



# **EU and Member State competences in human rights**

**Tamara Lewis, Adina Portaru (Raducanu), Ricki Schoen,  
Karen Murphy, TJ McIntyre, and Graham Finlay**



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<b>Authors</b>	<b>Tamara Lewis, Adina Portaru (Raducanu), Ricki Schoen, Karen Murphy, TJ McIntyre, and Graham Finlay</b>

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## Executive Summary

This report is submitted in connection with Work Package 8 of the FP7 FRAME (Fostering Human Rights Among European Policies) project. The report falls within Cluster Two, tasked to look at the actors in the European Union's Multi-Level, Multi-Actor Human Rights Engagement. Work Package 8, 'Coherence Among EU Institutions and Member States', examines the principles, competences, actions and interactions of EU institutions and the Member States that characterise human rights policies and that lead to coherence or incoherence in the EU and Member States' promotion of human rights. Having examined the potential for 'horizontal' coherence and incoherence in the Work Package's first report, 8.1, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', this report examines 'vertical' coherence and incoherence, produced by the interaction between the EU and its institutions and the Member States.

The specific task for the report, as described in the proposal for FP7 FRAME, is to examine the competences and responsibilities of the EU and its Member States and the implications of EU fundamental principles including the principle of sincere cooperation. In this report, we focus on the key statements of EU actors with regard to vertical coherence and consider their implementation in policies in a number of fields, including multilateral and bilateral action. These include policies governed by the competences conferred on EU institutions and Member States, including those where the EU has 'exclusive' competence, like trade, and their interaction with policy areas with shared competence, like development. In contrast to these areas where competences are supposed to be clear, we also examine policies with more 'intergovernmental' characteristics, such as the CSDP and CFSP.

In accordance with the understanding of competence developed for 8.1, this study begins with the premise that coherence and incoherence are visible in three aspects of policy environments – organisational structures, policy regimes and interests - of the EU and its Member States. In terms of structures, we first engage in an account of the principles governing policy-making in the European Union (III.A) before conducting a mapping of the competences of the EU and its Member States (III.B). We then examine discursive aspects of policy regimes, by describing the pronouncements on vertical coherence regarding human rights of different EU institutions, illustrating their coherent or incoherent approaches and implementation with particular examples.(III.C) In this survey, we find a wide variety of approaches to the promotion of human rights and fundamental freedoms and a limited engagement with the principles that are supposed to govern relations between the EU and its Member States. Crucial principles, like 'proportionality' and 'sincere cooperation' are often not referenced and, where they are, are found to be only beginning to be applied in a coherent manner. There is the real possibility that, as these principles evolve, particularly in the jurisprudence of the Court of Justice of the European Union, further incoherence may appear, particularly between the principles of 'proportionality' and 'sincere cooperation'.

In succeeding sections, we present contrasting case studies to show how the interactions between EU institutions and the Member States lead to incoherence, whether because of the 'organisational structures' (Trade and Development), 'policy regimes' (CSDP/CFSP) and two cases where the policies or pronouncements of EU institutions have come into conflict with human rights promotion or its absence in a particular Member State, in this case, Ireland (Austerity and Data Protection).

Thus, in Part III, 'Case studies: trade and development and the CSDP/CFSP', we examine two contrasting cases of EU-Member State interaction: Trade and Development, where the EU's exclusive competence regarding trade is complicated by the shared competence with Member States regarding development, and the CSDP/CFSP, where the Member States largely retain their competence. In both cases, we see that the interactions between the EU and its Member States lead to incoherence in the protection, promotion and, in particular, implementation of a coherent policy concerning human rights. This is due, in no small degree, to the incoherence of interests, namely conflict between the interests of the EU and its Member States.

Lastly, in Parts IV and V, we examine in depth two areas in which the EU and its institutions have played a role in hampering and promoting the enjoyment of human rights: social and economic rights under conditions of austerity and data protection. In the former case, the relevant EU institutions have not lived up to their human rights obligations by failing to maintain a human rights-based focus in their actions or to provide sufficient mechanisms of accountability or impact assessment surrounding the consequences of EU imposed austerity policies for social and economic rights. In the latter, a very different EU institution, the Court of Justice of the European Union, has provided, at least potentially, very strong protection of the right to data privacy against encroachments by the security policies of the Member States and of the EU itself.

Having examined all of these aspects of vertical coherence, we conclude that while there is hope for a more coherent approach to human rights protection by the EU and its Member States, conflicts between the interests of the various actors and the only nascent interpretation by the CJEU of the principles that are supposed to govern these interactions mean that a more coordinated approach to promoting human rights within and without the EU is a long way off. Progress in this regard will be made by the constitutionalisation of the EU and the clarification of the boundaries of competences with respect to issues involving fundamental and human rights, in particular through further development of the principles of proportionality and sincere cooperation. The greatest obstacle to this development is conflict arising from divergent political interests of the EU institutions and the Member States and these conflicts should be resolved using the discourse of human rights. Indeed, the greatest resource for future progress may be found in the conceptual coherence of the idea of human rights itself, with the obligations for implementation it imposes on both the EU and its institutions and on the Member States, with their separate commitments to international human rights conventions.

This report makes the following suggested actions to enhance vertical coherence in the promotion of fundamental and human rights by the EU institutions and Member States:

- The CJEU should develop a clear understanding of the principles of proportionality and sincere cooperation and their relation to each other and their application in cases involving fundamental and human rights.
- The discursive commitments of the EU institutions should reflect the wider discourse of human rights, developed by other courts and regional systems and in international fora.
- This human rights discourse should be the language in which political conflicts between the EU institutions and the Member States and between Member States regarding EU internal and external policies involving fundamental and human rights are resolved.
- A detailed analysis which measured the human rights implications of budgetary decisions and policy making would be a useful step in devising tools for EU institutions and EU Member States to identify weaknesses in protection and methods to respect, protect and fulfil rights obligations.
- Member states and EU institutions should affirm in rhetoric and structure the positive duties that States have 'to fulfil economic and social rights, as well as obligations to respect them (by refraining from deliberate infringement of those rights) and to protect rights against abuses by corporate and other private actors' - regardless of EU-led economic and financial policies - and the duty to fulfil which requires 'actively putting in place the conditions and systems necessary for all members of the population to be able to fully exercise and progressively realize their rights.
- All of the EU institutions should live up to their commitments to protect and promote fundamental and human rights, even in the face of resistance from the Member States based on divergent political interests. In particular, the European Commission should act to implement the decision of the ECJ in Digital Rights Ireland regarding data protection.

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Our partners in the FRAME network have been a great support. Beyond facilitating the work of Adina Portaru (Raducanu), Professor Wolfgang Benedek of ETC Graz has provided sound advice and support during the process of producing this report that has certainly influenced our approach. Professor Jeff Kenner of the University of Nottingham has helped coordinate our work with a view to the overall FRAME project and Nicolas Hachez has been a patient and sympathetic coordinator on behalf of the Leuven Centre for Global Governance Studies, who provided comprehensive comments at every point. We are especially grateful for the exceptionally detailed and helpful comments of our reviewers from within the FRAME network and for the careful consideration they have given this report in draft form.

## List of abbreviations

CCP	Common Commercial Policy
CESCR	UN Committee on Economic, Social and Cultural Rights
CFSP	Common Foreign and Security Policy
CIA	Central Intelligence Agency
CJEU	Court of Justice of the European Union
CSDP	Common Security and Defence Policy
CSO	Civil Society Organisation
DG	Directorate-General
EC	European Community
ECB	European Central Bank
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EEAS	European External Action Service
ENP	European Neighbourhood Policy
EP	European Parliament
ESCR	Economic, Social and Cultural Rights
ESDP	European Security and Defence Policy
EU	European Union
FLAC	Free Legal Advice Centres
GCHQ	UK Government Communications Headquarters
GDP	Gross Domestic Product
HR	Human Rights
IA	Impact Assessment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Political Rights
IHRL	International Human Rights Law
ILO	International Labour Organization
IMF	International Monetary Fund
M&D	Migration and Development
NAFTA	The North American Free Trade Agreement
NATO	North Atlantic Treaty Organisation
NHRI	National Human Rights Institutions
NSA	United States National Security Agency
PCD	Policy Coherence for Development
TDRA	Telecommunications Data Retention Act
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

TJ	Transitional Justice
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
WTO	World Trade Organisation

## I. Introduction

This study is composed of six parts. Part One explores the notion of EU human rights policy coherence in its vertical dimensions, drawing from the definition developed in report 8.1 and expanding the understanding of how Member States and European Union institutions cooperate to promote and protect human and fundamental rights.

Part Two examines the legal structures and principles underpinning the European Union and their role in ensuring coherence. In Part Three, the discourse and political pronouncements of the EU Institutions regarding vertical coherence are also reviewed and evaluated.

Part Four examines contrasting case studies in terms of the competences conferred on the EU or retained by the Member States. Both involve trade, which is an exclusive competence of the European Union and its interaction with development cooperation and with the Common Security and Defence Policy (CSDP)/ Common Foreign and Security Policy (CFSP). In both cases, incoherence arises in the promotion of human rights through the interactions of the EU's institutions and the Member States.

