PROMOTING AND PROTECTING FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION:
The role of national courts, of human rights defenders and of independent national human rights institutions
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BRIEFING PAPER

Résumé:
This briefing note defines the contribution of courts and independent human rights institutions (including both ombudsperson and national human rights institutions) to the protection and promotion of fundamental rights at the national level, and how the tasks these actors fulfill fit into the framework of the protection of fundamental rights in the EU legal order. The note is divided in three sections. First, it describes the position of national courts, taking into account the requirements which follow from the case-law of the European Court of Justice, which insists on the obligation of the EU Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. However, for a number of reasons, courts may not be adequately equipped to effectively protect fundamental rights, since these require also the establishment of preventive mechanisms (addressing, *ex ante*, the risk of violations) functioning on the basis of more liberal rules relating to standing, and mechanisms providing remedies to victims in non-judicial, but more accessible and flexible, settings. Therefore, the second section of the note reviews the contribution of both ombudspersons’ institutions and national human rights institutions established according to the 1991 Paris Principles to the protection and promotion of fundamental rights in the EU Member States. Finally, the third section of the note offers a number of conclusions, by relating these mechanisms existing at national level – both judicial and non-judicial – to the future role of the EU Fundamental Rights Agency.
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INTRODUCTION

Two sets of mechanisms exist, at national level, which may contribute to the promotion and protection of fundamental rights in the European Union: on the one hand, national courts provide remedies to individuals whose rights have been allegedly violated, and they ensure, in cooperation with the European Court of Justice, that the right to an effective remedy and to a fair trial (Article 47 of the EU Charter of Fundamental Rights) will thus be respected; on the other hand, non-judicial mechanisms exist, which may involve not only a national human rights institution, but also ombudsmen institutions or national parliaments. The purpose of this briefing note is not only to offer a description of the contribution of these different national mechanisms for the promotion and protection of human rights, but also to examine how they may interact with the protection of fundamental rights through mechanisms established at the EU level.

1. THE ROLE OF NATIONAL COURTS IN THE PROTECTION OF HUMAN RIGHTS

National courts have an essential function to fulfill in the protection of fundamental rights recognized within the legal order of the European Union, and partly codified in the EU Charter of Fundamental Rights. When asked to apply Union law, they should ensure that this will not result in a violation of fundamental rights included among the general principles of Union which the European Court of Justice has developed since 1969-1970, and in cases of doubt, they should refer the question of interpretation of the requirements of Union law (or, as the case may be, the question of the validity of an act adopted by the EU institutions) to the Court of Justice of the European Communities (European Court of Justice). During the recent years however, the problems facing national courts in fulfilling this role have been well highlighted. Apart from the difficulty of identifying precisely which fundamental rights are indeed included among the general principles of Union law which may be taken into account – since, under Union law, a human right recognized only under a national bill of rights, and which is not guaranteed as a fundamental right in the EU legal order, cannot constitute an obstacle to the full application of Union law, which in cases of conflict should be recognized a supremacy over all national rules –, the limits of the role of national courts have their source in two factors under the current state of Union law. This section recalls these problems (1.1.); it examines the solutions brought about by the Reform Treaty, currently in draft form (1.2.); it ends with a proposal (1.3.).

1.1. Problems in the current state of EU law

1.1.1. The variable jurisdiction of the Court of Justice in referral procedures

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1 The expression ‘Union law’ is used here as a shorthand to refer to both European Community law and EU law, including both primary law (the EU treaties) and secondary law (the legislative output of the EU institutions).

2 It is well established that ‘the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community’ (Case 44/79, Hauer v. Land Rheinland-Pfalz [1979] ECR 3727, para. 14).

3 These problems and potential solutions have been discussed extensively in the report by O. De Schutter, Vers l’Union de droit. L’amélioration de la protection juridictionnelle du particulier dans le cadre de la Conférence intergouvernementale, report commissioned by the European Commission (Fundamental Rights Unit A5, DG Justice and Home Affairs), January 2003, accessible on the “documents” section of www.cpdr.ucl.ac.be/cridho. That report emphasized the complementary roles of the European Court of Justice and of the national courts, and the need to stipulate expressly an obligation for the Member States, derived from the obligation of loyal cooperation, to organize national judicial remedies in order to ensure compliance with Article 47 of the Charter of Fundamental Rights.
First, because of the restrictions currently imposed on the jurisdiction of the European Court of Justice under the referral procedure for the delivery by the Court of preliminary rulings, national courts may be obliged to apply European Community law or EU law without being allowed to set aside acts adopted by the EU institutions, even in situations where they suspect that such acts have been adopted in breach of the requirements of fundamental rights. The powers of the European Court of Justice to deliver preliminary rulings upon the referral from a national court are defined, in principle, by Article 234 EC. However, this procedure is not currently applicable throughout all fields of Union law. Apart from the fact that no such preliminary rulings may be requested from the Court when acts have been adopted under Title V of the EU Treaty (Common Foreign and Security Policy), there are two other problematic situations:

- Under current Article 68(1) EC, the referral procedure to the European Court of Justice under Article 234 EC applies under Title IV of the second part of the EC Treaty (Visas, asylum, immigration and other policies related to free movement of persons) only under specific circumstances and conditions: only where a question of interpretation or validity of Community acts based on this title, or a question of interpretation of this title, is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, shall that court or tribunal, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. As was recognized clearly in 2002-2004, in the course of the negotiations of the Treaty establishing a Constitution for Europe, this restriction to the jurisdiction of the European Court of Justice is particularly unacceptable in areas where the consequences of having to wait until a court of last instance may submit such a question may be particularly severe. This is the case, in particular, when a person is deprived of his liberty – indeed, such delays may result in the question never being submitted, for instance where deportation proceedings are executed against a third-country national. It is deplorable that the ‘passerelle’ clause of Article 67(2) al. 2 EC has not been relied upon to put an end to this anomaly.

- In the system put in place by Article 35 EU, which defines the powers of the Court of Justice of the European Communities to give preliminary rulings on questions within the framework of Title VI EU (police cooperation and judicial cooperation in criminal matters), it is for each Member State to define the conditions of collaboration between the national courts and the Court of Justice. This, along with the impossibility for the Commission to bring infringement proceedings against a Member State that fails to comply with a decision or framework decision that has been adopted under that title, could threaten the uniform application of Community law and – consequently – the equal treatment of all those covered

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4 See e.g. Cases T-228/02, T-47/03, and T-327/03, which all illustrate the potential impact on fundamental rights of acts adopted in the framework of the CFSP.

5 The Treaty establishing a Constitution for Europe not only intended to abolish this anomaly inherited from the time when all Justice and Home Affairs issues were placed under Title VI EU and obeyed to intergovernmental mechanisms. Article III-369 al. 4 of the Constitutional Treaty goes even further, providing that ‘If such a [preliminary] 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 shall act with the minimum of delay’, thus recognizing the need for the Court in certain cases, for instance when a third-country national is placed under arrest and facing deportation, to provide the national court within the minimum delay possible with the answer it requests on the interpretation or the validity of Union law.

6 Since the expiry on 1 May 2004 of the period of five years following the entry into force of the Treaty of Amsterdam, Article 67(2) al. 2 EC allows the Council, acting unanimously after consulting the European Parliament, to take a decision with a view to providing for all or parts of the areas covered by title IV of the second part of the EC Treaty to be governed by the co-decision procedure referred to in Article 251 EC and adapting the provisions relating to the powers of the Court of Justice. In its Communication on the Programme of the Hague (COM(2005) 184 of 10.5.2005, p. 5), the European Commission considered it unjustifiable that the Decision 2004/927/EC of the Council of 22 December 2004 (OJ L 396 of 31.12.2004, p. 45) did not extend the powers of the European Court of Justice in a field – that covered by Title IV of the second part of the EC Treaty – which is so crucial for civil liberties.
by European Union law. And it could prevent the Court of Justice, within the framework of Title VI EU, from ensuring an adequate protection of fundamental rights which the adoption of instruments under that title could threaten. Ten Member States (Germany, Austria, Belgium, France, Hungary, Italy, Luxembourg, Netherlands, Czech Republic and Slovenia) have aligned the conditions for exercising preliminary jurisdiction of the Court of Justice of the European Communities under Title VI EU with the conditions of preliminary jurisdiction exercised under Community law under Article 234 EC: in these States, any national court is authorized to refer questions for a preliminary ruling, while national courts against whose decisions there is no judicial remedy under national law are obliged to do so. However, as a result of the variable geometry of referrals for preliminary rulings under Title VI EU resulting from the combination of Article 35 of the Treaty on European Union and Declaration no. 10 concerning Article K.7 of the Treaty on European Union annexed to the Final Act of the Intergovernmental Conference of Amsterdam, ten other Member States (Bulgaria, Cyprus, Denmark, Estonia, Ireland, Latvia, Lithuania, Malta, Poland, Romania, the Slovak Republic and the United Kingdom) that have not made the declaration provided for in Article 35(2) EU have made no provision for their national courts to refer questions to the Court of Justice for a preliminary ruling on the interpretation or the validity of decisions and framework decisions adopted under Title VI of the Treaty on European Union. Four other States provide for referral by all their national courts, without however those courts being obliged to do so, even courts of last instance (Finland, Greece, Portugal, Sweden). One Member State (Spain) provides that only national courts against whose decisions there is no judicial remedy under national law can refer questions for a preliminary ruling to the Court of Justice: those courts are obliged to proceed to such a referral if they are faced with a question of interpretation or validity of decisions or framework decisions adopted under Title VI EU.

