning the same issue.

As established above, Protocol no 8 to the Lisbon Treaty states, in Article 1: "The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the 'European Convention') provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to: (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention; (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate." When assessing a future EU accession to the ECHR the question arises; who should be the appropriate respondent before the ECtHR? In order to reach any conclusion on this matter *Lock* argues one must bear in mind the applicant's situation, the preservation of the autonomy of EU law, and not exclude the EU responsibility for primary law.[314] The preservation of the autonomy of EU law is emphasized by the Protocol mentioned above by the preservation of the "specific characteristics of the Union and Union law". In this respect, the concept of the autonomy of EU law is used with regard to the relationship of Union law and international law. In Opinion 1/91, discussed above, the ECJ concluded that the agreement at stake was incompatible with the autonomy of EU law. Three main findings based on autonomy can be identified in the Opinion.[315]

(i) an agreement must not affect the ECJ's jurisdiction to decide about the allocation of responsibilities within the EU,

(ii) as the issue at stake in the Opinion concerned the implementation of the EEA agreement, the European Union would have submitted itself to the decisions of the EEA Court and, consequently, the ECJ would have been bound by them. Thus, the Court highlighted in the subsequent Opinion 1/92 the importance of a provision in the agreement that the ECJ, as an essential safeguard which is indispensable for the autonomy of the Union legal order, was not to be bound by the case law of the dispute settlement body provided for in the agreement, and

(iii) the autonomy of EU law furthermore demands that the essential powers of the institutions will remain unchanged.

[314] Lock, *EU Accession to the ECHR: Implications for Judicial Review in Strasbourg*, p. 780

[315] Ibid., p. 781

In the *Kadi*[316] case the ECJ further elaborated on the matter by establishing that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty".[317] Thus, out of what has been established by the ECJ certain requirements for a future accession treaty can be discerned. An agreement cannot affect the essential powers of the institutions of the Union and the ECtHR cannot be given jurisdiction to, in a binding fashion, interpret the Treaties.[318] It follows, as *Lock* has established, in particular, that any solution which would allow the ECtHR to allocate responsibility according to the EU's internal distribution of competences would be incompatible with the autonomy of Union law.

Furthermore, the question of the responsibility of primary law has been discussed in this thesis in relation to the *Matthews* case yet is still, after an accession, a significant issue. Under Union law, the EU can only be responsible for violations of the ECHR deriving from primary law if that possibility is amended in the Treaties. However, the Union cannot itself amend the Treaties. Thus, the *Matthews* doctrine may still imply that the Union as such is not responsible for acts deriving from primary law. It has been argued that primary law should be excluded from judicial review of the ECtHR by the accession agreement. However, there are many counterarguments for why this would be an undesirable development. For example, there is no reason why the EU should not be held responsible for its own primary law when its Member States are already answerable for EU action, which they merely implement and where they have no discretion.[319] Also, the objective of the EU to enhance its credibility in relation to fundamental rights protection by the accession to the ECHR would suffer from the fact that the Convention is not applicable to the highest-ranking norms of the Union legal order. *Lock* states that the best solution would be to hold responsible the party which has "acted vis-à-vis the applicant in the concrete case".[320] This solution would indeed facilitate for the applicant to find the correct respondent and the correct domestic remedies. Furthermore, as an addition to this solution the possibility to hold the other non-acting party responsible as a co-respondent is introduced. This could certainly improve the effective protection of fundamental rights in cases involving EU law. For example, if the EU were made a co-respondent in addition to the responding Member State, the force of res judicata of a judgment would be extended to the European Union.[321] In those cases where the ECtHR finds a violation, the Union would have to abide by the judgment. It has

[316] Case 402/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities*
[317] Ibid., para 285
[318] Lock, *EU Accession to the ECHR: Implications for Judicial Review in Strasbourg*, p. 782
[319] Ibid., p. 784
[320] Ibid.
[321] Ibid., p. 786

argued that the Union could be designated as a co-respondent by both the respondent Member State and by itself.[322]

An individual can only bring an admissible application before the ECtHR if all domestic remedies are exhausted.[323] In line with the solutions described above an applicant thus would be entitled to bring a complaint either against a Member State or the Union. Depending on the chosen respondent two separate systems of remedies could therefore be applicable. Via Article 263 (4) TEU which reviews the legality of Union acts cases brought against the EU could be addressed. The ECJ will therefore, in this respect, be regarded as a "domestic" court. First and foremost, the complaint brought to the EU legal system has to be admissible. Article 263 (4) TFEU establishes that "any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures". This article was amended by the Lisbon Treaty. Prior to the amendment an individual had to show direct and individual concern of the act at stake whereas the last part of the article now provides that regulatory acts that do not entail implementing measures also constitute grounds for admissibility. However, it is uncertain how the term "regulatory act" should be interpreted. It has been argued that the wording could be open enough to include all types of secondary legislation, at least regulations.[324] Nevertheless, neither the Constitutional Treaty, where the amendment of the article was introduced, nor the Lisbon Treaty contain any definition of the concept. It is therefore appropriate to contend that an individual applicant claiming a violation of the ECHR by a Union legislative act, until the wording of Article 263 (4) TFEU is further defined by the ECJ, must seek to obtain a ruling by the courts of the Union under the said article in order to fully exhaust all "domestic" remedies. Moreover, Article 24 (3) TFEU establishes a right of every citizen to complain to the European Ombudsman about maladministration in the institutions of the Union, *inter alia*, violations of the rights contained in the ECHR. The question therefore arises whether an individual is obliged to file a complaint to the Ombudsman in order to exhaust the "domestic" remedies of the Union and thus have an admissible complaint before the ECtHR. The Strasbourg Court has in its case law established that the ombudsmen institution is inadequate as a domestic remedy and thus not in the need to be exhausted to file an admissible complaint before the Court. It has to be concluded that this case law will stand after an accession and that the European Ombudsman is not covered by the requirement to exhaust all domestic remedies. If an applicant wishes to claim a violation of the ECHR by EU primary law, there is no remedy against such a violation at EU level. This is a rather unprecedented issue for the ECtHR. However, in comparison, Constitutional Courts of the ECHR contracting parties do not