Parts Five and Six present case studies that illuminate how policies that impact human and fundamental rights are implemented within the Member States and by the EU institutions. These studies highlight the challenges and failures of policymaking in the areas of social policy and data privacy.

## II. Part One: The vertical dimensions of EU human rights policy coherence

### A. Policy coherence: a definition

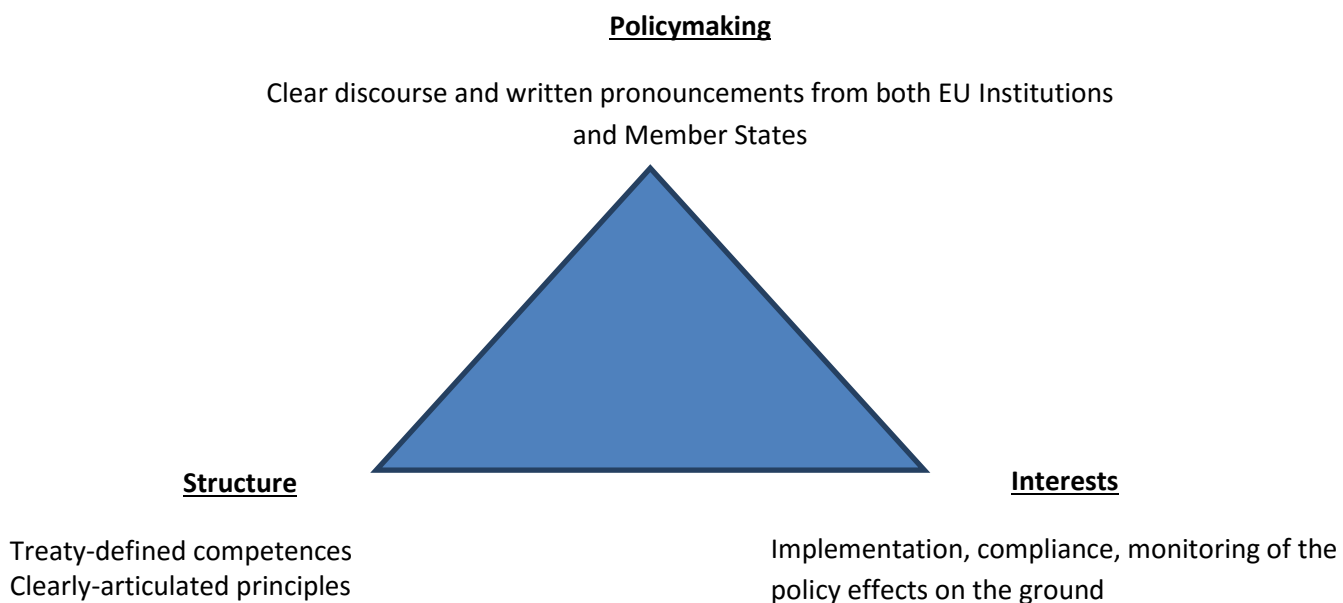
Continuing the discussion of coherence from our previous report, Deliverable 8.1, this study seeks to more carefully examine vertical coherence in European Union (EU) – EU Member State human rights policy. In that earlier report, we developed a definition of policy coherence, arguing that, in EU policy, coherence in human rights policy entails: policymaking that seeks to achieve common, identifiable goals that are devised and implemented in an environment of collaboration, coordination and cooperative planning among and within the EU Institutions, among the EU Institutions and Member States, as well as among EU Member States. This policymaking considers the internal (within EU borders) and external (with third countries or other partners) aspects of human rights policies, together with the vertical (policies handed to Member States by the EU) and horizontal relationships (policies among EU Institutions or among Member States). Additionally, human rights policymaking ensures the respect for the universality and indivisibility of human rights in each policy dimension.

That same report found that incoherence is introduced into policymaking when (1) structures are ill-designed leading to a lack of coordination in policy design or policy implementation; (2) frameworks have competing visions or overlapping responsibilities; and (3) interests diverge or conflict regarding policy goals. More specifically, structural incoherence is related to the way in which an institution or body is designed, hierarchy of decision-making, power sharing or, in the case of the EU, competence, mandate and responsibilities. The EU has special challenges given its nature. It has the features of a state, but is not a state. It is intergovernmental while still being supranational. Therefore, when the institutional framework and structure is poorly designed or the powers of the actors are poorly defined, structural incoherence will arise. While the EU is committed to human rights in its treaties and fundamental rights are enumerated in the Charter of Fundamental Rights of the EU, the EU's fundamental and human rights policies are enumerated in framework instruments and action plans. These documents communicate the vision of the EU in this policy area and guide its implementation. Sometimes, frameworks and instruments introduce competing visions or objectives, making it difficult to distinguish the direction of the organisation as a whole. Finally, as a powerful actor in global markets and international fora, the EU is subject to external influence and interest pressure groups. Within its ranks, there are also diverging interests and schools of political and economic thought that seek to influence and shape policy making. When opposing interests are identified in policy making, it can also introduce additional incoherence.

## B. Vertical coherence: EU-Member State policymaking in human rights

This second report is concerned with the coherence of policies between and among the EU Institutions and the Member States. This aspect of coherence, known as vertical coherence, is evident in human rights policymaking because, as in the international arena, respect for and protection of fundamental and human rights in the European Union (under the principle of subsidiarity) are first and foremost the responsibility of Member States. Although it is not the focus of this report, the international human rights system also presents a demand for coherence in human rights policy-making on the part of the EU and, especially, of the Member States both in terms of structures like treaty bodies and through the frameworks and visions embodied in international instruments. Member States have constitutional traditions and national legislation promoting and protecting human and fundamental rights. In addition, national judicial bodies assure citizens that their rights are justiciable and that violations of those rights can be addressed by national courts. However, as will be discussed in greater detail below, with the evolution of the EU over the last decades, more powers have been conferred to the Union in policy areas that intersect with human rights, while at the same time, the Union has also undertaken to respect and promote human rights. After the Lisbon Treaty reforms, the EU is also bound by the terms of the EU Charter of Fundamental Rights. As a result, human rights policies developed in the EU have a vertical dimension that encompasses both the Union and Member States.

**Figure 1: Vertical Coherence Influence Triangle**



This diagram illustrates the factors that impact vertical coherence in EU policymaking. Coherent policy making in the area of human rights is influenced by three factors: the structure (legal basis) of the policymaking institutions and the interests of those responsible for its implementation. In addition, the pronouncements and discourse of the institutions themselves will also play a role.

More concretely, in the context of EU human and fundamental rights policymaking, the structural aspects of vertical coherence will depend on the way in which the competences are distributed between EU Member States and EU Institutions and the clarity of the principles that govern vertical relationships, including proportionality and sincere cooperation. The manner in which the EU institutions announce and promote their policies to third countries and to EU Member States in written and verbal discourse will also influence the policy regimes. Finally, the interests of EU Institutions and Member States will impact how the policies are implemented and their compliance monitored on the ground. These factors are explored in the remainder of this report.



### III. Part Two: Competences, principles, discourse and interests

#### A. Principles governing vertical coherence

There are important concepts and principles that govern the vertical coherence of policymaking in the area of human and fundamental rights. These concepts include competence, the principles of conferral, proportionality as well as sincere cooperation. These concepts are briefly defined here.

##### 1. Competence and conferral, proportionality and subsidiarity

The structure of the European Union project is based on the distribution of *competence*. The European Union institutions get their authority to legislate and otherwise act in a policy area from the EU Member States through the handing over of decision-making power by the EU Member States to the Union.<sup>1</sup> This act of transferring the power to legislate in certain areas is recognized as the principle of 'conferral'.<sup>2</sup> The *conferral* of power grants the Union a certain competence in an agreed policy area. Furthermore, the European Union gains its authority to act solely from the conferral of power by Member States in the provisions of the treaties.<sup>3</sup>

Article 5(1) of the Treaty on European Union specifies that '[t]he limits of Union competence are governed by the principle of conferral.'<sup>4</sup> When power has been conferred upon the Union in a category or area, that power is generally recognized as a 'competence.' Union competence is also restricted in Article 5 TFEU by the two other important EU principles of *proportionality* (ensuring that measures taken only to the extend extent they are necessary to achieve an objective) and *subsidiarity* (acting only where the Union can better achieve an objective than Member States).

With the entry into force of the Lisbon Treaty, the EU gained legal personality, but the Union does not enjoy full competence to act in all policy areas. The Lisbon Treaty states, in Article 4, that 'competences

<sup>1</sup> Deirdre Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (OUP 2009) 34 (Curtin argues that the EU is not the only entity based on integration, stating 'The EU is in any event no longer the only (regional) international organization with such competences: NAFTA, Mercosur, and the WTO can all be placed along a continuum with the EU with regard to the level of integration aimed at, with the EU still in the vanguard.') 35.