1.1.2. The possibility for private litigants to challenge Union acts, including Community acts of general scope of application

A second problem has its source in the restrictive conditions under which private applicants may directly challenge an act adopted by the Union institutions. No direct action for annulment is possible under Titles V and VI of the EU Treaty, which may be problematic in certain cases, despite the fact that such acts are in principle not recognized a direct effect. In addition, private individuals may not file actions for annulment against acts adopted within the EC Treaty which have a general scope of application. It has been widely acknowledged, both in legal doctrine and by the European Court of Justice itself (or by individual members of the Court), that the current rules relating to the standing of private individuals seeking the annulment of an act of general scope of application under Article 230 al. 4 EC may be too restrictive and result in a violation of the right to an effective remedy as guaranteed under Article 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights. Nevertheless, the European Court of Justice, considering itself bound by the terms of Article 230 al. 4 EC, refused to liberalize the requirements of standing. However, the Court at the same time did emphasize that the powers of the national courts should be sufficient to ensure that they would be able to effectively contribute to guaranteeing the right to an effective remedy in the legal order of the Union. This obligation may be derived from the obligation of the EU Member States to cooperate loyally to the application

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7 See Case T-177/01, Jégo-Quéré et Cie SA v. Commission [2002] ECR II-2365; see also, inter alia, the opinion of Advocate General Jacobs delivered (prior to the Jégo-Quéré judgment of the Court of First Instance) in Case 50/00 P, Unión de Pequeños Agricultores v. Council [2002] ECR I-6677. In its Report of May 1995 on certain aspects of the application of the Treaty of the European Union, drawn up at the request of the Corfu European Council of 24-25 June 1994, in view of the preparation of the 1996 Intergovernmental Conference (IGC), the Court of Justice itself had acknowledged that ‘It may be asked, (…) whether the right to bring an action for annulment under Article 173 (new Article 230) of the EC Treaty (…), which individuals enjoy only in regard to acts of direct and individual concern to them, is sufficient to guarantee for them effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the institutions’. 
of Community law, imposed under Article 10 EC,\(^8\) which implies that they should ensure that their national jurisdictions have the powers necessary to effectively assume that role. National courts should have the power, in particular, to prevent violations of fundamental rights where there exists a demonstrated risk that such violations may result from the adoption of national measures implementing an act adopted by the Union. The Court of Justice has already specified – in order to dismiss the argument that in the present system of judicial remedies organized in the EC Treaty does not guarantee the right to an effective remedy – that ‘the opportunity open to individuals to plead the invalidity of a Community act of general application before national courts is not conditional upon that act's actually having been the subject of implementing measures adopted pursuant to national law. In that respect, it is sufficient if the national court is called upon to hear a genuine dispute in which the question of the validity of such an act is raised indirectly’.\(^9\) In the Jégo-Quéré case, after considering that it cannot brush aside the conditions imposed by Article 230, al. 4 EC on actions for annulment brought by an individual, even on the pretext of interpreting those conditions in the light of the principle of effective judicial protection, the Court of Justice points out that the fact that the Regulation in question applies directly, without intervention by the national authorities, ‘does not mean that a party who is directly concerned by it can only contest the validity of that regulation if he has first contravened it. It is possible for domestic law to permit an individual directly concerned by a general legislative measure of national law which cannot be directly contested before the courts to seek from the national authorities under that legislation a measure which may itself be contested before the national courts, so that the individual may challenge the legislation indirectly. It is likewise possible that under national law an operator directly concerned by [a regulation against which no action for annulment can be brought before the Community court] may seek from the national authorities a measure under that regulation which may be contested before the national court, enabling the operator to challenge the regulation indirectly'.\(^10\)

The Court of Justice has thus, in the above case-law, clearly indicated the measures which the Member States must adopt in order to close the gaps in judicial protection that might result from the conditions currently imposed by Article 230 al. 4 EC on the admissibility of actions for annulment brought by individuals. By extending the powers of the national courts, they should help ensure that the complete system of remedies organized by the EC Treaty guarantees, by the combined review by the Community court and the national courts, the right to an effective remedy within the meaning of Article 47 of the Charter. Most recently, in a judgment it delivered on 13 March 2007, the European Court of Justice noted that ‘while it is, in principle, for national law to determine an individual’s standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection [...]. It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right [...]’.\(^11\) This judgment thus confirms that the Court is willing to impose on the EU Member States to contribute to the elaboration of a complete system of remedies which will ensure that the requirements of Article 47 of the EU Charter of Fundamental Rights will be complied with within the EC legal order.

1.2. The Draft Reform Treaty

These problems are analyzed elsewhere and there is no need here to enter into them in

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\(^11\) Case C-432/05, Unibet, paras. 40-42 (judgment of 13 March 2007).
Indeed, as in the 2004 Treaty establishing a Constitution for Europe, in the draft Reform Treaty the normal jurisdiction of the Court, as currently defined under the EC Treaty, will be extended to all fields of Union law. In addition, the Draft Reform Treaty intends to improve access to justice by individuals, in comparison to the current state of Community law. The rules on standing for the filing of direct actions for annulment of regulatory acts will be liberalized, by an amendment to be made to Article 230 al. 4 EC. This provision would now read:

Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.

In addition, the case-law of the European Court of Justice, already referred to above, which imposes on the EU Member States to contribute to ensuring that the right to an effective judicial remedy will be guaranteed in the EU legal order, shall be constitutionalized. The Draft Reform Treaty provides to state an obligation imposed on the EU Member States to contribute to ensuring that the right to an effective judicial remedy will be recognized to all persons affected by Union law (Article 9f (1), al. 2):

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

1.3. The future

It will be important in the next few months to clarify the implications of this obligation, stipulated in the EU Treaty under Article 9f (1) al. 2 as proposed by the Reform Treaty, for the organisation of remedies before the national courts of the EU Member States. As we have seen, a similar obligation can already be identified in the case-law of the European Court of Justice. However, apart from the fact that this case-law will be made more visible and explicit by the inclusion by the Reform Treaty of Article 9f (1) al. 2 in the EU Treaty, the obligation will be different in form: since, in parallel, the rules limiting the possibility for private applicants to challenge Union acts of a general scope of application will be modified, in order to liberalize standing and, in particular, in order to provide that regulatory acts which is of direct concern to the individual and does not entail implementing measures, may be challenged directly before the European Court of Justice (Court of First Instance), the national courts of the Member States will not be obliged to provide for alternative possibilities in such a situation. It can nevertheless be expected that the pressure will augment on the EU Member States to improve remedies available before their national courts, in order to ensure that, in combination with the jurisdiction of the European Court of Justice, Article 47 of the Charter of Fundamental Rights will be fully complied with. In this context, a comparative study, identifying the best practices within the EU Member States as well as any remaining gaps in certain countries, would be extremely useful in bringing to the attention of the Member States the need to reform the definition of the powers of their national courts in the implementation of Union law, and to ensure thereby that the right to an effective remedy will be fully

14 The insertion of such a provision was originally proposed by the European Convention, in Article 28(1), al. 2, of the Draft Treaty establishing a Constitution for Europe.
guaranteed.