[322] Ibid., p. 787
[323] Article 35 (1) ECHR
[324] Lock, *EU Accession to the ECHR: Implications for Judicial Review in Strasbourg*, p. 789

have jurisdiction to review the validity of provisions, which they are asked to interpret, contained in their constitutions. Normally, in such cases the ECtHR is the first court to hear that case. It is indeed reasonable to compare EU primary law to national constitutions in this respect. Therefore, it is rational to believe that the ECtHR would not require an exhaustion of domestic remedies in such cases.[325]

If an individual, on the contrary, bring a complaint against a Member State to the ECtHR the individual has to exhaust all domestic remedies. However, if the alleged violation derives from the Member State's obligation under EU law the question arises whether a preliminary ruling by the ECJ also will be necessary to obtain in order satisfy the admissibility requirements in Article 35 (1) ECHR. The existence of the preliminary ruling system is contained in Article 267 TFEU and is an integral part of the Union legal system providing for a coherent interpretation of EU law.[326] The ECJ has stated that a development where the ECtHR is being called on to decide on the conformity of a Union act with the ECHR without prior giving the ECJ an opportunity to rule on the case would be undesirable.[327] Naturally, the ECJ wants to maintain its monopoly concerning the declaration of invalid acts of the Union. It is however important to remember that the ECtHR will never be given the power to declare a Union act void, but rather to establish its incompatibility with the ECHR. One argument opposing a system where a preliminary ruling is part of the requirements in Article 35 (1) ECHR is that the applicant has never any influence over the national court's decision whether to make a reference to the ECJ or not. Thus, the applicant could never fully control the process in which all domestic remedies have to be exhausted. Moreover, the questions referred to the ECJ or the decision of the ECJ could focus on other aspects of a certain case than the issue of compliance with fundamental rights. *Lock* argues that "if a preliminary reference to the ECJ were to become a domestic remedy which needs to be exhausted, it would only be consistent to deny access to the ECtHR where the ECJ did not discuss the question of the Convention rights allegedly violated".[328] A much similar system as the one granting the possibility to preliminary rulings in the Union legal order is to be found under Italian law. A lower Italian court can, in a comparable manner refer a case to the Italian

[325] Ibid., p. 790
[326] Article 267 TFEU: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.
[327] Lock, *EU Accession to the ECHR: Implications for Judicial Review in Strasbourg*, p. 791
[328] Ibid., p. 792

Constitutional Court, Corte Costituzionale. The ECtHR has establihed that such a reference is not to be considered as a remedy in need to be exhausted. In, *inter alia*, the *Immobiliare Saffi*[329] case the Court held that "in the Italian legal system an individual is not entitled to apply directly to the Constitutional Court for review of a law's constitutionality. Only a court trying the merits of a case has the right to make a reference to the Constitutional Court, either of its own motion or at the request of a party. Accordingly, such an application cannot be a remedy whose exhaustion is required under Article 35 of the Convention".[330] The requirement to let the ECJ make a decision prior to any action of the ECtHR could constitute a excessive demand on an individual during the process of accessing the Strasbourg Court. It has however been argued that a formal requirement for an individual to at least apply to the national court to make a reference to the ECJ could be considered as just.[331] With this solution, the national court would at least address the question of referring the case to the ECJ. In conclusion, a requirement of a preliminary reference to the ECJ in order to fulfill the demands of Article 35 (1) ECHR would not be desirable. Nevertheless, as *Lock* puts it, this means that "there may be instances in which the Strasbourg court will decide upon the compatibility of Member State action which is triggered by EU law without a prior decision by the ECJ on the issue".[332]

Different solutions have been proposed in order to avoid the situation where the ECJ has no possibility to decide on a specific case, as described above. Two possible solutions would be:

(i) an introduction of a reference procedure between the ECtHR and the ECJ, or
(ii) a reference by the European Commission to the ECJ

The first solution would mean that the ECtHR would refer a case to the ECJ for a review of the compatibility with the ECHR. Thus, when the ECJ finds no violation, the case would be referred back to for determination by the ECtHR. However, this would lead to further delay in proceedings (the ECtHR can already hardly cope with its intense workload), it would favor the EU in relation to other contracting parties of the Convention and it would be difficult for the ECtHR to decide which cases should be referred to the ECJ without somehow pre-judging their outcome.[333] A second solution would be to give the European Commission the right to refer pending ECtHR cases to the ECJ. The ECtHR would then, while awaiting the ECJ decision, temporarily suspend the proceedings. However, the ECJ review would in its entirety be dependent on the discretion of the

[329] *Immobiliare Saffi v. Italy*, Application no. 22774/93
[330] Ibid., para 42
[331] Lock, *EU Accession to the ECHR: Implications for Judicial Review in Strasbourg*, p. 792
[332] Ibid.
[333] Ibid., p. 793

Commission. Ultimately, these issues are tainted by ambiguities and have to be clarified by the accession negotiation.