<sup>2</sup> Bríd Moriarty and Eva Massa (eds), *Human Rights Law* (OUP 2012) 164.

<sup>3</sup> For a discussion of competence in the EU see Ramses A Wessel and Leonhard den Hertog, 'EU Foreign, Security and Defense Policy: A Competence-Responsibility Gap?', 3 <<http://www.utwente.nl/mb/pa/research/wessel/wessel82.pdf>> accessed 10 September 2015. Also published in Evans M and Koutrakos P (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart 2013); Elise Muir, 'Fundamental Rights: An Unsettling EU Competence', (2014) 15 *Human Rights Review* 30; Bríd Moriarty and Eva Massa (eds), *Human Rights Law* (OUP 2012) 164.

<sup>4</sup> Art 5(1) TEU.

not conferred upon the Union in the Treaties remain with the Member States.<sup>5</sup> It also provides that 'Under the principles of conferral the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.'<sup>6</sup> These limitations have important implications for vertical coherence. If the Union institutions act outside or beyond the scope of their competence by legislating in a field where they do not have competence or by choosing the wrong legal basis for a regulation or directive, the European Court of Justice (CJEU) will annul the legislation. By citing the legal basis for a legislative act, the EU institutions assert their competence in the area. The EU has also increasingly availed of the 'implied powers' to conclude international treaties in areas in which it enjoys competence inside the EU.<sup>7</sup> This follows the controversial (and narrow) claim that such powers 'must be necessary to ensure the practical effect of the provisions of the Treaty or the basic regulation at issue.'<sup>8</sup>

## 2. The principle of sincere cooperation

The principle of sincere cooperation can be defined as a requirement to act together in a manner that ensures the effective and efficient functioning or operation of an institution or comparable entity. It has been an implied guiding principle for how the European Union (EU) functions from its inception but has only recently been referred to specifically in the text of the governing treaty, the Treaty on European Union (TEU).

The Lisbon Treaty, which came into force in 2009, amends the two founding treaties that form the basis of the European Union (the Treaty establishing the European Economic Community (1957) and the Treaty on European Union (1992)). The consolidated TEU makes specific reference to 'the principle of sincere cooperation' in Article 4(3) and also Article 13(2).<sup>9</sup> Both articles set out the requirement to act together in order to fulfil the obligations arising from the treaty and to ensure that these actions do not impinge on the EU's ability to function properly: Article 4(3) refers to the cooperation between the EU and the Member States whereas Article 13(2) refers to the cooperation between EU institutions.

The origin of including the principle in the TEU lies in the previous treaty texts, specifically Article 5 in the Treaty establishing the European Economic Community in 1957.<sup>10</sup> It sets out that Member States will ensure that their actions facilitate the fulfilment of their obligations under the treaty and that these actions will not be detrimental to the Community. This provision was carried over into the subsequent treaty that established the European Union in 1992 and was consolidated under the Treaty of Amsterdam

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<sup>5</sup> Art 4 TEU.

<sup>6</sup> Art 5(2) TEU.

<sup>7</sup> See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (OUP 2011), 319.

<sup>8</sup> Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (OUP 2011), 78.

<sup>9</sup> Consolidated Version of the Treaty on European Union [2012] OJ C 326/01, art 4(3) and art 13(2).

<sup>10</sup> Treaty establishing the European Economic Community [1957], art 5.

in 1997<sup>11</sup> as Article 10. Incorporating the principle of sincere cooperation into the most recent treaty text is testament to the fact that it has become an accepted central requirement to ensure the proper and effective functioning of the EU. To this end the European Court of Justice has adopted the principle as a general criterion that underpins EU law as argued by Elsuwege and Merket.<sup>12</sup>

On occasion, sincere cooperation can be referred to as loyal cooperation, or the ‘spirit of loyalty’ as is the case in the 1992 Treaty of the European Union, Title V: provisions on a common foreign and security policy. In this provision the treaty requires Member States to ensure that their actions support the Common Foreign and Security Policy of the EU and that they do so ‘in a spirit of loyalty and mutual solidarity’.<sup>13</sup> Klamert suggests that there is no difference between the principle of sincere cooperation and the notion of loyal cooperation, and goes on to argue that duties of cooperation should be considered ‘a subcategory of a more general principle of loyalty’.<sup>14</sup> As Van Elsuwege and Merket argue, the principle of sincere cooperation has become *the* principle that is supposed to establish consistency and coherence in the actions of the EU and, more important, in the coordination of action between the EU institutions and the Member States.<sup>15</sup> At least in the area of the CFSP (see below), Van Elsuwege and Merket note that the principle of sincere cooperation can be used by the ECJ to ‘review the legality of restrictive measures against natural or legal persons and to police the borderline between CFSP and non-CFSP external action’.<sup>16</sup>

## B. Categories of Union competence

Competences exercised by the EU and the individual Member States, as set forth in the Treaty of the Functioning of the European Union (TFEU), fall into one of four categories:<sup>17</sup>

<sup>11</sup> Amsterdam Consolidated Version of the Treaty establishing the European Community [1997] OJ C 340/03, art 10.

<sup>12</sup> Peter Van Elsuwege and Hans Merket, ‘The Role of the Court of Justice in Ensuring the Unity of the EU's External Representation’ in Steven Blockmans and Ramses A Wessel (eds), *CLEER Working Paper* (Asser Institute 2012) 38.

<sup>13</sup> Treaty on European Union [1992] OJ C 191/01, title V, art J1(4).

<sup>14</sup> Markus Klamert, *The Principle of Loyalty in EU law* (OUP 2014) 12.

<sup>15</sup> Peter Van Elsuwege and Hans Merket, ‘The Role of the Court of Justice in Ensuring the Unity of the EU's External Representation’ in Steven Blockmans and Ramses A Wessel (eds), *CLEER Working Paper* (Asser Institute 2012) 42-43 and note 29. Van Elsuwege and Merket note that in versions of the Treaties in other languages than English, the English word ‘consistency’ is replaced by ‘coherence’, citing R A Wessel, ‘The Inside Looking Out: Consistency and Delimitation in EU External Relations’ (2000) 37(5) CML Rev., 1150.

<sup>16</sup> Peter Van Elsuwege and Hans Merket, ‘The Role of the Court of Justice in Ensuring the Unity of the EU's External Representation’ in Steven Blockmans and Ramses A Wessel (eds), *CLEER Working Paper* (Asser Institute 2012) 54.

<sup>17</sup> The Treaties do not define the types of competence, but in 2002 the Convention on the Future of Europe issued a discussion paper defining exclusive, concurrent or shared competence. See European Convention, ‘Discussion Paper on the Delimitation of Competence between the European Union and Member States’ (Brussels, 15 May 2002) CONV 47/02, 6 et seq <<http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00047.en02.pdf>> accessed 20 May 2014.

1. competence exercised solely by the Union, called ‘exclusive competence’;<sup>18</sup>
2. ‘shared competence,’ held by both the Member States and the Union;<sup>19</sup>
3. competence to support, coordinate or supplement actions of Member States;<sup>20</sup> and
4. competence to provide arrangements within which Member States must coordinate policy.<sup>21</sup>

## 1. Policy domains of the Union’s exclusive competence

In areas of exclusive competence, the Union is the only entity competent to adopt rules. Member States may adopt rules only where granted power by the Union or where lacunae exist.<sup>22</sup> To date, the Union has been granted exclusive competence to act within the areas of customs union, the establishment of competition rules for the internal market, monetary policy for Eurozone members, conservation of marine biological resources under common fisheries policy, common commercial policy and the conclusion of international agreements under certain circumstances.<sup>23</sup>

## 2. Policy domains of the Union’s shared competence

Shared competence signifies that the Member State may adopt legislation until the Union does so, at which point the Union then exercises exclusive competence.<sup>24</sup> Any action within an area of shared competence is subject to the principle of subsidiarity (the Union takes action only if the objectives of the proposed action cannot be sufficiently achieved by the Member States).<sup>25</sup> The action is also governed by the principle of proportionality (any action by the Union should not go beyond what is necessary to achieve the objectives of the Treaty).<sup>26</sup> The Union and Member States share competence for matters involving the internal market, social policy, economic, social and territorial cohesion, agriculture and fisheries, the environment, consumer protection, transportation, trans-European networks, energy, area

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<sup>18</sup> The Treaty on the Functioning of the European Union (TFEU), Arts 2(1), 3.

<sup>19</sup> Arts 2(2), 4 TFEU.

<sup>20</sup> Arts 2(3), 5 TFEU.

<sup>21</sup> Art 6 TFEU.

<sup>22</sup> European Convention, ‘Discussion Paper on the Delimitation of Competence between the European Union and Member States’ (Brussels, 15 May 2002) CONV 47/02, 6 et seq <<http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00047.en02.pdf>> last accessed 20 May 2014.

<sup>23</sup> Art, 3 TFEU .

<sup>24</sup> European Convention, ‘Discussion Paper on the Delimitation of Competence between the European Union and Member States’.