2. NATIONAL HUMAN RIGHTS INSTITUTIONS AND OMBUDSIINSTITUTIONS

In addition to the national courts, non-judicial mechanisms contributing to the promotion and protection of human rights at national level should be taken into account in order to understand the current architecture of human rights protection in the European Union. Three developments have been influential in this respect. They are: the progressive establishment, in approximately half of the EU Member States to date, of independent national institutions for the promotion and protection of human rights (or national human rights institutions - NHRIs) (2.1.); the development of tools which ensure the prevention of human rights violations, whether or not in the hands of these NHRIs (2.2.); and the evolution of the role of Ombudsinstitutions, whose contribution to the promotion and protection of human rights may be significant (2.3.). This section describes these developments as they have manifested themselves in the EU Member States.

2.1. The development of independent national human rights institutions (NHRIs)

Since the early 1990s, independent NHRIs have been developing in the world, including in the EU Member States. In the Vienna Declaration and Programme of Action of 25 June 1993, the World Conference on Human Rights reaffirmed ‘the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights’. It also encouraged ‘the establishment and strengthening of national institutions, having regard to the ‘Principles relating to the status of national institutions’ [Paris Principles] and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level’. The support of the international community for the establishment of NHRIs has not weakened since, and the establishment by the national institutions of a coordinating committee, building on the momentum created by the Vienna Declaration and Programme of Action, has facilitated cooperation between them and the exchange of good practices. Since the early Vienna Declaration and Programme of Action, a number of States have established NHRIs in accordance with a set of guidelines based primarily on the Paris Principles on national institutions for the promotion and protection of human rights, already referred to. These Principles, initially the result of a meeting convened in Paris in 1991 by the French Commission nationale consultative des droits de l’homme, were approved successively by the Commission on Human Rights in 1992, and by the United Nations General Assembly in 1993. Other texts however should be mentioned, in particular Recommendation No R(97)14 on the establishment of independent national institutions for the promotion and protection of human rights, adopted on 30 September 1997 by of the Committee of Ministers of the Council of Europe. Referring to the Paris Principles, this recommendation encourages the Council of Europe Member States to ‘consider, taking account of the specific requirements of each member State, the possibility of establishing

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17 The coordinating committee was created at the second International Workshop on National Institutions for the Promotion and Protection of Human Rights, held at Tunis from 13 to 17 December 1993.
effective national human rights institutions, in particular human rights commissions which are pluralist in their membership, ombudsmen or comparable institutions’. The United Nations human rights treaty bodies have also repeatedly stated their interest in the establishment of NHRIs, clarifying the contribution such institutions could make to the promotion and protection of the specific rights they monitor. Thus, the Committee on Economic, Social and Cultural Rights adopted a general comment in 1998 on the role of national human rights institutions in the protection of economic, social and cultural rights, and the Committee on the Rights of the Child followed suit four years later. The Copenhagen Declaration, adopted on 13 April 2002 by the Sixth International Conference for National Institutions for the Promotion and Protection of Human Rights, held in Copenhagen and Lund, should also be mentioned. These documents have been complemented by compendiums of best practices for the establishment of such institutions.

The situation in the Member States with regards to the establishment of NHRIs remains varied. To date 14 of the 27 Member States have established a NHRI. These States are Cyprus, the Czech Republic, Denmark, France, Germany, Greece, Ireland, Latvia, Luxembourg, Poland, Portugal, Sweden, Spain, and the United Kingdom. All of these institutions with the exceptions of four (Cyprus, the Czech Republic, Latvia and the United Kingdom) have been granted ‘A’ status by the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, which implies that they are considered to conform fully with the Paris Principles. These institutions are: for Cyprus, the National Organisation for the Protection of Human Rights (1998); for the Czech Republic, the Ombudsman Office (1999); for Denmark, the Danish Institute for the Protection of Human Rights (2002); for France, the Commission nationale consultative des droits de l’homme (1984); for Germany, the German Institute for Human Rights (2001); for Greece, the Greek National Commission for Human Rights (1998); for Ireland, the Irish Human Rights Commission (2001); for Latvia, the National Human Rights Office (1995); for Luxembourg, the Consultative Commission on Human Rights (2000); for Poland, the Commissioner for Civil Rights Protection (1999); for Portugal, the Provedar de Justiça (1999); for Spain, the Ombudsman (Defensor del Pueblo) (2000); for Sweden, the Ombudsman against Ethnic Discrimination (1999); and for the United Kingdom, most recently, the Commission for Equality and Human Rights (2006). In addition, certain institutions fulfill in the Member States with regards to the establishment of NHRIs remains varied. To date 14 of the 27 Member States have established a NHRI. These States are Cyprus, the Czech Republic, Denmark, France, Germany, Greece, Ireland, Latvia, Luxembourg, Poland, Portugal, Sweden, Spain, and the United Kingdom. All of these institutions with the exceptions of four (Cyprus, the Czech Republic, Latvia and the United Kingdom) have been granted ‘A’ status by the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, which implies that they are considered to conform fully with the Paris Principles. These institutions are: for Cyprus, the National Organisation for the Protection of Human Rights (1998); for the Czech Republic, the Ombudsman Office (1999); for Denmark, the Danish Institute for the Protection of Human Rights (2002); for France, the Commission nationale consultative des droits de l’homme (1984); for Germany, the German Institute for Human Rights (2001); for Greece, the Greek National Commission for Human Rights (1998); for Ireland, the Irish Human Rights Commission (2001); for Latvia, the National Human Rights Office (1995); for Luxembourg, the Consultative Commission on Human Rights (2000); for Poland, the Commissioner for Civil Rights Protection (1999); for Portugal, the Provedar de Justiça (1999); for Spain, the Ombudsman (Defensor del Pueblo) (2000); for Sweden, the Ombudsman against Ethnic Discrimination (1999); and for the United Kingdom, most recently, the Commission for Equality and Human Rights (2006).
States functions which resemble those of a NHRI, although they may not present all the characteristics of such institutions. The most significant examples are those of Austria (Austrian Human Rights Advisory Board, Menschenrechtsbeirat), of Bulgaria (Parliamentary Ombudsman), of Estonia (Legal Chancellor), of Finland (Advisory Board on International Human Rights), of Romania (People’s Advocate), and of Slovakia (Slovak Centre for Human Rights).

2.2. The development of non-judicial mechanisms aimed at the prevention of human rights violations

The UN human rights treaty bodies and the Committee of Ministers of the Council of Europe have encouraged, not only to establish NRHIs, but also to adopt national plans of action in the field of human rights, or national strategies aimed at the realization of specific rights, in particular social or economic rights; and to develop tools, such as ex ante human rights impact assessments, or the post hoc evaluation of the impact of certain policies on human rights, in order to minimize the need for the judiciary to intervene in order to remedy violations which might be committed, and in order to ensure that international jurisdictions will only have to intervene on an exceptional basis, where national mechanisms have failed to prevent violations from occurring and, if they did occur, to offer a proper reparation to the victims. Indeed, the developments of such mechanisms can be linked to the setting up of NRHIs, since the preparation of the such action plans and of human rights impact assessments may be entrusted to these institutions: the Paris Principles provide that a national human rights institution shall, in principle, have the power to ‘submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights [relating, inter alia, to] any legislative or administrative

network of National institutions for human rights, although it operates at sub-national level. It was created by section 68 of the Northern Ireland Act 1998, in compliance with a commitment made by the UK Government in the Belfast (Good Friday) Agreement of 10 April 1998.