As established above, the system of preliminary rulings in Article 267 TFEU is an important and integral part of the Union legal order. The issue whether such an instrument could be added to the ECJ – ECtHR relationship has been discussed. This would indeed contribute to a coherent interpretation of the ECHR by the ECJ and the ECtHR. However, the result would be that a clear hierarchy between the courts is established and this may have implications on the role of the ECJ as the highest court in the Union.[334] Furthermore and in line with what has already been discussed, the Union would be favored in relation to other high courts of the contracting parties which do not enjoy such an opportunity. In addition to this, the proceedings could suffer from delays since a reference to the ECJ by a national court takes a long time to be answered. If yet another reference to the ECtHR was possible, an applicant could face an unreasonable long process which could therefore cause a serious detrimental effect. Another question with importance after an EU accession to the ECHR is whether the inter-state complaints provided for in Article 33 ECHR should be applicable for the EU and its Member States, i.e. could the EU or a Member State refer an alleged violation of the Convention by the EU or another Member State to the ECtHR? It has been argued that the simplest and best solution is to exclude all inter-state complaints between the Member States of the Union.[335] This would indeed deny the ECtHR a number of cases. However, considering the fact that a complaint can still be made by an individual applicant and that there has been a restricted number of such cases before the ECtHR any negative impact would in fact be limited. It should also be mentioned that this, in respect to what has been discussed earlier in this essay, would not favor the Union in relation to other contracting parties since Article 55 ECHR or an explicit reservation in the accession agreement could exclude inter-state complaints for all contracting parties.

It should be emphasized that the actual negotiations of an EU accession to the ECHR initially could be perceived as lengthy and time consuming. First and foremost, the European Commission has to negotiate an agreement on a specific given mandate whereupon the approval of the Member States, the consent of the European Parliament and the ratification of all contracting parties of the EU and the ECHR has to be secured.[336] Certain questions concerning the EU accession was addressed by the CoE in June 2010.[337] In this document it is established that Protocol 14 ECHR itself is not sufficient to allow accession because its modalities remain to be negotiated by the EU and all CoE Member States and that some accession modalities will require further technical amendments to the ECHR and its additional protocols whereas others may be settled in complementary agreements between the

[334] Ibid., p. 794
[335] Ibid., p. 797
[336] Bergström & Hette, op. cit., p. 109
[337] Accession by the European Union to the European Convention on Human Rights, Answers to frequently asked questions, 1 June 2010, Council of Europe

CoE and the EU, the Rules of the Court or in Committee of Ministers' resolutions.[338] It was further on emphasized that an accession will only be legally possible "if and when further amendments to the ECHR concerning the modalities of accession will have entered into force". Also, the EU will have to express their consent to be bound by the key accession modalities, which will require, as described above, formal consent by national Parliaments as well as the European Parliament. The CoE also stated that, "from a political point of view, the link between accession and incorporation of the EU Charter must be maintained in order to ensure a coherent application of human rights law all over Europe. The period between entry into force of the Lisbon Treaty, on 1 December 2009, and effective accession should therefore be as short as possible." Therefore, it was established that the legal texts setting out the modalities of EU accession should be finalized by 30 June 2011 at the latest. From an EU perspective the work of facilitating an accession is progressing. On 17 March 2010, the Commission proposed negotiation Directives for the EU accession to the ECHR. Furthermore, on 4 June 2010, the Justice Ministers of the EU Member States gave the Commission the mandate to conduct the negotiations on their behalf. The negotiating mandate in the Draft Council Decision authorizing the Commission to negotiate the Accession Agreement of the EU to the ECHR has been confidential and was not made available for any scrutiny.[339] However, a partially declassified version has been released. The European Council established, after giving due regard to Article 6 TEU and Protocol 8 related thereto as well as the Recommendation of the Commission, that, as stated in Article 1 of the decision, "the opening of negotiations on behalf of the EU in order to agree with the contracting parties to ECHR to the accession of the European Union to that Convention is authorized". Article 2 nominates the Commission as the Union negotiator. It is further established in Article 3 that the Commission should conduct the negotiations in consultation with the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons, as the special committee appointed by the Council, in accordance with Article 218 (4) TFEU. The Commission should also report regularly to the special committee on the progress of the negotiations and shall forward all negotiating documents without delay to this special committee. In conclusion, the wheels are in motion, but there is still work to be done until a formal accession of the EU to the ECHR is a reality.

[338] Ibid., p. 8

[339] Council Decision authorizing the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR), 10817/10, 4 June 2010 (partially declassified on 8 june 2010)

6 Conclusions

When contemplating a suitable title or subtitle for this essay, *From Stork to the Lisbon Treaty* would indeed cover the entire spectrum of the objective and contents of the thesis. Nevertheless, by using that type of rhetoric one might readily get the illusion that the protection of fundamental rights within the EU was developed in homogenous step-by-step fashion. This is however not entirely true. Ironically, one may argue that the substantial protection of fundamental rights stands rather unaffected despite the large-scale activity in this area. As this examination has showed, startlingly few substantial rights and means of protecting them have been added during the fundamental rights development in the Union. Instead, the ECJ early established the existence of fundamental rights as general principles of EU law and hence also the sources from which they derived, thus enabling the possibility to invoke fundamental rights as a central instrument of the Union legal order. From that point on, the question was not if the protection of fundamental rights was to be an integral and momentous part of EU law but rather how and to what extent. Therefore, it is possible to contend that the development of the protection of fundamental rights within the Union merely has been a matter visualization and legitimacy, albeit with a significant importance. In one sense it is almost possible to argue that there has been an inherent protection of fundamental rights in the Union already from its inception, yet only after a daring excursion of the EJC was this confirmed. This chapter will analyze the findings of this thesis in relation to its purpose – examining to what extent the protection of fundamental rights within the European Union has been strengthened and the added value of the development in this field.