<sup>25</sup> European Convention, ‘Discussion Paper on the Delimitation of Competence between the European Union and Member States’.

<sup>26</sup> European Convention, ‘Discussion Paper on the Delimitation of Competence between the European Union and Member States’.

of freedom, security and justice, common safety concerns in public health matters, research technological development and space, and development cooperation and humanitarian aid.<sup>27</sup>

The principle that a shared competence becomes exclusive once the EU has started to exercise it however knows a few exceptions. Art. 4 TFEU, paragraph 4, states: '4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.' These competences can therefore be exercised alongside each other.

### **3. Policy domains for support, coordination or supplementary actions**

The Union supports, coordinates or supplements Member State actions in the areas of protection and improvement of human health, industry, culture, tourism, education, vocational training youth and sport, civil protection and administrative cooperation.<sup>28</sup> In this area, any action by the Union will never exclude the Member States from acting in the same policy area.<sup>29</sup> This type of competence is also referred to as 'complementary competence.'<sup>30</sup>

### **4. Policy domains of the Union's competence to provide arrangements**

Finally, the Union can provide arrangements within which Member States must coordinate their policies relating to economic matters, employment and social policies.<sup>31</sup> As Craig and de Búrca note, political differences regarding these sensitive areas led to the creation of this separate category of action.<sup>32</sup> It is not surprising that these areas, which touch on many issues involving human rights, should be the site of incoherence arising from conflicting political interests. Some examples of how incoherence can arise in a specific country are found in the section on austerity below.

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<sup>27</sup> Art 4 TFEU.

<sup>28</sup> Art 5 TFEU.

<sup>29</sup> European Convention, 'Discussion Paper on the Delimitation of Competence between the European Union and Member States'.

<sup>30</sup> Bríd Moriarty and Eva Massa (eds), *Human Rights Law* (OUP 2012) 165.

<sup>31</sup> Art 5 TFEU.

<sup>32</sup> Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (OUP 2011), 88.

## 5. Special competence of the Union

Other special competences have been designated to the Union in the Treaty of the European Union (TEU). For example, the Union as a whole has been granted competence to act in the sphere of external relations. Article 8 of the TEU is the basis for the European Neighbourhood Policy. That article empowers the Union to ‘develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.’ Similarly, the EU has competence in all fields related to the common foreign security policy; nevertheless, the EU cannot legislate in the field and the Court of Justice cannot issue a judgment in this area.<sup>33</sup>

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<sup>33</sup> Arts 2(4), 275.

**Table 1: Chart of competence of the EU Institutions by policy field**

	<b>Policy field</b>	<b>Legal basis</b>
<b>Exclusive</b>	Customs union Competition rules for internal market Monetary policy for Eurozone Member States Conservation of marine biology resources (common fisheries policy) Common commercial policy Concluding international agreements (when required by legislative act, necessary to enable exercise of internal competence, conclusion may affect/alter scope of common rules)	Article 3 TFEU
<b>Shared</b>	Internal market Economic, social and territorial cohesion Agriculture and fisheries, excluding conservation of marine biology resources Environment Consumer protection Transport Trans-European networks Energy Area of freedom, security and justice Public health defined in TFEU Research, technological development and space Development cooperation/humanitarian aid	Article 4 TFEU
	Common foreign security and defence policy, defining and implementing via the President of the European Council and the High Representative of the Union for Foreign Affairs and Security Policy. However, the EU may not adopt legislative acts in this field. The CJEU does not have competence to give judgments in this area.	Article 24 TEU
<b>Support, coordinate, supplement Member State action</b>	Improving human health Industry Culture Tourism Education, vocational training, youth and sport Civil protection Administrative cooperation	Article 6 TFEU
<b>Provide arrangements</b>	Economic policy Employment	Article 5 TFEU

## 6. Competence in human and fundamental rights

As discussed in our previous report regarding specific competence granted to the Union to act in the area of human rights, no such specific treaty provision exists. Indeed, there is no direct and general power conferred upon the EU institutions to protect and promote human rights. The European Court of Justice declared in 1996 in Opinion 2/94 that '[n]o Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international arrangements in this field.'<sup>34</sup> The CJEU also discussed the competence of the Union to make human rights the essential element of a development cooperation agreement in the Case C-268/94 *Portugal v Council*, upholding the Union's competence to do so based upon a treaty provision providing that development cooperation shall contribute to respecting human rights and fundamental freedoms.<sup>35</sup> Finally, the Court stated in Case C-249/96 *Grant v South-West Trains Ltd* that the respect for fundamental rights is a condition of the legality of Union acts, but the 'rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the [Union.]'<sup>36</sup>

The lack of a treaty provision stating that the Union has competence in human rights does not signify that the Union lacks authority to promote or protect human rights. To the contrary, the fact that the Union has been conferred an exclusive, shared or complementary competence in a policy domain also gives it indirect competence to protect and promote respect for human rights within that policy domain due to the general provisions regarding promotion and protection of human rights as general principles of the Union.<sup>37</sup> Many, if not all, of the areas where the Union enjoys exclusive or shared competence cut across the gamut of human rights issues.<sup>38</sup> In addition, the Charter of Fundamental Rights is binding upon the EU Institutions and on Member States when the latter are implementing Union law.

The principles enumerated in this section all impact on the vertical coherence of human rights policy in the EU. While this section was not written to flag all of the circumstances where conferral and competence could result in vertical incoherence, there are potential sources of concern arising from all three sources of incoherence. Structural incoherence especially arises regarding shared competence. In the area of shared competence, it is imperative to know what the role of EU Institutions is and what they can do in the policy domain. This is not always easily defined. An example, below, is development policy. Incoherence resulting from different policy pronouncements or discourse can arise when the policies and pronouncements of the Member States differ from those of EU institutions. This is most obvious in the

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<sup>34</sup> European Court of Justice Opinion 2/94 on the Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms (28 March 1996).

<sup>35</sup> Case C-268/94 *Portugal v Council* [1996] ECR I-6177; Bríd Moriarty and Eva Massa (eds), *Human Rights Law* (OUP 2012) 166.

<sup>36</sup> Case C-249/96 *Grant v South-West Trains Ltd* [1998] ECR I-621, para 5. With the Lisbon Treaty, the Charter of Fundamental Rights became binding upon the Union; therefore, the ruling in this case has likely been nullified by the new role for fundamental rights in the Post-Lisbon era.

<sup>37</sup> Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (OUP 2011), 392.

<sup>38</sup> For example, the common commercial policy involves human rights considerations, as does the shared competence for social policy and consumer protection.



cases of austerity and data protection. Finally, both structural and policy incoherence are often the product of diverging interests between the governments of Member States and EU institutions. It is in those cases that the Member States and the EU institutions may find it desirable to encroach on the other's powers or to stretch the boundaries of their powers. This is especially evident in areas such as the common foreign and security policy or the common security and defence policy, as well as in the area of freedom, security and justice.<sup>39</sup> Because these boundaries are contested and not always clear, conflicts between diverging interests show the existence of structural incoherence and are displayed in incoherence between policy pronouncements.

## **C. Elaboration of coherence between the EU and the Member States: discourse**

In their discourse and policy pronouncements, the EU Institutions have invoked the need for coherent policies regarding human rights. In this section, we examine the second category of coherence, discourse coherence as it appears in policy pronouncements. Each institution's written discourse will be examined to illustrate how coherence is viewed in those institutions.

### **1. European Commission<sup>40</sup>**

#### ***a) General aspects***

The European Union has always placed a strong emphasis on the safeguarding and promotion of human rights and democracy both within its borders and as part of its external relations policy. The importance of these principles was underlined when the EU Charter of Fundamental Rights was adopted in 2000 and later strengthened when the Charter became legally binding as part of the Lisbon Treaty coming into force in 2009. Respect for human rights is an essential criterion which any country that applies for EU membership has to accept, and all agreements entered into between the EU and third countries include a provision which stipulates that the protection of human rights represents a crucial element of the arrangement.<sup>41</sup> This obligation to respect and protect human rights as a criterion of EU membership was adopted at the European Council meeting in Copenhagen in 1993 where the 'Copenhagen criteria' for

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<sup>39</sup> On this see, Viljam Engström and Mikaela Heikkilä, *Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice* [2014] Work Package No 11-Deliverable No 1 124-131 available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/09-Deliverable-11.1.pdf>> last accessed 8 May 2015.

<sup>40</sup> This section was written by Ricki Schoen and Karen Murphy.

