1. INTRODUCTION

My first point on Ottavio Quirico’s presentation is that fundamental rights are no longer only “firewalls” surrounding the implementation of European Union (EU) policies but have become, in several cases, the very objective of EU action. This was already the case after the Amsterdam Treaty and it is even more so after the entry into force of the Lisbon Treaty and of the Charter of Fundamental Rights of the European Union (European Charter), which has been associated to the development of the EU as an area of freedom security and justice (AFSJ).

May I stress that the very notion of AFSJ could not be considered just a rhetorical formula covering all the initiatives previously dispersed and anecdotic in the so called “third pillar” created by the Maastricht Treaty; it has become a full fledged constitutional and political objective by which the EU legislator has to not only promote but protect fundamental rights. As such it requires, for example, a proactive anti-discriminatory policy, the creation of a common asylum system, the protection of personal data, the promotion of the principle of transparency and right to good administration, and the protection of social rights – all objectives which can hardly be considered as only ancillary to the economic mission of the EU.

Even the Schengen cooperation, which was a consequence of a market related need, such as the abolition of the EU internal borders, is now developing as the core of new European public order where the individual and the national and European administrations interact more and more closely by strengthening the rule of law and the respect for fundamental freedoms at the supranational level.

This idea of European public order is now mirrored in Article 3 of the Treaty on European Union and in the European Charter itself; again these can no longer be considered as general statements and even if the authors intended them to be so, after the ratification of the Lisbon Treaty, the power of these words will outpace the authors’ original intention in the interpretation of national and European judges.

This new sense emanating from the Treaties and the Charter is taken more and more seriously by the EU institutions; the European Commission has already established very strict criteria to comply with fundamental rights when drafting new EU legislation¹ or even delegated and executing acts and the Council is cur-

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ently adopting internal guidelines on the same track. For the European Parliament (EP) fundamental rights have become a pivotal and permanent issue, notably when negotiating and adopting EU legislation and when Members take part in plenary debates, as happened in the recent case of Roma discrimination and the Hungarian reform of media law.

2. The Essential Importance of the Dialogue Between European and National Courts

As a second point, I will strongly support Quirico’s position arguing for a closer dialogue on fundamental rights between the Luxembourg and Strasbourg Courts, as well as with the national constitutional courts. There are indeed some potential concerns on possible diverging jurisprudence on fundamental rights arising from the different constitutional position of these courts, as well as from the different legal status recognised by national constitutions to the European Convention on Human Rights (ECHR) and the European Charter.

The game will become inevitably more complex with the growing importance of the European Union as a new standard setting body in several sensitive areas such as judicial and police cooperation in penal matters, discrimination and migration policies. The fact that after the Lisbon Treaty the unanimity will no longer be required in these domains will create a great opportunity for the EU to increase its legislative workload exponentially by adopting solutions which will inevitably be different from the ones currently existing in a given Member State. Moreover, the new EU legislation for the AFSJ could have the form of Regulations directly applicable in the Member States or of international agreements directly binding for the Member States.

Looking from a Treaty perspective, there are several measures that can be taken to avoid an overzealous European legislator in these domains, such as the rules defining the matters where the EU could play an exclusive, a concurrent or simply a complementary role towards the Member State. In the same perspective, there are also stricter rules to implement the principle of subsidiarity and proportionality and even an “emergency break” when police and judicial cooperation are at stake. Therefore, all these rules have not prevented the European Council and the Member States from launching an extremely ambitious legislative programme for the European AFSJ.

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3 See Articles 82 and 83 TFEU.