A number of early cases before the ECJ, described in this thesis, were central in the development of the protection of fundamental rights. Notable among these are the *Stauder* case, the *Internationale Handelsgesellschaft* case and the *Nold* case. They were all part of the EU judiciary response to the forces among the Member States calling for a clarification of the relationship between the supremacy of EU law and the fundamental rights guaranteed in the constitutions of the Member States. By giving the fundamental rights the status of general principles of EU law and by using, *inter alia*, the constitutional traditions common to the Member States as a considerable source for the general principles the potential conflict between Union law and the "inviolable" fundamental rights of the Member States was avoided. Despite the fact that nothing in the Treaties establishing the Community explicitly mentioned the fundamental rights, the ECJ had nevertheless developed an own human rights agenda. When collisions between the values on which the Union was based, the fundamental freedoms, and the fundamental rights occurred the ECJ applied the principle of proportionality by letting a fair balance test decide which right or freedom that would prevail. Germany was one of the Member States that early opposed the Union approach to the protection of fundamental rights.

Its Constitutional Court ex officio reviewed the validity of specific Union acts in the light of German national fundamental rights as long as it deemed the level of protection of fundamental rights within the EU inferior to that guaranteed by the German Constitution. The German affection to the protection of fundamental rights within the Union culminated in 1999 when the Charter of Fundamental Rights drafting procedure began under the supervision of the German Presidency. Prior to the establishment of the Charter, treaty provisions acknowledging the protection of fundamental rights within the Union were added by the TEU and the ToA. Article 6 TEU established that the EU should respect the fundamental rights and Article 7 TEU added the possibility for the European Council to suspend specific rights of a Member State if it is found responsible for a serious and persistent breach of the principles in Article 6. I contend that, when contemplating the fact that there was prior to this development no legislative confirmation of the protection of fundamental rights within the Union, this is indeed a noteworthy moment within the context of this development. The purely political character of Article 7, only enabling the Council to act, is also notable. It is furthermore remarkable that Article 6 TEU did not confer any explicit obligations to the Member States, it concerned only the Union. However, the obligations of the Member States, that also were established by the ECJ, to respect fundamental rights "when acting within the scope" of Union law was introduced, albeit in a slightly different way, by the EU Charter of Fundamental Rights.

The Charter of Fundamental Rights was proclaimed in a period to some extent characterized by a human rights renaissance. There were however many reasons for why the implementation of an EU fundamental rights catalogue took place at this point. One of the crucial aspects was the need to enhance EU legitimacy as the Union had to demonstrate itself as committed to the principles of good governance. The establishment of a Charter was therefore, according to me, much needed. As it has been argued, it is indeed difficult, not to say impossible, to lead by example without setting an example. A Charter would, in this aspect, lead to dual benefits. Firstly, it would display the Union's commitment to the principles of human rights and thus enhance its legitimacy. Secondly, it would act as a source of inspiration and an efficient tool in future human rights missions of the EU. The Union is indeed a normative power on the international arena and in need of credibility in order to operate as a human rights promoter. Furthermore, it is equally clear that the imminent enlargement of the Union and the rise of far-right parties in Europe contributed to the will to visualize fundamental rights. It is true that the Charter, at least in the eyes of the drafters and from a political point of view, merely represented a codification of existing rights and thus only reaffirmed the obligations of the Union deriving from the case law of the ECJ. However, it is important to not underestimate the potential effect of visible fundamental rights. Even if a visualization of fundamental rights mainly would enhance the EU self-image and distinctly define the Union as an organization of democratic principles and values, one cannot rule out that individuals, who otherwise would face a complex web of ECJ case law, could benefit from the

enactment of a fundamental rights catalogue. In my view, the will to visualize fundamental rights and enhance the legitimacy of the Union is characterized by the transparent drafting procedure, seemingly lacking any hidden agenda. In addition to the transparent procedure, a novelty in this context, the inclusiveness of parliamentarians and to some extent NGOs and CSOs contributed to a document supported by a broad and vast majority of the stakeholders. I contend that the drafting procedure itself does have an enormous impact on how the Charter would be perceived and, at the end of the day, on how visible the fundamental rights would be. A high profile drafting would most certainly equal a high profile Charter. De Burca has stated: "what the Presidency chose to do was to seize the initiative to launch something which would constitute a high-profile move as far as human rights and the European Union was concerned, but simultaneously which would not, in its view, introduce any concrete policy changes nor alter anything significant within the existing legal, political and constitutional framework".[340] One possible disadvantage of including a considerable number of participators in the process is the impending need of compromises. Indeed, certain compromises regarding, *inter alia*, the preamble of the Charter and the existence of an explicit reference to the ECtHR case law occurred. However, if this is an expression of the collective will, an inclusive process would nevertheless be advantageous. Once the Charter was proclaimed, legal certainty would be improved it was argued. Undoubtedly, fundamental rights were made visible but at the same time a period of uncertainty of its legal status followed. Questions of its legal value as well as of specific interpretations of its provisions arose. The ECJ relinquished from referring to the Charter for a long time, despite the fact that other parts of the EU judiciary used it as an instrument for its argumentation. Since the Charter later on became legally binding I will not immerse myself in issues relating to this, but rather note that, even if the exact interpretation of the Charter suffered from the silence of the ECJ, the references from, *inter alia*, Advocates General, the CFI and the European Ombudsman still made the Charter a document of significant influence. Another aspect concerning the added value of the Charter is the recurrent assertion that it does not add anything new to the legal order of the Union, which, as emphasized throughout this essay derives mainly from the provisions in the ECHR and the constitutional traditions common to the Member States. I found this statement too categorical. The provisions of the Charter and their phrasing were based upon several sources and inspired by contemporary values and demands of the modern society. Also, the Charter contains rights specific for the EU, visible rights that now enjoys its protection in a fundamental rights context and safeguards the rights of individuals in relation to the EU bureaucracy. It is furthermore clear that the Charter, to some extent, has to be regarded as a living document open for the interpretation primarily of the ECJ and moreover subject to future changes and amendments as well as dependent on other Treaty changes and amendments. This is important when assessing the criticism of certain provisions of the Charter, such as Article 21 (2).[341] The Charter as it now