<sup>41</sup> European Union External Action Service (EEAS), 'The EU and human rights' EEAS <[http://www.eeas.europa.eu/human\\_rights/about/index\\_en.htm](http://www.eeas.europa.eu/human_rights/about/index_en.htm)> last accessed 10 September 2015.

accession to the EU were set out in detail for the first time.<sup>42</sup> The ‘Copenhagen criteria’ were designed as a mechanism to determine whether an applicant country met certain accession conditions and included the criterion that a prospective new Member State had to have a political and legal framework in place that respected human rights; this was in addition to other pre-conditions that would enable the applicant country to meet the obligations of EU membership.<sup>43</sup> The EU enlargement phases that have taken place since 1993 have seen the European Commission become the EU institution that has played a critical role in further specifying what the ‘Copenhagen criteria’ actually entail and is actively engaged in assessing membership applications.<sup>44</sup>

### *b) The European Commission’s human rights commitments & powers*

This section presents the European Commission’s (hereinafter EC) stated commitments to fundamental rights, drawing attention to the scope and limitations of the EC’s interest and mandate. Of particular note, the Commission sets a high standard for protection of fundamental rights, while at the same time acknowledging its own limitations to ensure that protection.

The European Commission presents its human rights obligations as those that are defined by the Charter of Fundamental Rights of the European Union which, ‘brings together into a single text all the personal, civic, political, economic and social rights enjoyed by people within the EU.’<sup>45</sup> The Commission has made a solemn undertaking, before the CJEU, to uphold the Charter and there is one Commissioner with responsibility for justice, fundamental rights and citizenship.<sup>46</sup> In addition, the Commission uses language which suggests a high standard for rights protection. In its strategy for the effective implementation of the Charter, it notes its role ‘to guarantee that the EU is *beyond reproach* in upholding fundamental

<sup>42</sup> See Conclusions of the Presidency, European Council in Copenhagen, 21-22 June 1993, SN 180/1/93 Rev 1, <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/72921.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/72921.pdf)> last accessed 14 October 2015.

<sup>43</sup> See European Commission, Enlargement policy, Accession criteria <[http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria\\_en.htm#](http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria_en.htm#)> last accessed 14 October 2015.

<sup>44</sup> See FP7 FRAME Deliverable No. 6.1 for a discussion of the ‘Copenhagen criteria’ and their application (particularly under Section B. Human rights developing into a key area in EU enlargement policy) Susanne Fraczek ‘Report on Mapping, Analysing and Implementing Foreign Policy Instruments in Human Rights Promotion’ Work Package No 6-Deliverable No 1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>> last accessed 14 October 2015.

<sup>45</sup> European Commission, ‘Fundamental rights’ (2015) <[http://ec.europa.eu/justice/fundamental-rights/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/index_en.htm)> last accessed 22 October 2015.

<sup>46</sup> European Commission, Commission Communication: Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union’ [2010] COM (2015) 573 final) 4 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:en:PDF>> last accessed on 31 August 2015.

rights'<sup>47</sup> and it calls on the European Union to be '*exemplary*' in making fundamental rights as effective as possible. It presents human rights-based reasons and reputational reasons to support this:

That the Union is exemplary is vital not only for people living in the Union but also for the development of the Union itself. Respect for fundamental rights within the EU will help to build mutual trust between the Member States and, more generally, public confidence in the Union's policies. A lack of confidence in the effectiveness of fundamental rights in the Member States when they implement Union law, and in the capacity of the Commission and the national authorities to enforce them, would hinder the operation and strengthening of cooperation machinery in the area of freedom, security and justice. Effective protection is also necessary to strengthen the credibility of the Union's efforts to promote human rights around the world.<sup>48</sup>

This role can be fulfilled by a number of means. First, assessment on the impact of new legislative proposals on fundamental rights should be conducted through 'Commission Impact Assessments'. The strategy for effective implementation of the Charter provides a check-list template against which proposals can be human-rights proofed, reminding actors of the obligations that limitations on fundamental rights must be limited and proportionate. Second, 'after the impact assessment, when the draft legislative proposal (or delegated/implementing act) is prepared, the Commission will check its legality, and in particular its compatibility with the Charter.' This process should be 'subject to a transparent inter-institutional dialogue.'<sup>49</sup>

Third, the Commission can work to ensure MS compliance with the Charter (when implementing EU law) through (i) prevention by advocacy efforts, (ii) infringement procedures including via the CJEU, and (iii) informing the public about their rights under the charter regarding the duties of EU bodies and their avenues for redress.<sup>50</sup>

Fourth, the commission plays a monitoring role by publishing an annual report on the application of the Charter. The publication has two objectives: 'to take stock of progress in a transparent, continuous and consistent manner [and...] to offer an opportunity for an annual exchange of views with the European

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<sup>47</sup> Emphasis added. European Commission, 'Fundamental rights' (2015) <[http://ec.europa.eu/justice/fundamental-rights/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/index_en.htm)> last accessed 22 October 2015.

<sup>48</sup> Emphasis added. European Commission, Commission Communication: Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' [2010] COM (2015) 573 final) 4 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:en:PDF>> last accessed on 31 August 2015.

<sup>49</sup> European Commission, 'Fundamental rights' (2015) [http://ec.europa.eu/justice/fundamental-rights/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/index_en.htm); European Commission, Commission Communication: Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' [2010] COM (2015) 573 final) 5, 7-9 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:en:PDF>> last accessed on 31 August 2015.

<sup>50</sup> European Commission, Commission Communication: Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' [2010] COM (2015) 573 final) 11 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:en:PDF>> last accessed on 31 August 2015.

Parliament and the Council.<sup>51</sup> The reports monitor 'progress in the areas where the EU has powers to act, showing how the Charter has been *taken into account in actual cases*, notably when new EU legislation is proposed.'<sup>52</sup>

The European Commission has also published a communication on the rule of law. This communication was developed following:

recent events in some Member States [which...] demonstrated that a lack of respect for the rule of law and, as a consequence, also for the fundamental values which the rule of law aims to protect, can become a matter of serious concern. During these events, there has been a clear request from the public at large for the EU, and notably for the Commission, to take action. Results have been achieved. However, the Commission and the EU had to find ad hoc solutions since current EU mechanisms and procedures have not always been appropriate in ensuring an effective and timely response to threats to the rule of law.<sup>53</sup>

In response to these identified weaknesses, and to calls from the European Parliament and the Council of the European Union to strengthen rule of law protection, the Commission published a communication on 'a new EU framework to strengthen rule of law' in 2014. The outcome document identifies underlying principles which the EU must uphold, including 'legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.'<sup>54</sup>

The Commission has used its capacity to hold member states to account when they infringe on Charter law, promoting the vertical coherence in fundamental rights protection. For example, in Hungary, where several laws had been adopted under its new Constitution, the Commission conducted a legal analysis on aspects where there was a link to EU law. Following warning letters sent in 2011, in 2012 the Commission decided to bring infringement procedures before the Court.

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<sup>51</sup> European Commission, Commission Communication: Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' [2010] COM (2015) 573 final) 12 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:en:PDF>> last accessed on 31 August 2015.

<sup>52</sup> European Commission, 'Annual Reports' (2015) <[http://ec.europa.eu/justice/fundamental-rights/charter/application/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/application/index_en.htm)> last accessed 22 October 2015.

<sup>53</sup> European Commission, 'Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law' (2014) COM (2014) 158 final/2 <[http://ec.europa.eu/justice/effective-justice/files/com\\_2014\\_158\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf)> 2 last accessed 22 October 2015.

<sup>54</sup> European Commission, 'Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law' (2014) COM (2014) 158 final/2 <[http://ec.europa.eu/justice/effective-justice/files/com\\_2014\\_158\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf)> 4 last accessed 22 October 2015. The Commission noted that 'respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa. Fundamental rights are effective only if they are justiciable. Democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process.'

The Commission firstly challenged interferences with the independence of the Hungarian data protection authority, on the ground that the ‘complete independence’ of national data protection authorities is a requirement under the 1995 Data Protection Directive and is recognised explicitly in Article 16 TFEU as well as in Article 8 of the Charter. In a second infringement proceeding, the Commission contested the early retirement of around 274 judges and public prosecutors in Hungary caused by a sudden reduction of the mandatory retirement age for this profession from 70 to 62. The basis for the Commission’s action was Directive 2000/78/EC on equal treatment in employment which prohibits discrimination at the workplace on grounds of age. This also covers the dismissal for age related reasons without an objective justification. This case thus helps to implement the general prohibition of discrimination, including on grounds of age, as guaranteed by Article 21 of the Charter. The Court’s ruling of 6 November 2012 upheld the Commission’s assessment according to which the mandatory retirement age for judges, prosecutors and notaries within a very short transitional period is incompatible with EU equal treatment law. Hungary will have to change these rules to comply with EU law<sup>55</sup>.

### *c) Weaknesses identified and vertical coherence*

Limitations in the Commission’s capacity to protect fundamental rights are associated with its limited powers under the TEU and with weaknesses in some of the apparatus described above.

First, the Commission is unequivocal regarding the limits of its powers to protect fundamental rights, given that the Charter’s provisions do not extend to the competences as defined in the EU Treaties and that it ‘cannot intervene in fundamental rights issues in areas over which it has no competence’.<sup>56</sup>

Second, there is evidence of weaknesses and ineffective use of the tools outlined above. The Commission is tasked with checking legislative proposals and acts – ‘a fundamental rights “reflex” [which] must be

<sup>55</sup> European Commission, ‘2012 Report on the Application of the EU Charter of Fundamental Rights’ (2013) <<http://ec.europa.eu/justice/fundamental-rights/report/2012/files/assets/downloads/publication.pdf>> 13 last accessed 22 October 2015.