In the Vienna Declaration and Programme of Action of 1993, the World Conference on Human Rights recommended that ‘each State consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights’ (World Conference on Human Rights, Vienna Declaration and Programme of Action, Vienna, 14–25 June 1993, A/Conf.157/23, para 71). The UN human rights treaty bodies have repeatedly encouraged states to use this tool in order better to protect and promote human rights. Thus, the Committee on Economic, Social and Cultural Rights adopted General Comment no15 (2002), The right to water (arts. 11 and 12), adopted at the 29th session of the Committee on Economic, Social and Cultural Rights, Geneva, 11–29 Nov 2002, E/C.12/2002/11, para 26, requiring states to adopt ‘a national water strategy and plan of action to realise this right’; in General Comment no14 (2000), The right to the highest attainable standard of health (art. 12), adopted at the 22nd session of the Committee on Economic, Social and Cultural Rights, Geneva, 25 Apr–12 May 2000, E/C.12/2000/4, para 56, the Committee encourages states to establish ‘national mechanisms for monitoring the implementation of national health strategies and plans of action’ including ‘provisions on the targets to be achieved and the time-frame for their achievement: General Comment 11 (1999), Plans of action for primary education (art. 14), adopted at the 20th session of the Committee on Economic, Social and Cultural Rights, Geneva, 26 Apr–14 May 1999, E/C.12/1999/4, paras 8–10, requiring states to adopt a detailed plan which ‘must be aimed at securing the progressive implementation of the right to compulsory primary education, free of charge, under article 14’. The Committee on the Rights of the Child, similarly, adopted General Comment 5 (2003), General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para 6), adopted at the 34th session (Geneva, 19 Sept–3 Oct 2003, CRC/GC/2003/5, in paras 28–36 of which it recommends states to develop a ‘comprehensive national strategy or national plan of action for children’ (para 29); such a plan should set out ‘specific goals, targeted implementation measures and allocation of financial and human resources’ (para 32). In its General Recommendation 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, adopted on 17 Aug 2005 at its 67th session, the Committee on the Elimination of Racial Discrimination recommended that states should ‘implement national strategies or plans of action aimed at the elimination of structural racial discrimination’ and ‘entrust an independent national institution with the task of tracking, monitoring and measuring progress made under the national plans of action’ (advance unedited version, at 2.1, paras 9–10). The Committee on the Elimination of Discrimination against Women adopted General Recommendation 24 (1999), Women and Health (art.12) in which it recommends that ‘States parties should implement a comprehensive national strategy to promote women's health throughout their lifespan’ (paras 29–31).
provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures’ (emphasis added).

For a number of reasons, the human rights proofing of legislation prior to the enactment of laws or regulations has been a particularly important tool in this shift towards non-judicial mechanisms for the promotion and protection of human rights. First, preventing the violation of human rights by legislation is better, from the point of view both of the efficiency of parliamentary work and from the point of view of legal certainty, than remedying violations through courts, post hoc, where such violations are found to occur. Second, where a debate on compatibility with internationally recognized human rights is formally part of the parliamentary process for the adoption of legislation, this ensures that such compatibility will be discussed in the open, with the participation of the parliamentary opposition and civil society organisations, and of the general public via the coverage of such debates by the media: the very fact that such a discussion takes place will contribute both to the quality of the legislation enacted and to the strength of the democratic control, by parliamentary assemblies, on the initiatives of the Executive. Third, a post hoc control by courts of the compatibility of legislative enactments with the international human rights obligations of the State concerned may be insufficient, not only because it intervenes after any violation is found to have occurred rather than preventively, but also because the negative censorship by courts may not ensure that the laws are drafted according to the requirements of human rights: as illustrated for instance by the case of Sari and Colak v. Turkey, where national legislation should organize the regime for the exercise of fundamental rights, it may not be sufficient to disregard any provision or set of provisions which are incompatible with the requirements of international human rights – rather, a positive obligation is imposed on the State concerned, to provide the legislative framework required, which a judge will mostly find it beyond its powers to establish. Fourth, the existence of procedures which, prior to the adoption of legislation, seek to ensure that it will be in conformity with the human rights obligations of the State concerned, especially if such procedures include a wide-ranging consultation process and impact assessments, justify establishing a presumption that the legislation is in conformity with human rights, and in particular, that it complies with the requirement of proportionality. Fifth, pre-legislative scrutiny of draft legislation may contribute to creating a human rights culture within government, as well as within Parliament or among the other institutional actors involved in the legislative process: it serves a collective learning function. Sixth and finally, monitoring legislation also serves as a deterrent in the sense that the legislation drafters will by themselves endeavour to limit the negative impact of legislation on human rights, as they know that some form of verification for compliance with human rights will take place, resulting in a certain political cost if a proposal is found not to comply.

In the Annex an overview on the human rights vetting of legislation by NHRIs is provided


covering the EU-27.

2.3. The evolution of the role of Ombuds institutions

The institution of the Ombudsperson is less recent than that of NHRIs. Originally, the mandate of Ombudspersons, which was centered on reacting to violations of the principle of good administration by public administrations, did not include human rights more generally. This is changing, however. Recommendation No. R(85)13 of the Council of Europe Committee of Ministers on the Institution of the Ombudsman encourages the Member States of the Council of Europe to consider empowering the Ombudsman, where this is not already the case, to give particular consideration, within his general competence, to the human rights matters under his scrutiny and, if not incompatible with national legislation, to initiate investigations and to give opinions when questions of human rights are involved. This to a certain extent aligns the mandate of the ombudsman with those normally entrusted to NHRIs. In addition, the understanding of the requirement of 'good administration', which is traditionally central to the mandate of the Ombuds institution, has evolved to include the full range of human rights, or at least rights such as non-discrimination and the right to respect for private and family life and to respect for the home. As a result, overlaps occur between the respective mandates of a NHRI and of an Ombudsperson, in countries which have established both.

2.4. Conclusion

The developments referred to above have been motivated by two quite distinct concerns. A first concern was to shift from a purely remedial and post hoc approach to the protection of human rights, to a preventive, ex ante approach, for a number of reasons explained above. A second concern was to provide individuals whose rights have been allegedly violated with an opportunity to seek a remedy before non-judicial instances, in order to take into account the obstacles of access to justice and to help surmount these obstacles. The possibility for individuals to address themselves to ombuds institutions or to NHRIs (where such institutions have received the mandate to receive and examine individual communications) is seen as positive, since without this possibility many instances of human rights violations might remain unaddressed due to the obstacles facing the filing of actions before courts, and since the mandates of the ombuds institutions and NHRIs are generally very flexible, allowing them to propose innovative solutions to the structural problems highlighted by specific instances of violations, and to do so through a dialogue with the bodies concerned, in a less contentious climate than where courts are asked to intervene. Non-judicial mechanisms for the prevention of human rights violations also present the distinct advantage of alleviating the case-load of the national courts, and of facilitating the compliance by the domestic authorities with their

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33 adopted on 23 September 1985 at the 388th meeting of the Ministers’ Deputies.
34 See Parliamentary Assembly of the Council of Europe (PACE), PACE Recommendation 1615 (2003), The institution of ombudsman, where the Assembly notes that: ‘the development of methods of human rights protection has influenced the role of the ombudsman in that respect for human rights is now included in the standards to be respected by a good administration, on the basis that administrative actions which do not respect human rights cannot be lawful. National constitutional and legal circumstances particular to each country, furthermore, may dictate that ombudsmen in different countries require mandates conferring various additional responsibilities with respect to human rights protection’ (text adopted by the Standing Committee, acting on behalf of the Assembly, on 8 September 2003 (see Doc. 9878, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mrs Nabholz-Haidegger)).
35 See in this regard the position of Alvaro Gil-Robles, the then Council of Europe Commissioner for Human Rights: ‘the distinction between national Ombudsmen and National Human Rights Institutions is often hard to draw. This is not, in itself, problematic, but care must be taken to ensure that their respective competences are well articulated when both exist in the same country. Further reflection in this area may well prove necessary in the future as both kinds of institution continue to develop at a rapid rate. For my part, I am certain that the two types of institution can happily co-exist and that both should be encouraged’ (Final Report of Mr Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights (October 1999 – March 2006), Strasbourg, 29 March 2006 (doc. CommDH(2006)17), para III.4).
obligations under international human rights law, in conformity with the principle of subsidiarity. Together, these developments illustrate a shift away from a 'normative-judicial' model for the protection of human rights, towards a model which is both more ambitious (since it comprises a variety of institutions and tools) and more modest (since it acknowledges the limits of the normative-judicial model), and which recognizes the relationship between the protection and promotion of human rights and governance structures.

3. CONCLUSION: NATIONAL COURTS AND NON-JUDICIAL MECHANISMS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN THE ARCHITECTURE OF THE EU HUMAN RIGHTS SYSTEM

3.1. The relationship of EU law to national judicial and non-judicial mechanisms

There is, one might say, a difference between the contribution of EU law to the definition of the remedies available before national courts, on the one hand, and its contribution as regards the development of non-judicial mechanisms for the promotion and protection of human rights, on the other hand. As regards judicial remedies, although in principle EU law was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law, there is one exception to the principle of procedural autonomy: the remedies available should be adapted to the need to ensure the effectiveness of the judicial protection benefiting the individual. The EU Member States are thus free to define the scope of the remedies open before national courts, provided that these remedies are equivalent to those available for claims based on national law in similar cases, and that they suffice to ensure the full effectiveness of Union law. As we have seen, this has now been interpreted to extend to an obligation to provide an effective remedy as required by Article 47 of the Charter and by the principle of effective judicial protection derived from Articles 6 and 13 of the European Convention on Human Rights.