[340] De Burca, op. cit., p. 129
[341] See p. 30

stands is not the final acquis of the Union providing protection of fundamental rights, on the contrary further development is highly likely. Moreover, hesitation concerning the application of the Charter and the lack of clear and precise provisions in relation to activities of the Member States could constitute a detrimental effect on legal certainty. From the wording of Article 51 (1) as well as the explanatory comments to the Charter it is difficult to in detail foresee all situations where Member States acts and measures could be reviewed by the provisions in the Charter. Even though all EU Member States are contracting parties to the ECHR, situations might occur when the Charter is providing a higher standard of protection than the ECHR and thus when this higher standard only applies to situations when the Member States are "implementing EU law". Therefore, whether the Member States implement national law or EU law, the applicable standard of the protection of fundamental rights might be different. Nevertheless, apart from a detailed examination of the provision of the Charter, this thesis has established that the Lisbon Treaty did fulfill the aim which already from the commencement of the drafting process was the primary objective of the proposed Charter; a fundamental rights catalogue included in the Treaties. The enhanced visualization of fundamental rights was achieved. The application and interpretation of the Charter, now a legally binding document, will be further clarified by the future case law of the ECJ. Unfortunately, the credibility of the Charter as a document of high legal value might be harmed by the "opt out" of three Member States, United Kingdom, Poland and the Czech Republic. Even if the exceptions granted these states will turn out to be of insignificant legal importance it nevertheless illustrates that the Charter itself was not as highly prioritized as other aspects of the Lisbon Treaty. In turn, that could be perceived as an implicit statement that the contents of the Charter are protected elsewhere in EU law, i.e. by the general principles and not in the urgent need of legislative confirmation. Also, the far-reaching idea of constitutionalism within the Union was embodied in a more extensive way in the failed Constitutional Treaty. The Charter was incorporated as an own section with an amplified attention. This was however not adopted by the Lisbon Treaty and it is therefore possible to contend that the symbolic value of the Charter to some extent was reduced. Lastly, the fact that the Charter mainly codifies already existing Union law does not mean that it is without any added value. A legally binding Charter would limit the discretion and the scope of interpretation of the ECJ and thus "fixate" the protection of fundamental rights. In addition to making fundamental rights visible, legal certainty would, in this aspect, be further enhanced. The impact of the Charter is very well illustrated by the fact that its contents, even prior to the Lisbon Treaty, was used by more and more individuals as crucial arguments in proceedings concerning fundamental rights issues. This alone proves the effect of the Charter as a tool making fundamental rights visible for individuals all over Europe. Moreover, in the ongoing enlargement process with new Member States not possessing the legal traditions of a developed protection of fundamental rights, a common Charter which expresses the values of the Union in a visible manner is much needed.

"There is no point in reinventing the wheel" – Indeed, a main issue when the second important institutional development in the 21th century in regard to fundamental rights protection in the EU, the Fundamental Rights Agency, was established was whether this would constitute a duplication of the work already being done by the CoE. Throughout the founding process not least the CoE explicitly pointed out the importance of not duplicating the mandate and scope of action of the monitoring bodies of the Council of Europe. Even though an EU monitoring agency with a mandate to monitor and review acts of the Member States indeed would enhance the legitimacy of the Union and strengthen the protection of fundamental rights, it could also serve as detrimental to the overall protection in Europe and thus not provide any added value. As stated in paragraph 11, Resolution 1427 of the Parliamentary Assembly of the Council of Europe: "Avoiding duplication is not only a matter of upholding the pre-eminent role of the Council of Europe in the protection and promotion of human rights in Europe: it is first and foremost about the vital interest of hundreds of millions of individuals in Europe in the effective enjoyment and protection of human rights. A multiplication of European institutions in the field of human rights will not necessarily mean better protection of those rights. On the contrary, creating institutions with mandates which overlap with those of existing ones can easily result in the dilution and weakening of their individual authority, which in turn will mean weaker, not stronger, protection of human rights, to the detriment of the individual." Due to the strict approach of the CoE and not least due to the difficulties of reaching consensus within the EU the FRA was given a narrow mandate not covering the actual monitoring of Member States' compliance with fundamental rights. As it has been argued, the FRA is to be considered as a mere rhetoric instrument, focusing on collecting and analyzing data rather than by decisions and actual judicial review mainstreaming the practices of the Union and the Member States. During the Agency's limited number of active years it has to some extent been influential on the legislative process in the Union but there are still considerable uncertainties of its impact on the overall protection of fundamental rights. The structure and composition of the FRA was indeed also affected by the complex founding process and the approach of the CoE. The Paris Principles, developed by the UN, were to some extent considered when setting up the Agency. I contend that this fact along with others, *inter alia*, the representation of the CoE in the FRA Management Board, is important in order for the Agency to achieve credibility and thus legitimacy within the Union legal order. Furthermore, it is my belief that since the CoE makes sizeable efforts in ensuring that new developments within the EU do not duplicate the work of the CoE bodies, inversely the new developments within the EU on the area of fundamental rights protections not contested by the CoE would provide added value. This is an integral part of the mutual comity that has evolved over the years between the CoE and the ECtHR in particular and the EU. This mutual comity is perhaps best illustrated by the *Bosphorus* case. As it has been argued a future EU accession to the ECHR, as provided by the Lisbon Treaty, would likely change the *Bosphorus* doctrine and end the presumption therein. This is, according to me, a highly desirable development. With an intact *Bosphorus* presumption and a

maintained deferential attitude of the ECtHR towards the EU, the benefits of an accession will be lost. The accession is yet another part in the EU quest for legitimacy and an integral step in, by allowing external review of EU acts and measures, the continued development of the protection of fundamental rights. However, the negotiations of an EU accession to the ECHR could indeed be lengthy. It is nevertheless important to use the momentum of fundamental rights protection gained by the recent development in the EU. The CoE has also expressed its desires that, from a political point of view, the link between accession and incorporation of the EU Charter must be maintained in order to ensure a coherent application of human rights law all over Europe and that the period between entry into force of the Lisbon Treaty and effective accession therefore should be as short as possible.[342] The aim, explicitly expressed by the CoE, is to complete the accession negotiations within 2011. This thesis has presented a number of issues in need of clarification. The accession negotiations will have to address all these issues in order to make the future relationship between the EU/ECJ and the ECHR/ECtHR as fruitful and prosperous as possible. As *Lock* has argued: "It is [..] hoped that the negotiators would strike the right balance between the European Union's autonomous legal system and the ECJ's jurisdiction, on the one hand, and the need for an effective human rights protection for the individual, on the other".[343]