<sup>56</sup> European Commission, ‘Fundamental rights’ (2015) [http://ec.europa.eu/justice/fundamental-rights/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/index_en.htm). last accessed 22 October 2015: ‘The Charter applies primarily to the institutions and bodies of the Union (Article 51(1) of the Charter). It therefore concerns in particular the legislative and decision-making work of the Commission, Parliament and the Council, the legal acts of which must be in full conformity with the Charter.’ European Commission, Commission Communication: Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union’ [2010] COM (2015) 573 final) 3 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:en:PDF>> last accessed on 31 August 2015.

reinforced within the Commission departments drawing up such proposals and acts.<sup>57</sup> As this report describes, this has not always been the case. As discussed below in section V, there was limited evidence of human rights assessments and human rights proofing during the development and evaluation of European Commission-backed economic policies established since the financial crisis which began in 2008. As described in section VI regarding data privacy, the Commission has been requested by civil society organisations to investigate the legality (or illegality) of data retention laws in member states, given recent CJEU rulings on the issue, but has failed to do so, raising serious questions about the state of coherence with regard to rights protections.<sup>58</sup>

Throughout the Commission's key human rights documents, there are limited references to coherence and sincere cooperation in the Commission's discourse on fundamental rights protection. In its strategy for the effective implementation of the Charter, the Commission notes that Union actions must be based on (in addition to other factors) 'the respect for the principles of the United Nations Charter and international law.'<sup>59</sup> The Commission also undertakes to cooperate with the Parliament and the FRA, and to use domestic, Council of Europe and international law, and civil society inputs as sources of information.<sup>60</sup> In its pronouncements, it looks forward to the 2015–19 Action Plan (described below) 'with a focus on ensuring coherence between internal and external human rights policies, notably for counterterrorism, migration and mobility, and trade.'<sup>61</sup>

Where there are clear indications of a systemic threat to the rule of law in a Member State, the Commission will initiate a structured exchange with that Member State, based on dialogue, assessment, equal treatment and action in response. It calls on Member states to cooperate

throughout the process and refrains from adopting any irreversible measure in relation to the issues of concern raised by the Commission, pending the assessment of the latter, in

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<sup>57</sup> European Commission, Commission Communication: Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' [2010] COM (2015) 573 final) 4 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:en:PDF>> last accessed on 31 August 2015.

<sup>58</sup> 'While it is understandable that the Commission might prefer to avoid this politically sensitive area, the full protection of Charter rights will require action on its part. Restrictive standing rules, limited civil society resources and the cost of litigation mean that in several Member States there is no practical possibility of a domestic challenge being brought. It is unacceptable that legislation breaching the Charter should remain in force due to the difficulties national legal systems put in the way of a challenge – and the result is a lack of vertical coherence as different national legal systems interpret the *Digital Rights Ireland* decision in different ways.' TJ McIntyre, Section VI of this report (see below).

<sup>59</sup> European Commission, Commission Communication: Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' [2010] COM (2015) 573 final) 4 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:en:PDF>> last accessed on 31 August 2015.

<sup>60</sup> European Commission, Commission Communication: Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' [2010] COM (2015) 573 final) 13 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:en:PDF>> last accessed on 31 August 2015.

<sup>61</sup> European Commission, '2014 report on the application of the EU Charter of Fundamental Rights' (2015) <[http://ec.europa.eu/justice/fundamental-rights/files/2014\\_annual\\_charter\\_report\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/2014_annual_charter_report_en.pdf)> 9 last accessed 22 October 2015.

line with the duty of *sincere cooperation* set out in Article 4(3) TEU. Whether a Member State fails to cooperate in this process, or even obstructs it, will be an element to take into consideration when assessing the seriousness of the threat.<sup>62</sup>

However, while this rule of law framework is intended to ‘fill a gap between diplomatic demarches toward a Member State, and the hard mechanism of article 7 TEU,’<sup>63</sup> concerns have been raised about its utility. Criticism has been levelled due to ‘the fact that the Framework is mainly reactive and does not include proactive monitoring of the rule of law situation of all Member States, or the fact that much of the process will be kept behind closed doors, despite publication of the reasoned opinion,’ and commentators have called for a strengthening of the potential of local and regional authorities and civil society and not to simply rely on the ‘top-down’ approach of the European Commission and other bodies.<sup>64</sup>

## 2. European Parliament (EP)<sup>65</sup>

### a) General aspects

According to article 4(3) TEU, ‘the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union’.<sup>66</sup> This clearly refers to human rights obligations as well.

Furthermore, pursuant to article 21 of the TEU, the EU shall promote human rights and democracy through all its external actions.<sup>67</sup> According to the 2012 EU Strategic Framework and Action Plan on HR and Democracy:

<sup>62</sup> Emphasis added. European Commission, ‘Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law’ (2014) COM(2014) 158 final/2 <[http://ec.europa.eu/justice/effective-justice/files/com\\_2014\\_158\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf)> 7-8 last accessed 22 October 2015.

<sup>63</sup> European Union: Committee of the Regions (Axel Marx, Nicolas Hachez, Katrien Meuwissen, Pierre Schmitt, Kolja Raube, Jakub Jaraczewski, Joanna Roszak, Tamara Lewis, Klaus Starl, Maria Dolores Morondo Taramundi, Anna-Kaisa Tuovinen and Amy Weatherburn), ‘Multilevel Protection of the rule of law and fundamental rights – the role of local and regional authorities and of the Committee of the Regions’ (2014) <<http://cor.europa.eu/en/documentation/studies/Documents/Multilevel-Protection-Rule-of-Law-Fundamental-Rights.pdf>> 5 last accessed 22 October 2015.

<sup>64</sup> European Union: Committee of the Regions (Axel Marx, Nicolas Hachez, Katrien Meuwissen, Pierre Schmitt, Kolja Raube, Jakub Jaraczewski, Joanna Roszak, Tamara Lewis, Klaus Starl, Maria Dolores Morondo Taramundi, Anna-Kaisa Tuovinen and Amy Weatherburn), ‘Multilevel Protection of the rule of law and fundamental rights – the role of local and regional authorities and of the Committee of the Regions’ (2014) <<http://cor.europa.eu/en/documentation/studies/Documents/Multilevel-Protection-Rule-of-Law-Fundamental-Rights.pdf>> 6-7 last accessed 22 October 2015.

<sup>65</sup> This section was written by Adina Portaru (Raducanu).

<sup>66</sup> Art 4(3) TEU.

<sup>67</sup> Art 21 TEU.

The entry into legal force of the EU Charter of Fundamental Rights, and the prospect of the EU's acceptance of the jurisdiction of the European Court of Human Rights through its accession to the European Convention on Human Rights, underline the EU's commitment to human rights in all spheres. Within their own frontiers, the EU and its Member States are committed to be exemplary in ensuring respect for human rights. Outside their frontiers, promoting and speaking out on human rights and democracy is a joint responsibility of the EU and its Member States.<sup>68</sup>

### *b) Relevant documents where vertical coherence is addressed*

The EP has repeatedly addressed the issue of coherence between the EU institutions and the Member States in a rather general manner. In this sense, the EP underlined that the EU 'is founded on the principle of respect for human rights and has a legal obligation, as outlined in its Treaties, to place human rights at the core of all EU and Member State policies, without exception, and at the core of all international agreements',<sup>69</sup> that 'promoting human rights and democracy is a joint responsibility shared by the EU and its Member States' and that 'progress in this area can only be made by means of coordinated, coherent action by both parties'.<sup>70</sup> In a similar vein, the EP has stressed the 'need for coherence and consistency across all policy areas as an essential condition for an effective and credible human rights strategy' and reminded 'Member States and EU institutions that respect for fundamental rights begins at home and must not be taken for granted, but continually assessed and improved, so that the EU can be heard as a credible voice on human rights in the world'.<sup>71</sup>

The EP clarified that the Strategic Framework and Action Plan are 'a floor, not a ceiling, for EU human rights policy, and insisted that the EU institutions and the Member States adopt a firm and coherent approach to human rights abuses worldwide, in a transparent and accountable manner'.<sup>72</sup> Additionally, the 'more for more approach' and mutual accountability between partner countries, the EU and its Member States are key elements in achieving vertical coherence.<sup>73</sup>

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<sup>68</sup> EU Strategic Framework and Action Plan on Human Rights and Democracy, Luxembourg, 25 June 2012, 11855/12. 2. The Action Plan was replaced by the Action Plan on Human Rights and Democracy (2015-2019), Brussels, 28.4.2015, JOIN (2015) 16 final.

<sup>69</sup> European Parliament resolution 2012/2062 (INI) of 13 December 2012 on the review of the EU's human rights strategy [2012], A.

<sup>70</sup> European Parliament resolution 2012/2062 (INI) of 13 December 2012 on the review of the EU's human rights strategy [2012], J.