In contrast, EU law has hitherto left the EU Member States entirely free whether or not to establish non-judicial mechanisms for the promotion and protection of human rights. The European Union itself has clearly sought, since the last few years, to better take into account the requirements of fundamental rights by the setting up of mechanisms of governance, at least within the framework of European Community law: in April 2005, the Commission has adopted a Communication by which it seeks to improve the compliance of its legislative proposals with the requirements of the Charter; on 15 June 2005, it has adopted a new set of guidelines for the preparation of impact assessments, which pays a much greater attention to the potential impact of different policy options on the rights, freedoms and principles listed in the EU Charter of Fundamental Rights. But the EU Member States are under no obligation to establish equivalent mechanisms at national level. For instance, they may choose whether or not to establish a NHRI in conformity with the Paris Principles and the recommendations from the United Nations and from the Council of Europe; they may set up


ombudsinstitutions, but they are not obliged to do so; they may choose whether, and if so, how, to organize human rights impact assessments when national measures are adopted in order to implement Union law; they may decide to adopt national human rights action plans, as Sweden has done most spectacularly, or not to do so.

3.2. A potential contribution of the European Union in strengthening non-judicial mechanisms for the promotion and protection of human rights?

While it is clear that the implementation of Union in conformity with human rights, and particularly in conformity with the EU Charter of Fundamental Rights, would benefit greatly from the development at national level of such non-judicial mechanisms for the promotion and protection of human rights, there are a number of obstacles to the European Union playing an active role in encouraging such a development:

• First, it is doubtful whether the Union (or, in the current constitutional framework, the Community) has been attributed a competence to legislate on this matter. Of course, certain precedents come to mind. Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin41 did impose on all EU Member States to set up an Equality Body in charge of making studies and recommendations and of providing assistance to victims in the field of race or ethnic discrimination. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data42 did require that they establish independent supervisory authorities in the field of personal data protection. However, these could hardly be seen as valid precedents for imposing the establishment, in all the EU Member States, of a NHRI acting in conformity with the Paris Principles, or of an Ombudsinstitution with a mandate extending to the full range of human rights. There exists no provision equivalent to Article 13 EC (adoption of measures to combat discrimination on a number of grounds) or to Article 95 EC (establishment of the internal market) which would allow for this in the broader field of human rights, and it would be difficult to justify relying on Article 308 EC (the legal basis for the Regulation establishing the Fundamental Rights Agency43) for the adoption of a measure reaching as far into the prerogatives of the Member States. Similarly, in the absence of a general competence of the Union to promote and protect human rights in the Member States, it would seem difficult to justify the imposition of an obligation to prepare human rights impact assessments or human rights national action plans.

• Second, within the EU Member States, the approaches adopted towards these matters have been extremely varied, and there appears to be no convergence towards one single model. Only about half of the EU Member States have set up NRHIs which are in conformity, partly or fully, with the Paris Principles; not all of them have created Ombudsinstitutions; both the existing NRHIs and the existing Ombudsinstitutions are diverse in their structure, their mandate, and the powers they have been attributed; and the relationships between Ombudspersons and NRHIs, in the countries where both coexist, have evolved differently in each case. This diversity is unsurprising. While the Paris Principles on national institutions for the promotion and protection of human rights define certain general standards for the establishment of NRHIs, which concern their composition, their mandate, and the tools they should use, these Principles also note that it is for each State to determine which model of NHRI best suits its domestic needs. Similarly, it has been noted that ‘there is great variety in how [the] different offices [of Ombudspersons in the EU Member States] are organised, in how they work and in such matters as, for example, the division of labour between

ombudsmen and the courts. This diversity results from one of the keys to the success of the
ombudsman institution - its flexibility - which enables it and us to adapt prudently to different
constitutional, legal, cultural and political environments’. 44

- Third, the Council of Europe has been actively promoting the establishment of non-judicial
mechanisms for the promotion and protection on human rights, as well as coordination among
these mechanisms in order to promote the exchange of best practices. By Resolution 97(11)
on co-operation between national human rights institutions of the Member States and between
them and the Council of Europe, the Committee of Ministers of the Council of Europe
decided ‘to institute, in the framework of the Council of Europe, regular meetings with
national human rights institutions of member states to exchange views and experience on the
promotion and protection of human rights in their areas of competence’. 45 When the
Commissioner for Human Rights of the Council of Europe was established in 1999, one of
the missions entrusted to him was to ‘facilitate the activities of national ombudsmen or
similar institutions in the field of human rights’. 46 An agreement between the Commissioner’s
Office and the Presidency of the European Co-ordinating Committee of NHRIs led to the
establishment of a Liaison Office ensuring that the co-operation between the Office of the
Commissioner for Human Rights and the European NHRIs continue on a regular basis.
Biannual meetings called European Roundtables of National Human Rights Institutions,
have been held between the Office of the Commissioner for Human Rights and European NHRIs,
coinciding with the biannual meetings of the European Co-ordinating Committee of NHRIs. It
may be inopportune to duplicate this work of the Council of Europe, in seeking to improve
the range of non-judicial mechanisms ensuring the promotion and protection of human rights
within the EU Member States.

3.3. Strengthening the link between existing national human rights non-judicial
mechanisms and the EU Charter of Fundamental Rights: a role for the Fundamental
Rights Agency

On the other hand however, there may be a specific role for the EU Fundamental Rights
Agency, which formally came into existence on 1 March 2007, in ensuring that fundamental
rights protected under EU law, particularly as codified in the EU Charter of Fundamental
Rights, will be adequately taken into account in the existing non-judicial mechanisms for the
promotion and protection of human rights, or in such mechanisms as could be created in the
future. Three possibilities in particular should be explored.

3.3.1. The role of NHRIs in monitoring the implementation of EU law and reliance by the
NHRIs on the Charter of Fundamental Rights

A priority in this respect should be to encourage the NHRIs established in the EU Member
States to cooperate in order to identify how they could better monitor the human rights
dimensions of the implementation of EU law in their respective countries, and how their
contribution in this regard can be best coordinated with the work of the EU Fundamental

44 Keynote Speech by the European Ombudsman, Professor P. Nikiforos Diamandouros, at the Fifth Seminar of
the National Ombudsmen of the EU Member States, The Hague, 12 September 2005 (at www.euro-
ombudsman.eu.int).
45 Adopted by the Committee of Ministers on 30 September 1997, at the 602nd meeting of the Ministers’ Deputies.
46 Article 3, d), of the terms of reference of the mandate of the Council of Europe Commissioner for Human
Rights, as adopted by Resolution (99)50 on the Council of Europe Commissioner for Human Rights, adopted by
the Committee of Ministers on 7 May 1999, at its 104th Session, Budapest. The Commissioner for Human Rights
also is to ‘provide advice and information on the protection of human rights and prevention of human rights
violations. When dealing with the public, the Commissioner shall, wherever possible, make use of and co-operate
with human rights structures in the member States. Where such structures do not exist, the Commissioner will
encourage their establishment’.

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Rights Agency. One of the main functions of national institutions for the promotion and protection of human rights – as it also appears clearly from the Paris Principles adopted in 1993 by the United Nations General Assembly – has been, traditionally, to contribute to the implementation by the State concerned of international human rights law. The Council of Europe has considered however, quite naturally, that the NHRIs of its Member States should constitute the channel not only of international human rights law, but also of the standards of the Council of Europe. This is the significance of Resolution 97(11) of the Committee of Ministers of the Council of Europe, which invited the Secretary General of the Council of Europe to ‘ensure that national human rights institutions are informed of relevant activities concerning the promotion and protection of human rights in the framework of the Council of Europe’. It should now be asked whether the NHRIs should not also contribute to the effective application of the EU Charter of Fundamental Rights, in the fields where the national authorities implement Union law and in which, therefore, the Charter applies. Practical initiatives could be taken to encourage this. Thus for instance, in cooperation with the existing NHRIs, and seeking inspiration in existing human rights impact assessment methodologies, the existing NHRIs could be provided with methodologies and tools allowing them to take into account the EU Charter of Fundamental Rights when examining the implementation of EU law, especially those provisions of the Charter which do not correspond to internationally recognized human rights such as those found in the European Convention on Human Rights, the European Social Charter, of the UN human rights treaties.