The development of the protection of fundamental rights within the EU should, according to me, not only be referred to the legislative apparatus of the Union. It is, to a large extent, the result of the efforts made by national courts, commonly constitutional courts as the German Bundesverfassungsgericht discussed above, when not accepting the supremacy of EU law as an argument for restricting fundamental rights protected by the constitutions. Thus, the development has been driven "backwards", with the ECJ, although in the driver's seat, affected by the pressure and hence in the need of enhancing the legitimacy of Union's legal order and the protection of fundamental rights therein. With this in mind, and when considering the special political characteristics of the EU, it is rather obvious why Member States actions only in specific cases can be reviewed as not in compliance with the fundamental rights. The EU is not, nor will it ever be, a human rights organization. In order to avoid duplication of the work being done by the CoE bodies and, most certainly, to prevent any excessive transfer of powers, the Member States will only be liable for measures and actions in close connection to the EU.

I believe that in the area of fundamental rights protection, one should not underestimate the importance of "soft values". It remains unclear exactly to what extent the protection of fundamental rights has been strengthened by the development the latest fifty years. It is however crystal clear that the new aspects of Union law in this area, the case law of the ECJ, the treaty provisions of the TEU and ToA, the Charter of Fundamental Rights, the

[342] See Chapter 5.2
[343] Lock, *EU Accession to the ECHR: Implications for Judicial Review in Strasbourg*, p. 798

Fundamental Rights Agency and lastly but not least the extensive provisions of the Lisbon Treaty all have provided increased visibility, enhanced legitimacy and a large-scale symbolic value for the protection of fundamental rights. Whether any problems of interpretation or of legal certainty will appear, it is up to the ECJ (and the ECtHR) to further elaborate on. It is clear that there are still issues that can only be solved and clarified by the judiciary of the institutions; *inter alia*, the future relationship between the fundamental rights and the fundamental freedoms within the Union (it must here be emphasized that the ECJ has compromised by establishing that the fundamental rights can prevail over the fundamental freedoms despite the fact that these freedoms form the very basis of the Union and constitute an extension of the spirit in the Rome Treaty), the application of the Charter not least in relation to Member States measures, the impact of the FRA recommendations and the interface between the EU and the ECHR after an EU accession. It is clear that future case law of the ECJ will be decisive in the further development. Despite the fact that the ECJ seemingly enjoys a narrower scope of discretion, its importance will not be reduced, rather the contrary. Cartabia states: "Some feared that the Charter would chill the creativity of the European Court of Justice, but the result seems to be exactly the opposite. Facts show that the Charter is strengthening rather than diminishing the interpretative and creative ability of the European Court."[344] The protection of fundamental rights within the Union has not developed in a smooth and conflict free manner, on the contrary many issues have been encountered delaying its implementation. The Union has nevertheless succeeded to implement a number of significant measures, providing added value, and all, to some extent, in line with the size and the importance of the Union, both as a forum of European integration and cooperation and as a pioneer and a normative power on the international arena. In that respect, one could readily discern *an improved human rights agenda within the European Union*.

[344] Cartabia, op. cit., p. 8

Bibliography

Literature

Alston, P; Bustelo M.R.	*The EU and Human Rights*, Oxford University Press, Oxford, 1999
Alston, P; De Shutter, O	*Monitoring Fundamental Rights in the EU, The Contribution of the Fundamental Rights Agency*, Hart Publishing, Oxford, 2005
Bergström, C.F; Hettne J	*Lissabonfördraget, en grundlag för EU?*, Norstedts Juridik, Stockholm, 2010
Bernitz, U; Nergelius J et al (eds.)	*General Principles of EC Law in a Process of Development*, Kluwer Law International BV, The Netherlands, 2008
Chalmers, D; Hadjiemmanuil, C et al	*European Union Law*, Cambridge University Press, Cambridge, 2006
Craig, P; De Burca G	*EU Law, text, cases and materials* (4th ed.), Oxford University Press, Oxford, 2008
Griller, S; Ziller, J (eds.)	*The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?*, Springer Wien, New York 2008
Groussot, X	*Creation, Development and Impact of the General Principles of Community Law: Towards a jus commune europaeum?*, Faculty of Law Lund University, Lund, 2005
Lindfelt, Mats	*Fundamental Rights in the European Union – Towards higher Law of the Land?*, Åbo Akademi University Press, Åbo, 2007

Ovey, C; White, R.C.A — *The European Convention on Human Rights* (4th ed.), Oxford University Press, Oxford, 2006

Peers, S; Ward, A (eds.) — *The European Union Charter of Fundamental Rights*, Hart Publishing, Oxford, 2004

Røddik Christensen, A.M — *Judicial Accommodation of Human Rights in the European Union*, DJØF Publishing, Copenhagen, 2007

Tridimas, T — *The General Principles of EU Law* (2nd ed.), Oxford University Press, Oxford, 2006

Wouters, J; Verhey L et al (eds.) — *European Constitutionalism beyond Lisbon*, Intersentia, Oxford, 2009