<sup>71</sup> European Parliament resolution 2012/2062 (INI) of 13 December 2012 on the review of the EU's human rights strategy [2012], para 12.

<sup>72</sup> European Parliament resolution 2012/2062 (INI) of 13 December 2012 on the review of the EU's human rights strategy [2012], para 4.

<sup>73</sup> European Parliament resolution 2012/2062 (INI) of 13 December 2012 on the review of the EU's human rights strategy [2012], G.



This is specifically why the EP has reiterated its appreciation of the EU Strategic Framework and Action Plan on Human Rights and Democracy as a milestone in integrating and mainstreaming human rights across all EU external policies. However, in its 2013 Annual Report on human rights, Parliament also urged for ‘a general consensus and enhanced coordination of the EU’s human rights policy between the EU institutions and the Member States, and called on the EEAS to step up its efforts to increase the sense of ownership of this Action Plan among Member States.’<sup>74</sup>

The EP has addressed the issue of vertical coherence more thematically, in a number of documents related to human rights:

- European Parliament Resolution 2012/2062 (INI) of 13 December 2012 on the review of the EU’s human rights strategy [2012];
- European Parliament Resolution 2012/2130 (INI) of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) [2013]
- European Parliament Resolution 2013/2702 (RSP) of 10 October 2013 on alleged transportation and illegal detention of prisoners in European Countries by the CIA [2013];
- European Parliament Resolution 2013/2058 (INI) of 13 March 2014 on the EU 2013 Report on Policy Coherence for Development [2014];
- European Parliament Resolution 2013/2146 (INI) of 3 April 2014 on the EU comprehensive approach and its implications for the coherence of EU external action [2014];

The topics highlighted as problematic in terms of coherence between the EU institutions and the Member States are, *inter alia*:

### (1) Security and development<sup>75</sup>

The EP has pointed out that ‘development, democracy and the rule of law are prerequisites for, but not identical to, the realization of human rights’ and called on the EU and Member States to support the ‘establishment of democratic and human-rights-based ideals throughout society, especially with a view to promoting gender equality and children’s rights.’<sup>76</sup>

The EP has also emphasised that the areas of security and development must generally benefit from more consistency and complementarity and that ‘the effectiveness of EU development policy is hindered by fragmentation and duplication of aid policies and programmes across Member States (and that) a more

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<sup>74</sup> Council of the European Union, ‘EU Annual Report on Human Rights and Democracy in the World in 2013’ 1107/14, 121.

<sup>75</sup> European Parliament Resolution 2012/2062 (INI) of 13 December 2012 on the review of the EU’s human rights strategy [2012], paras 13, 16, 33.

<sup>76</sup> European Parliament Resolution 2012/2062 (INI) of 13 December 2012 on the review of the EU’s human rights strategy [2012], 31.

coordinated EU-wide approach would reduce the administrative burden and reduce the related costs.<sup>77</sup> The EP has also called on the EU, the Member States and their partner institutions to ensure that the new “post-2015” framework includes a Policy Coherence for Development (PCD) objective which makes it possible to develop reliable indicators to measure the progress of donors and partner countries and to assess the impact of the various policies on development, in particular by applying a “PCD lens” to key issues such as population growth, global food security, illicit financial flows, migration, climate and green growth.<sup>78</sup>

Regarding development strategies in its external action, the EP has underlined the shared and indivisible responsibility of all EU institutions and Member States in mainstreaming human rights worldwide, and expressed its wish to be involved in reshaping the policy framework and overseeing its implementation. On this basis, it has advocated a joint inter-institutional declaration on human rights, committing all institutions to common founding principles and objectives,<sup>79</sup> an initiative which, as shown by the EU Annual Report on Human Rights and Democracy in the World in 2012, was not achieved.<sup>80</sup>

The EP has also recommended that, as part of the human rights country strategies, the EU should ‘agree on a list of ‘minimum items’ that its Member States and the EU institutions should raise with their relevant counterparts in third countries during meetings and visits, including at the highest political level and during summits.’<sup>81</sup>

## (2) Illegal detention of prisoners in European countries by the CIA<sup>82</sup>

An area in which the EP tackled the issue of vertical coherence concerns the alleged transportation and illegal detention of prisoners in European countries by the CIA. On 11 September 2012, the EP adopted a Resolution on the alleged transportation and illegal detention of prisoners in European countries by the CIA<sup>83</sup> in which it addressed the worries that the Member States policies in this matter came against the EU’s human rights policies. In its response, the European Commission affirmed that practices referred to

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<sup>77</sup> European Parliament Resolution [2013/2058\(INI\)](#) of 13 March 2014 on the EU 2013 Report on Policy Coherence for Development [2014], L.

<sup>78</sup> European Parliament Resolution [2013/2058\(INI\)](#) of 13 March 2014 on the EU 2013 Report on Policy Coherence for Development [2014], 2.

<sup>79</sup> Council of the European Union, ‘EU Annual Report on Human Rights and Democracy in the World in 2012’ 9413/13, 149.

<sup>80</sup> Council of the European Union, ‘EU Annual Report on Human Rights and Democracy in the World in 2012’ 9413/13, 149.

<sup>81</sup> Council of the European Union, ‘EU Annual Report on Human Rights and Democracy in the World in 2012’ 9413/13, 38.

<sup>82</sup> European Parliament Resolution [2013/2702\(RSP\)](#) of 10 October 2013 on alleged transportation and illegal detention of prisoners in European Countries by the CIA [2013]; Council of the European Union, ‘EU Annual Report on Human Rights and Democracy in the World in 2012’ 9413/13, 151.

<sup>83</sup> European Parliament Resolution [2013/2702\(RSP\)](#) of 10 October 2013 on alleged transportation and illegal detention of prisoners in European Countries by the CIA [2013].

as ‘renditions’ constituted a serious violation of several fundamental rights and the fight against terrorism could not justify such unacceptable practices. The Commission stressed that it was for the Member States concerned to commence or continue detailed, independent and impartial investigations to establish the truth.<sup>84</sup>

### 3. European Council<sup>85</sup>

#### a) General aspects

The European Council is not one of the EU institutions that negotiates or adopts legislation but rather it sets out the political agenda and direction of the EU by defining its political priorities and goals. It does so by adopting ‘conclusions’ at meetings of the Council where Member States’ heads of state or government, the Presidents of the Council and the Commission come together to discuss issues that affect the EU as a whole and to decide what actions should be taken in order to address them. Accordingly, it has tremendous potential as an agent for greater coherence and is, in all likelihood, the final resort for conflicts arising from the opposing political interests of either the EU institutions and the Member States or between the Member States themselves. Nevertheless, these political conflicts also pose the greatest challenge to the European Council playing this role as can be seen, perhaps most clearly, in the response to the ongoing refugee crisis.

A review of conclusions reached by the European Council since 2014 shows that it places significant importance on efforts to ensure that the EU operates in a coherent and consistent manner in how it develops and implements its policies both internally and externally. It expresses this through the use of various terms that reflect this strategy which include mainstreaming, systemic and comprehensive. This approach also has the support of the Council of the European Union. The press release issued by the Council of the EU on 20 July 2015 also employs this terminology and underlines its support for the coherence agenda adopted by the European Council, in this case in regard to the issue of migration. It notes, for example, ‘...that migration priorities should be further mainstreamed into relevant European Union instruments and policies, including in the framework of the development and European neighbourhood policies. Coherence and synergies between different policy fields, such as Common Foreign and Security Policy/Common Security and Defence Policy, justice and home affairs, human rights, development cooperation, trade and employment, is key’, and it argued further ‘that the implementation of a comprehensive migration policy is a joint undertaking and shared responsibility for EU institutions and Member States.’<sup>86</sup>

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<sup>84</sup> Council of the European Union, ‘EU Annual Report on Human Rights and Democracy in the World in 2012’ 9413/13, 66.

<sup>85</sup> This section was written by Ricki Schoen.

<sup>86</sup> Council of the European Union, Press release 606/15 ‘Council Conclusions on Migration’ (20 July 2015), points 3, 4 < [http://www.consilium.europa.eu/press-releases-pdf/2015/7/40802201078\\_en.pdf](http://www.consilium.europa.eu/press-releases-pdf/2015/7/40802201078_en.pdf)> last accessed on 10 September 2015.

The issue of migration is understandably a top priority for the EU currently as the number of people attempting to enter the EU through its southern Member States has been increasing dramatically over the last few years; linked to this is a concern over the EU developing a coherent asylum as well as a relocation/resettlement strategy. It has stressed the importance of coherence in this context on a number of occasions including at its meeting in June 2014 when the European Council concluded that the EU needed an 'efficient and well-managed migration, asylum and borders policy' and that a 'comprehensive approach' was needed to ensure the benefits of legal migration are optimised. It added that Europe needed to develop 'coherent and efficient' rules so that legal migration into Europe is maximised in order for it to continue to be an attractive destination. In regard to the issue of respecting and safeguarding fundamental rights, the European Council specified that 'coherent policy measures' need to be taken so that a barrier-free area within the EU can be created where 'freedom, security and justice' are provided and protected equally as enshrined in the Treaties and the relevant Protocols (i.e. those that deal with issues such as borders, immigration, asylum, and police and judicial cooperation).<sup>87</sup>

Other key policy areas addressed at recent European Council meetings include security and defence, external relations and the conflicts in Ukraine, Gaza, Syria and Libya, and dealing with the Ebola crisis; climate change, energy independence and food security; economic recovery job growth and industrial competitiveness, and international trade agreements; concluding Association Agreements/Deep and Comprehensive Free Areas with former Soviet republics; and cybercrime and cybersecurity.