3.3.2. The role of NHRIs in monitoring the adoption of European legislation

Involving the NHRIs in the monitoring of the implementation of Union law may not be sufficient, however. A crucial question for the future will be how NHRIs, but also other instances currently involved in the pre-screening of draft legislation at the national level, can extend their role to the adoption of European laws in the framework of the European Union (in particular directives, regulations, or framework decisions). Some may consider that such screening should take place only at the European level, through the processes described above – extended impact assessments prepared by the lead department of the Commission proposing legislation, verification of compliance by the Legal Service of the Commission with DG JLS and DG RELEX – to which, occasionally, the Fundamental Rights Agency could also be asked to contribute. However, we should recall that the human rights obligations of the EU Member States differ quite widely, leading to the existence of different standards which a

47 The European Group of national human rights institutions has taken the position already that ‘the Agency should work in ‘close cooperation with the already existing institutions, particularly NHRIs and other national independent bodies’ (Common position regarding the European Commission’s proposals for a Council regulation establishing a European Union Agency for Fundamental Rights, 17 January 2006).

48 Under the Paris Principles, NHRIs should in particular ‘promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation’; and ‘encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation’.

49 Resolution 97(11) on co-operation between national human rights institutions of the Member States and between them and the Council of Europe, adopted by the Committee of Ministers on 30 September 1997, at the 602nd meeting of the Ministers’ Deputies.

50 The Agency, however, is not authorized under Regulation (EC) n°168/2007 to intervene on its own motion in the legislative process: see Art. 4(2) of the Regulation.

51 These commitments vary even if we consider only the instruments prepared within the framework of the Council of Europe. All the EU Member States are parties to the European Convention on Human Rights. But for instance, while all the Member States are parties either to the European Social Charter or to the Revised European Social Charter, Austria, the Czech Republic, Denmark, Germany, Greece, Hungary, Latvia, Luxembourg, Netherlands, Poland, Slovakia, Spain and the United Kingdom have not ratified the Revised European Social Charter. And both within the 1961 European Social Charter and within the 1996 Revised European Social Charter, the commitments of the States parties are variable, as they may upon ratification accept only a limited number of the provisions of these instruments. Belgium, France, Greece and Luxembourg, have not ratified the Framework Convention for the Protection of National Minorities. Belgium, Finland, France, Germany, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Sweden and the United Kingdom have not ratified the Convention on Human Rights and Biomedicine.
screening as performed within the European Commission could hardly take into account fully. Moreover, the preventive mechanisms established by the European Commission (described above) currently concern only the legislative proposals of the Commission. But under Title VI of the EU Treaty, the Member States may take the initiative of proposing the adoption of certain instruments, in particular framework decisions.52 No preventive mechanism, ensuring that the proposal will be compatible with fundamental rights, exists in that context. This would justify a more active role for instances which, at national level, are entrusted with ensuring that draft legislation complies with fundamental rights, in the monitoring of European instruments proposed in the fields of police cooperation and judicial cooperation in criminal matters.

3.3.3. Strengthening the links between the EU Fundamental Rights Agency and Ombudsinstitutions established at national level

Thirdly, the architecture of the promotion and protection of human rights in the EU would be incomplete if coordination were not sought, also, between the Fundamental Rights Agency and the Ombudsinstitutions existing in the EU Member States. The Commission Staff Working Paper which accompanied the proposal of the European Commission for the establishment of a Fundamental Rights Agency contains an overview of ‘existing mechanisms to monitor and collect information on respect for fundamental rights in the EU’ which refers inter alia to the courts in the Member States and national human rights institutions,53 but which makes not a single reference to ombudspersons. Considering the evolving role of these institutions and their importance to the promotion and protection of human rights in a variety of national settings, this is a striking omission.54 Courts, ombudspersons and human rights institutes may be seen as forming a ‘human rights triangle’. Each of them has an essential role to play in protecting and promoting human rights: in settling disputes, in addressing situations of maladministration and in formulating policy proposals, respectively. Ideally, these institutions complement one another and exchange information about their activities.

52 Article 34(2) EU.
54 The same is true for the contacts that, according to the Working Paper, the future Agency is to establish: ‘The creation of the Agency will lead to better coordination of national human rights institutions and engagement with NGOs, when the Agency will work with them for consultation, information gathering purposes’ (Ibidem, p. 21). 

15
ANNEX – not translated

The human rights vetting of legislation by NHRIs

Although the establishment of a NHRI should in principle facilitate the *ex ante* human rights vetting of legislation, it is striking that in the majority of the EU Member States which have set up a NHRI, the NHR has been attributed no formal role in the human rights proofing of legislation. In Cyprus, the National Organization for the Protection of Human Rights was established already in 1998, but it has no formal role in the preparation of legislation. Instead, all Bills are submitted to the Office of the Attorney General of the Republic for legal vetting before their submission to the Council of Ministers for approval. The Counsels of the Republic examine *inter alia* the compatibility of a Bill with the international obligations of the Republic including human rights. Subsequently they are transmitted to the House of Representatives for enactment. The competent Committee examining a Bill may consult and seek the approval of the Committee of Human Rights of the House, before its submission before the full House for enactment. In the Czech Republic, the Ombudsman Office established in 1999 has no formal role in the preparation of legislation. The Legislative Council of the Government examines compliance of the legislation with the constitutional principles and international undertakings of the State before the legislation/regulation is drafted by the Government and adopted by the Government or submitted to Parliament and adopted by Parliament. The Government Council for Human Rights takes part in the procedure as well. In Germany, the German Institute for Human Rights established in 2001 has no formal role in the prelegislative procedure, in order to verify compliance of draft legislation with the international commitments of the Federal Republic of Germany in the field of human rights. The Common Rules of Procedure of the Federal Ministries, which regulate in detail the co-operation between the ministries while preparing draft law, provide instead that the Commissioner for Human Rights Issues in the Federal Ministry of Justice is involved in the preparation of draft legislative acts, which should ensure such compliance. In Sweden, the ombudspersons have no formal role in the legislative process. Rather, the compatibility of draft legislation with the international human rights treaties is in principle verified by the ministry responsible for drafting the legislation. All draft bills are thereafter sent to the Ministry of Foreign Affairs. A second control is done by the Law Council (*Lagrådet*), which consists of members of the Supreme Court and the Supreme Administrative Court. Similarly in Portugal, where the 1976 Constitution established the Ombudsman, called *Provedor de Justiça*, whose functions were defined by Law No. 81/77, as of November 22, 1977, and more recently by Law No. 9/91, as of April 9, 1991, the Ombudsman has no formal role in the legislative process. In Poland, the institution of the Ombudsman has been established by the Constitution and its scope and mode of operation is specified in the Act of 15 July 1987 on the Ombudsman. The Ombudsman may lodge proposals for a legislative initiative with the relevant governmental agencies, may approach the Constitutional Court on matters of conformity of statutory laws, international treaties and other legal regulations with the Constitution and may participate in the proceedings before the Court. He/she may approach the Supreme Court asking for an interpretation of the law. During the legislative process in the parliament, the Ombudsman may be consulted, along with representatives of the Department of International Co-operation and European Law of the Ministry of Justice and other experts, including representatives of non-governmental organisations. In cases involving significant human rights issues they express their opinions on the draft and its conformity with the Constitution and international human rights standards. Such a consultation however, would appear to be rather exceptional and thus is not in any way systematic. In Spain, the *Defensor del Pueblo* elected by the Cortes Generales (Senate and Congress) may issue opinions on his/her own initiative, but is not formally involved in the legislative process.