Articles

Alonso Garcia, R — *The General Provisions of the Charter of Fundamental Rights of the European Union*, European Law Journal, Vol. 8, No. 4, December 2002, pp. 492 – 314

Alston, P; Weiler, J.H.H — *An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights*, 9 European Journal of International Law, 1998

Bellamy, R; Schönlau J — *The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights*, Constellations Volume 11, No 3, 2004

Bergström, C.F; Hettne, J — *Lissabonfördraget: Hur ändras EU?*, Europarättslig tidsskrift, 2008:1

Bernitz, U	*EU:s nya rättighetsstadga – hur kommer den att tillämpas*, Europarättslig tidsskrift, 2008:2
Cartabia, M	*Europe and Rights: Taking Dialogue Seriously*, European Constitutional Law Review, 5:5–31, 2009
De Burca, G	*The drafting of the European Union Charter of Fundamental Rights*, European Law Review 2001, 26(2), pp. 126-138
De Schutter, O	*The EU Fundamental Rights Agency: Genesis and Potential*, New Institutions for Human Rights Protection, Oxford Scholarship Online, September 2009
De Wet, E	*The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation?*, European Constitutional Law Review, 5: 284–306, 2009
Eriksen, E.O .	*Why a Charter of Fundamental Human Rights in the EU?*, Ratio Juris, Vol. 16 No. 3 September 2003 pp. 352–73
Harpaz, G	*The European Court of Justice and its relations with the European Court of Human Rights: The quest for enhanced reliance coherence and legitimacy*, Common Market Law Review 46: 105–141, 2009
Hette, J; Öberg, U	*Domstolarna i Europeiska Unionens konstitution*, 2003:15 SIEPS
Karolewski, I.P.	*Pathologies of Deliberation in the EU*, European Law Journal, Vol. 17, No. 1, January 2011, pp. 66–79.

Kinzelbach, K; Kozma, J	*Portraying Normative Legitimacy: The EU in Need of Institutional Safeguards for Human Rights*, Perspectives on European Politics and Society, Vol. 10, No. 4, pp. 603–620, December 2009
Kuhnert, K	*Bosphorus – Double standards in European human rights protection?*, Utrecht Law Review, Volume 2, Issue 2 (December) 2006
Lenaerts, K; De Smijter, E	*The Charter and the Role of the European Courts*, Maastricht Journal of European Law (2001)
Lock, T	*EU accession to the ECHR: implications for the judicial review in Strasbourg*, European Law Review 2010, 35(6), pp. 777-798
Lock, T	*The ECJ and the ECtHR: The Future Relationship between the Two European Courts*, The Law and Practice of International Courts and Tribunals 8 (2009) pp. 375–398
McCrudden, C	*The Future of the EU Charter of Fundamental Rights*, House of Lords, Select Committee on the European Union, EU Charter of Fundamental Rights (Session 1999-2000, 8th Report), HL Paper 67 (2000), Jean Monnet Working Paper 13/01
Toggenburg, G.N	*The role of the new EU Fundamental Rights Agency: debating the "sex of angels" or improving Europe's human rights performance?*, European Law Review 2008, 33(3), pp. 385-398

Van den Berghe, F — *The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?*, European Law Journal, Vol. 16, No. 2, March 2010, pp. 112–157

Weiler, J.H.H; Lockhart, N — *Taking Rights Seriously: The European Court of Justice and its Fundamental Right Jurisprudence*, Parts I and II, Common Market Law Rev. 32, 1995, pp. 579 – 627

Legal documents

Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950

Treaty establishing the European Economic Community, signed 25 March 1957

Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, Official Journal C 103, 27 April 1977

Opinion of the European Court of Justice delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, 1/91, 14 December 1991

Treaty on the European Union, signed on 7 February 1992

UN General Assembly Resolution, National institutions for the promotion and protection of human rights, 48/134, adopted 20 December 1993

Opinion of the European Court of Justice, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2/94, 28 March 1996

Treaty of Amsterdam, signed on 2 October 1997

Draft Charter of Fundamental Rights of the European Union, Charte 4105/00, Brussels, 13 January 2000

Resolution, Parliamentary Assembly of the Council of Europe, "Charter of fundamental rights of the European Union", 1210 (2000), 25 January 2000

Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union, COM(2000) 644 final, 11 October 2000

Draft Charter of Fundamental Rights of the European Union, Charte 4473/00, 11 October 2000

Charter of Fundamental Rights of the European Union, 2000/C 364/01, signed on 7 December 2000

European Parliament resolution on the situation as regards fundamental rights in the European Union (2000) (2000/2231(INI)), 5 July 2001

Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15 October 2003

European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 — C5-0594/2003 — 2003/2249(INI)), 20 April 2004

Communication from the Commission, The Fundamental Rights Agency Public consultation document, COM(2004) 693 final, 25 October 2004

Resolution, Parliamentary Assembly of the Council of Europe, "Plans to set up a fundamental rights agency of the European Union", 1427 (2005), 18 March 2005

Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposal, COM(2005) 172 final, 15 June 2005

Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights Proposal for a Council Regulation empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union, COM(2005) 280 final, 30 June 2005

Recommendation, Parliamentary Assembly of the Council of Europe, "Follow-up to the 3rd Summit: the Council of Europe and the proposed fundamental rights agency of the European Union", 1744 (2006), 13 April 2006

Council Regulation establishing a European Union Agency for Fundamental Rights, 168/2007, 15 February 2007

Memorandum of Understanding between the Council of Europe and the European Union, CM(2007)74, 10 May 2007

Treaty on the functioning of the European Union, signed on 13 December 2007

Council Decision authorizing the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR), 10817/10, 4 June 2010