There are other, more encouraging, situations. In Denmark, the Danish Institute for Human Rights, established in its current form in 2002 and a successor to the Danish Centre for Human Rights, established by act of parliament in 1987, is heard on regulation within the field of human rights. The Institute considers the compliance of bills, decisions, opinions and government initiatives with the human rights conventions ratified by Denmark before the adoption of the regulation. The Institute is consulted by the Danish ministries and receives several consultation papers each year. The Institute replies to the consultation papers by describing the human rights concerns raised by the regulation. In France, the national consultative commission on human rights (Commission nationale consultative des

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55 http://www.provedor-jus.pt/welcome.htm
Ministry of Justice has not indicated that it assesses draft bills from the point of view of their compliance with human rights standards is not the subject of specific scrutiny, however, and the international law standards are applicable and how is the proposed draft meeting their requirements. Although the representatives of the NHRO proposal for human rights; it can also, of its own motion, make recommendations on measures to strengthen and promote human rights in the state. The Commission has exercised both of these powers since its establishment in the course of the legislative process and its representatives have also appeared before parliamentary committees to explain the Commission’s comments on legislative and other proposals. While no formal system of parliamentary scrutiny of legislation for human rights compatibility exists and the opportunity to institute such a system was not availed of in the legislation to give further effect to the European Convention on Human Rights in Irish law (European Convention on Human Rights Act, 2003), issues of domestic human rights concern usually arise for consideration by the Oireachtas Committee on Justice, Equality, Defence and Women’s Rights. In Latvia, the National Human Rights Office (Valsts cilvēktiesibu birojs) was established initially on 18 July 1995 on the basis of the Cabinet of Ministers Regulations on the National Human Rights Office (NHRO), and subsequently, by the Law on the National Human Rights Office adopted by the Saeima (Parliament) on 5 December 1996. The NHRO has no formal role in the legislative process. Each draft legislation is accompanied by an annotation or explanatory statement in which the authors state whether any international law standards are applicable and how is the proposed draft meeting their requirements. Compliance with human rights standards is not the subject of specific scrutiny, however, and the Ministry of Justice has not indicated that it assesses draft bills from the point of view of their compliance with human rights in any systematic way. Although the representatives of the NHRO regularly participate in the meetings of the Human Rights Committee of the Parliament in the discussions on the draft legislation and present their opinions and proposals to the other parliamentary committees, this participation remains ad hoc and does not ensure that the human rights proofing of legislation will be satisfactorily performed. In Luxembourg, the Consultative Commission for Human Rights established by the Government Council’s regulation of 28 April 2000 delivers its opinions and prepares its studies at the request of the government, but also on its own initiative. In most cases, its opinions intervene prior to the adoption of legislative acts, when such acts are still in draft form.

In none of the cases cited above, is there an obligation to request an opinion from the NHRI prior to the adoption of legislation. This is only partly compensated for, either by a practice of the government (Denmark) or the national parliament (Latvia) to regularly consult the NHRI on draft legislation, or by the competence attributed to the NHRI to raise human rights issues in pending legislation on its own motion, or both (Ireland, France, Luxembourg). In the absence of any formal involvement, in all the States cited, of the competent NHRI, the human rights screening of draft legislation is performed either internally within the Ministry having authored the draft or within another government department, or by the relevant parliamentary committee, or both.

In this picture, the National Commission for Human Rights (GNCHR) founded in Greece by Law 2667/1998 appears to constitute a remarkable exception. The GNCHR has to be consulted prior to the submission of any draft law to the Parliament, if such draft law concerns, directly or indirectly, human rights. The GNCHR systematically verifies whether such draft law is in conformity with the Constitution and the international obligations of Greece in the field of human rights. Furthermore, when the draft law is submitted to the Parliament, it is immediately sent to the “Scientific Council” of the Parliament, which verifies, once more, its compatibility with the Constitution and the international commitments of Greece.

58 Sponsoring government departments may also comment on the compatibility of legislative proposals with international human rights obligations.
59 The Irish Human Rights Commission has a full-time Senior Legislation & Policy Review Officer (with an Assistant).
60 A Human Rights Sub-Committee (under the aegis of the Oireachtas Foreign Affairs Committee) does exist but its focus is largely human right and foreign policy.
The United Kingdom deserves a separate comment, due to the recent changes which have occurred there. The principal responsibility for vetting the compatibility of proposed legislation with international undertakings in the field of human rights rests hitherto with the department bringing it forward. However, in the case of the European Convention on Human Rights a request may also be made for the matter to be checked by the Government Agent before the European Court of Human Rights (a legal adviser in the Foreign and Commonwealth Office) and in all cases it is possible that the Cabinet Committee responsible for legislation may raise particular issues about compliance. Furthermore there is an obligation under the Human Rights Act 1998, s 19 for the Minister in charge of a Bill to make a statement to the effect that either the provisions of the Bill are in his view compatible with the Convention rights (“a statement of compatibility”) or the government wishes consideration of the Bill to proceed although he or she is unable to make a statement of compatibility. In the latter case there is no legal impediment to the adoption of the proposed measure but this may only be politically acceptable where a derogation is made under Article 15 of the Convention and section 14 of the 1998 Act. A statement of compatibility must be in writing but there is no requirement that the advice on which the statement of compatibility is made be disclosed and it is not disclosed in practice. Following the introduction of a Bill its provisions may be considered by the Joint Committee on Human Rights which can examine them from the perspective of any of the United Kingdom’s international obligations in the field of human rights (and not just the Convention). The Joint Committee will report on the proposed legislation that it examines before its adoption and comments made by it may lead to modification or withdrawal of particular proposals, and it is this committee which is so far charged with the proofing of legislation. As it is composed of members of both Chambers and different political parties, it is, moreover, very independent.

The Equality Act 2006 establishes the Commission for Equality and Human Rights. This new body shall take over the work of the three currently existing equality bodies, while also focusing on the three other equality strands (age, religion and belief and sexual orientation) and take responsibility for the promotional agenda which underpins the Human Rights Act, it should be up and running in October 2007. Under sect. 11(2)(d) of the Equality Act 2006, chapter 3, part 1, the Commission shall ‘advise central or devolved government about the likely effect of a proposed change of law’. It is at yet unclear how this function shall be exercised, and in particular, whether the new Commission will be consulted on a systematic basis before the ‘statement of compatibility’ of sect. 19 of the 1998 Human Rights Act is presented. However, considering the role fulfilled hitherto by the Joint Committee on Human Rights, it has been announced in the White Paper launched by the United Kingdom Government prior to the decision to establish the new Commission for Equality and Human Rights that this body will not take over this role. Therefore, any role of the new Commission in human rights proofing of legislation most likely will remain the exception rather than the norm.

The human rights vetting of legislation by other institutions, similar to NHRI

Apart from the EU Member States which have already been cited, who have established a national institution for the promotion and protection of human rights in accordance with the Paris Principles, a number of EU Member States have established an institution with certain powers equivalent to those of a NHRI. In particular, a number of Member States have ombudspersons, whose mandate includes the full range of internationally recognized human rights.

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63 The United Kingdom is presented here among the States which have not yet established a national human rights institution within the meaning of the 1993 Paris Principles. However, there exists for Northern Ireland a Human Rights Commission, which was established as part of the 1998 Belfast Agreement. See, in particular, Christopher McCrudden, ‘The Contribution of the EU Fundamental Rights Agency to Combating Discrimination and Promoting Equality’, in Ph. Alston and O. De Schutter (eds), Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency, Hart Publ., Oxford, 2005, pp. 131-158, which offers a discussion of the debates in the United Kingdom.

64 Sect. 19 of the 1998 Human Rights Act provides:

(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill- (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate’.

Typically however, ombudspersons – even where their mandate extends beyond bad administration and includes the protection and promotion of human rights – are not involved in human rights proofing of draft legislation. This is the case in *Slovenia*, where Article 159.1 of the Constitution established the Ombudsman as an institution for the out of court and informal protection of human rights and basic freedoms.\(^{66}\) In *Hungary*, which has no NHRI, four commissioners, the Parliamentary Commissioner for Human Rights, the Deputy Ombudsman, the Parliamentary Commissioner for Data Protection and Freedom of Information, and the Parliamentary Commissioner for Ethnic Minorities, are elected by the Parliament of the Hungarian Republic upon the proposal of the President of the Republic, for terms of six years. Although the mandate of these Parliamentary Commissioners, as defined by the 1993 Act on the Parliamentary Commissioners,\(^{67}\) partly recoup those of a NHRI, they have no formal role in the drafting of legislation. Rather, the Human Rights Department of the Ministry of Justice examines whether the draft legislation is in accordance with the European Convention on Human Rights, and the similar department of the Ministry of Foreign Affairs does the same work in relation to the UN human rights treaties. Thus, any incompatibility with international treaties ratified by Hungary should be revealed during the drafting process. In *Estonia*, the Legal Chancellor of the Republic of Estonia is an independent official who is appointed to office by the Parliament (Riigikogu) on the proposal of the President of the Republic for a term of seven years; the Office of the Legal Chancellor currently consists of approximately 40 qualified lawyers and other staff. The Legal Chancellor not only acts as an ombudsman on the basis of individual complaints; he also controls the conformity with the constitution of all new laws, foreign treaties, regulations and other legal acts of state and municipal organs, and may recommend that these acts be modified in order to ensure compliance, and if the competent authority does not follow upon this recommendation, he may bring the issue to the Supreme Court. However, while both the Legal Chancellor of the Republic of Estonia and the Supreme Court may be consulted in the course of the legislative procedure in order to ensure that the draft legislation is compatible with the requirements flowing from international human rights treaties, this rarely happens in practice. In *Romania*, the People’s Advocate (Ombudsman) may issue opinions on the exceptions of unconstitutionality regarding laws and ordinances which refer to civic rights and freedoms, upon the Constitutional Court’s request; but he is not formally involved in the legislative process at the drafting stage.