Miscellaneous

Affirming Fundamental Rights in the European Union: Time to Act, Report of the Expert Group on Fundamental Rights, Brussels, European Commission, Employment, Industrial Relations and Social Affairs, February 1999

European Council decision on the drawing up of a Charter of fundamental rights of the European Union, I.64, Annexes to the Presidency conclusions (26/28) , Bulletin EU 6-1999

Presidency Conclusions of the Laeken European Council (14 and 15 December 2001): Annex I: Laeken Declaration on the future of the European Union, in Bulletin of the European Union 2001, No 12, pp. 19-23

Office of the United Nations High Commissioner for Human Rights, Economic, Social and Cultural Rights – Handbook for National Human Rights Institutions, Professional Training Series No. 12, United Nations New York and Geneva 2005

Council of Europe – European Union: A sole ambition for the European continent, Report by Jean-Claude Juncker Doc. 10897, 11 April 2006

European Union Agency for Fundamental Rights, Annual Report 2008

European Union Agency for Fundamental Rights, Annual Report 2009

Presidency Conclusions, Brussels, (15265/1/09 REV), ANNEX I, 29 - 30 October 2009

European Union Agency for Fundamental Rights, Annual Report 2010 – Conference edition

Accession by the European Union to the European Convention on Human Rights, Answers to frequently asked questions, Council of Europe, 1 June 2010

http://www.fra.europa.eu/fraWebsite/about_fra/what_we_do/what_we_do_en.htm, accessed on 7 April 2011

http://fra.europa.eu/fraWebsite/research/opinions/opinions_en.htm, accessed on 7 April 2011

Table of Cases

European Court of Justice

Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA* v *High Authority of the European Coal and Steel Community*, Judgment of the Court of 13 June 1958

Case 1/58, *Friedrich Stork & Cie* v *High Authority of the European Coal and Steel Community*, Judgment of the Court of 4 February 1959

Case 29/69, *Erich Stauder* v *City of Ulm – Sozialamt*, Judgment of the Court of 12 November 1969

Case 11/70, *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Judgment of the Court of 17 December 1970

Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung* v *Ruhrkohle Aktiengesellschaft*, Order of the Court of 11 January 1977

Case 36/75, *Roland Rutili* v *Ministre de l'intérieur*, Judgment of the Court of 28 October 1975

Case 44/79, *Liselotte Hauer* v *Land Rheinland-Pfalz*, Judgment of the Court of 13 December 1979

Case 98/80, *Giuseppe Romano* v *Institut national d'assurance maladie-invalidité*, Judgment of the Court (First Chamber) of 14 May 1981

Case 222/84, *Marguerite Johnston* v *Chief Constable of the Royal Ulster Constabulary*, Judgment of the Court of 15 May 1986

Case 12/86, *Meryem Demirel* v *Stadt Schwäbisch Gmünd*, Judgment of the Court of 30 September 1987

Case 5/88, *Hubert Wachauf* v *Bundesamt für Ernährung und Forstwirtschaft*, Judgment of the Court (Third Chamber) of 13 July 1989

Joined cases 46/87 and 227/88, *Hoechst AG* v *Commission of the European Communities*, Judgment of the Court of 21 September 1989

Case C-260/89, E*lliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou* v *Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, Judgment of the Court of 18 June 1991

Case C-206/91, *Ettien Koua Poirrez* v *Caisse d'allocations familiales de la région parisienne, substituée par la Caisse d'allocations familiales de la Seine-Saint-Denis*, Judgment of the Court (Second Chamber) of 16 December 1992

Case C-185/95, *Baustahlgewebe GmbH* v *Commission of the European Communities*, Judgment of the Court of 17 December 1998

Case C-292/97, *Kjell Karlsson and Others*, Judgment of the Court (Sixth Chamber) of 13 April 2000

Case C-173/99, *The Queen v Secretary of State for Trade and Industry*, ex parte *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, Judgment of the Court (Sixth Chamber) of 26 June 2001

Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge* v *Republik Österreich*, Judgment of the Court of 12 June 2003

Joined cases C-20/00 and C-64/00, *Booker Aquacultur Ltd* (C-20/00) and *Hydro Seafood GSP Ltd* (C-64/00) v *The Scottish Ministers*, Judgment of the Court of 10 July 2003

Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn*, Judgment of the Court (First Chamber) of 14 October 2004

Case C-540/03, *European Parliament* v *Council of the European Union*, Judgment of the Court (Grand Chamber) of 27 June 2006

Case C-131/03, *R.J. Reynolds Tobacco Holdings, Inc. and Others* v *Commission of the European Communities*, Judgment of the Court (Grand Chamber) of 12 September 2006

Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd* v *Justitiekanslern*, Judgment of the Court (Grand Chamber) of 13 March 2007

Case C-438/05, International *Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti*, Judgment of the Court (Grand Chamber) of 11 December 2007

Case C-341/05, *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, Judgment of the Court (Grand Chamber) of 18 December 2007

Case C-402/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the*

European Communities, Judgment of the Court (Grand Chamber) of 3 September 2008

European Court of Human Rights

Chappell v. *United Kingdom*, Application no. 10461/83, 30 March 1989

Niemetz v. *Germany*, Application no. 13710/88, 16 December 1992

Funke and others v. *France*, Application no. 10828/84, 25 February 1993

Matthews v. *United Kingdom*, Application no. 24833/94, 18 February 1999

Immobiliare Saffi v. *Italy*, Application no. 22774/93, 28 July 1999

Bosphorus Hava Yollari Turizm v. *Ireland*, Application no. 45036/98, 30 June 2005

Koua Poirrez v. *France*, Application no. 40892/98, 30 September 2003

Other

Bundesverfassungsgericht, German Constitutional Court
Case 2 BvR 197/83, Re Wunsche Handelsgesellschaft, judgment of 22 October 1986 in 3 CLMR, 1987