**The human rights vetting of legislation in the EU Member States who possess neither a NHRI nor an equivalent institution**

A significant number of EU Member States have not established a national human rights institution in conformity with the Paris Principles, or any equivalent institution. It may or may not be the case that, in addition, no human rights screening of draft legislation takes place in these States. In *Italy*, there is no *ex ante* mechanism to ensure the compatibility of draft legislation with the requirements of international human rights treaties binding upon the State. In *Malta*, the office of the Attorney General is responsible for the drafting and review of national legislation, occasionally with the assistance of specifically appointed commissions; but the legislative process does not include a specific human rights proofing mechanism.

Other States do have some human rights proofing of draft legislation, either within the government apparatus (as regards proposals emanating from the government) or within the parliamentary procedure. In *Slovakia*, the Slovak National Centre for Human Rights [*Slovenské národné stredisko pre ľudské práva*] established by the Act of the National Council of the Slovak Republic no. 308/1993\(^{68}\) has no role in the legislative process. The human rights proofing of draft legislation is in the hands, rather, of the Legislative Council to the Government, and of the relevant parliamentary committee. Indeed, pursuant to the Rules of Procedure of the National Council of the Slovak

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\(^{66}\) Official Gazette RS, Nos. 33/91, 42/97, 66/00 and 24/03. It should be added however that draft legislation is made available at an early stage, making it possible for the Ombudsman to make his or her opinion known at an early stage, *sua sponte*, and even to require a reasoned answer to any concerns expressed in his or her opinion. In certain instances, where the Ombudsman has indicated post hoc that a particular statute was problematic from the point of view of fundamental rights, it has been reproached not to have drawn the attention of the lawmaker on the problem during the preparatory process of the adoption of legislation.

\(^{67}\) However, the Commissioner for Data Protection and Freedom of Information (Data Protection Ombudsman) was already established under the 1992 Act on Data Protection and Freedom of Information.

\(^{68}\) Coll. of 15 December 1993 on the Establishment of the Slovak National Centre for Human Rights, as amended by the Act no. 136/2003 Coll.
Republic, each bill submitted to the parliamentary discussion must contain an explanatory report, which must include a declaration that the bill is in conformity with the Constitution, constitutional laws, international treaties and the EU law. The Rules of Procedure of the Slovak Government also stipulate that the governmental decrees and other regulations must comply with the obligations of the Slovak Republic resulting from the international treaties and other international instruments, and they require that all relevant international treaties and international documents be enumerated in the explanatory report. Therefore, the compliance of any legislative proposal or regulation with the international undertakings of the Slovak Republic in the area of human rights must be evaluated from the beginning of the legislation process and before their adoption. The Legislative Council of the Government, as an advisory body to the Slovak Government, evaluates the compliance of the governmental proposals of the legislation and regulations with the Constitution, constitutional laws, and international undertakings, including international treaties on human rights, before the proposals are submitted to the government for their adoption. Pursuant to the Rules of Procedure of the National Council of the Slovak Republic, the Constitutional and Legal Affairs Committee deliberates each bill, especially from the point of its compliance with the Constitution, constitutional laws, binding international treaties, laws of the Slovak Republic and EU law. At the final phase of the legislative process, the President of the Slovak Republic may veto a piece of legislation adopted by the National Council, and return it back to the parliament with his comments for repeated discussion and adoption. The President has used this power, in particular, where there were doubts about the compatibility of the adopted law with the international treaty on human rights.

In Lithuania, the Statute of the Seimas (parliamentary assembly) provides that the drafts of legal acts it is presented with have to be verified on their compliance with the European Convention on Human Rights. This imposes on the initiators of the draft to ensure such compliance. A special opinion on the issue could be obtained from the European Law Department under the auspices of the Government. Finally, a specific parliamentary committee, the Seimas Committee on Human Rights undertakes the parliamentary control on the compliance of the drafts of legal acts with the Lithuanian obligations in the field of human rights. The Ombudsman’s Office, which Lithuania established on 8 December 1994 but whose powers are limited to traditional ombudspersons’ functions – including protecting from abuse by public administrations but not including a general mandate to protect and promote human rights –, has no role in these procedures.

In Austria, it is the standard practice that every legislative bill drafted by any of the Federal Ministries is submitted to an extensive consultative assessment procedure, which involves many stakeholders, including other Federal Ministries, the social partners (Chamber of Commerce, trade unions etc.) and civil society organisations, among them human rights NGOs and the Ludwig Boltzmann Institute of Human Rights. At this stage, these institutions can, of course, raise human rights concerns, but very often these concerns are not taken into account. The Department on Constitutional Issues (Verfassungsdienst) in the Federal Chancellery checks whether draft legislation is in conformity with the Federal Constitution, including the domestic bill of rights. With the exception of the European Convention on Human Rights, the Convention for the Elimination of Racial Discrimination (Articles 1-2) and the Convention on the Elimination of all forms of Discrimination Against Women (Articles 1-4), international and regional human rights treaties have, however, not been directly incorporated into the Austrian Federal Constitution.

In Finland, which has no national human rights institution functioning according to the Paris Principles, the Parliament comprises a specialized Committee on Constitutional Law that examines all Bills that appear to raise questions of compatibility with the Constitution or with international human rights treaties. The Committee issues up to 70 opinions per year. These opinions are treated as de facto binding for other Committees that then modify the Bill so that it corresponds to the Constitution or to international human rights treaties. The Constitutional Law Committee always hears academic experts, typically three, before issuing an opinion. The experts are professors of constitutional or international law or other experts in constitutional and human rights.

In Belgium, the legislative section of the Council of State – the administrative jurisdiction established in 1946 and composed of independent magistrates – may be asked to deliver an opinion on the compatibility with higher-ranking norms (the Belgian Constitution of international treaties to which

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70 http://www.raadvst-consetat.be.
Belgium is a party or, where executive decrees (arrêtés royaux and arrêtés de gouvernement de la Région ou de la Communauté) are concerned, ordinary legislation) of draft texts, of a legislative (laws, decrees, ordinances) or executive decrees. In certain cases this consultation is obligatory. In other cases it is optional: where a text has originated in a parliamentary bill (and unless two thirds of the members of the parliamentary assembly concerned request that such a consultation takes place), the president of the parliamentary assembly concerned may request the Council of State to deliver an opinion. The opinion delivered by the legislative section of the Council of State, even where it arrives at the conclusion that a particular piece of legislation or executive decree should not be adopted as it is in violation of the human rights guaranteed in either the Constitution or the international treaties to which Belgium is a party, is purely advisory in nature.

The situation in the Netherlands is quite similar to that of Belgium. The Prime Minister issued in 1992 the Aanwijzingen voor de regelgeving (Directives for Law-making) which apply to those who are involved in the drafting of acts and other regulations of the central authorities. The Directives were most recently revised in 2000. The need to ensure compliance with international human rights standards is addressed in Aanwijzing 18 (Directive 18), which provides that ‘When drafting regulations it shall be determined whether and if so how freedom to regulate the matter in question has been restricted by superior rules’. The explanations accompanying this directive specify that ‘As far as international rules are concerned, mention should be made in particular of European standard-setting, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights. [...]’ Accordingly, the persons charged with the preparation of draft legislation and regulation are at the same time responsible to ensure that the new rules will be compatible with international human rights standards. In addition the Minister of Justice ought to review the constitutionality of draft acts. The Raad van State (Council of State, Conseil d’État), in giving advisory opinions to the Government on draft legislation, also pays attention to this issue. No systematic reference to relevant international human rights instruments is made in the explanatory memoranda that accompany the bills that are submitted to Parliament. It is therefore not always possible for the public to ascertain whether human rights were taken into account when the bill was prepared.