## (1) Migration

As part of its discussion of the migration issue at the European Council meeting in June 2015, the related concerns of 'relocation, resettlement, return, readmission, reintegration and cooperation with countries of origin and transit' were also addressed.<sup>88</sup> The European Council concluded that Europe needed a 'comprehensive approach' towards migration and added that, 'Operational action to tackle the traffickers and smugglers in accordance with international law is an essential part of our comprehensive approach.' It noted further that 'a comprehensive and systemic approach' should be taken in regard to the Commission's 'European Agenda on Migration'.<sup>89</sup>

Part of the agenda to address the issue of migration is to develop a clear and coherent strategy that will provide the proper assistance to those individuals who have entered the EU who are in need of protection due to the dangerous conditions in their country of origin. Following the recent escalation of this issue into a crisis, with the large numbers of refugees entering the EU, the decision was taken to agree to

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<sup>87</sup> European Council Conclusions EUCO 79/14 (CO EUR 4 CONCL 2) of 26/27 June 2014, points 5, 6. <http://data.consilium.europa.eu/doc/document/ST-79-2014-INIT/en/pdf> last accessed 10 September 2015.

<sup>88</sup> European Council Conclusions ST 22 2015 INIT (CO EUR 8 CONCL 3) of 25/26 June 2015. <http://data.consilium.europa.eu/doc/document/ST-22-2015-INIT/en/pdf> last accessed 10 September 2015.

<sup>89</sup> European Council Conclusions ST 22 2015 INIT (CO EUR 8 CONCL 3) of 25/26 June 2015. <http://data.consilium.europa.eu/doc/document/ST-22-2015-INIT/en/pdf> last accessed 10 September 2015, points 1, 2.

relocate 120,000 refugees from Greece, Italy and Hungary to other MS within the EU.<sup>90</sup> This replaced the earlier European Council conclusion of relocating 40,000 people over the next two years from Italy and Greece to elsewhere within the EU (with the exception of the UK which will not participate under Protocol 21 of the TEU<sup>91</sup>) and to assist a further 20,000 ‘displaced persons’ who are ‘in clear need of international protection’ to be accommodated within the EU.<sup>92</sup> It also found, however, that there is a need to put forward a strategy that will allow the return of those individuals who are not ‘in clear need of international protection’ to their country of origin; to this end, ‘Member States will fully implement the Return Directive, making full use of all measures it provides to ensure the swift return of irregular migrants.’<sup>93</sup>

While the EU has attempted to produce a coherent strategy in order to deal effectively with migrants and refugees coming across its borders, recent events have shown that it has fallen short of the goal it set itself. Given the clearly erratic and uncoordinated response to the current refugee crisis facing the EU, its institutions and Member States need to urgently find a way to address the issue otherwise, as Jeanne Park of the Council on Foreign Relations argues,

the lack of a coordinated and proportional EU response to irregular migration in the near-to-mid-term could continue to feed sentiments that push individual countries to emphasize national security over international protection. This could make closed borders, barbed-wire, and maritime pushbacks the policy norm rather than the exception.<sup>94</sup>

The EU continues to try to address the crisis and most recently has produced the EU-Turkey joint action plan in October 2015.<sup>95</sup> In welcoming the progress made at the European Council meeting on 15 October 2015, European Council President Donald Tusk stated that, ‘If we are not able to find humanitarian and efficient solutions, then others will find solutions which are inhumane, nationalistic and for sure not European.’<sup>96</sup> While this is certainly true, it remains to be seen if the EU is able to ensure that it finds the right solutions to this continuing crisis. The refugee crisis has tested the European institutions in general, including the European Council. That the European Council has maintained a semblance of consensus is a remarkable testimony to the capacity of the European Council to promote vertical coherence. In terms of the real enjoyment of human rights by refugees, however, vertical incoherence has contributed to the present crisis.

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<sup>90</sup> European Commission press release, Brussels 9 September 2015 [http://europa.eu/rapid/press-release\\_MEMO-15-5698\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm) last accessed 16 October 2015.

<sup>91</sup> Protocol (No 21) on the Position of The United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice [2012] OJ C326/13.

<sup>92</sup> European Council Conclusions ST 22 2015 INIT (CO EUR 8 CONCL 3) of 25/26 June 2015, points 4a, 4e.

<sup>93</sup> European Council Conclusions ST 22 2015 INIT (CO EUR 8 CONCL 3) of 25/26 June 2015, point 5d.

<sup>94</sup> Jeanne Park (2015), ‘Europe’s Migration Crisis’, Council on Foreign Relations <http://www.cfr.org/migration/europes-migration-crisis/p32874> last accessed 16 October 2015.

<sup>95</sup> For further information on the action plan see [http://europa.eu/rapid/press-release\\_MEMO-15-5777\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5777_en.htm) last accessed 16 October 2015.

<sup>96</sup> Remarks by President Donald Tusk after the European Council meeting of 15 October 1 <http://www.consilium.europa.eu/en/press/press-releases/2015/10/15-tusk-final-remarks-european-council/> last accessed 16 October 2015.

## (2) Security and defence, and external relations

The European Council also discussed the need for the EU to approach issues concerning European security and defence with a coherent as well as comprehensive strategy, and it reaffirmed the need for 'European defence cooperation' to be more 'systematic'.<sup>97</sup> In terms of the EU's external relations strategy, the European Council has raised a number of concerns that needed to be addressed. These included the conflict in Iraq/Syria where it noted that it was crucial to stem the flow of foreign fighters and emphasised '...the need for close cooperation with third countries to develop a coherent approach, including to strengthen border and aviation security and counter-terrorism capacity in the region.'<sup>98</sup>In regard to the conflict in Gaza, the European Council noted that the living conditions there needed to be improved while at the same time there was a need to remove the threat posed by Hamas. It added, 'This should be supported by international monitoring and verification to ensure full implementation of a comprehensive agreement. All terrorist groups in Gaza must disarm.'<sup>99</sup>The European Council also restated '...the readiness of the European Union to contribute to a comprehensive and sustainable solution enhancing the security, welfare and prosperity of Palestinians and Israelis alike.'<sup>100</sup>

The conflict in Ukraine is another topic that has been discussed by the European Council and it concluded that 'comprehensive border control arrangements' should be set up in response to the conflict there.<sup>101</sup> It also reiterated that the European Council would not recognise the annexation of Crimea by the Russian Federation and called on Russia to fully implement the Minsk agreements which include maintaining a ceasefire and the removal of heavy weaponry from the area.<sup>102</sup> In addition, the efforts to reunite Cyprus have also been addressed by the European Council which noted that it supported them under the UN framework and added that the settlement should be 'comprehensive and viable'.<sup>103</sup> At its meeting in October 2014, the European Council concluded that conditions should be established so that the negotiations for a 'comprehensive Cyprus settlement' could be re-launched.<sup>104</sup>

In regard to the Ebola crisis, the European Council called '...for increased coordination at EU level of the assistance provided by EU Member States and invites the Council to adopt a comprehensive EU response

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<sup>97</sup> European Council Conclusions ST 22 2015 INIT (CO EUR 8 CONCL 3) of 25/26 June 2015, point 10c.

<sup>98</sup> European Council Conclusions ST 163 2014 INIT (CO EUR 11 CONCL 4) of 30 August 2014, point 18 <<http://data.consilium.europa.eu/doc/document/ST-163-2014-INIT/en/pdf>> last accessed 10 September 2015.

<sup>99</sup> European Council Conclusions ST 163 2014 INIT (CO EUR 11 CONCL 4) of 30 August 2014, point 19 <<http://data.consilium.europa.eu/doc/document/ST-163-2014-INIT/en/pdf>> last accessed 10 September 2015.

<sup>100</sup> European Council Conclusions ST 163 2014 INIT (CO EUR 11 CONCL 4) of 30 August 2014, point 20 <<http://data.consilium.europa.eu/doc/document/ST-163-2014-INIT/en/pdf>> last accessed 10 September 2015.

<sup>101</sup> European Council Conclusions ST 169 2014 INIT (CO EUR 13 CONCL 5) of 23/24 October 2014, point 17 <<http://data.consilium.europa.eu/doc/document/ST-169-2014-INIT/en/pdf>> last accessed on 10 September 2015.

<sup>102</sup> European Council Conclusions ST 169 2014 INIT (CO EUR 13 CONCL 5) of 23/24 October 2014, point 17 <<http://data.consilium.europa.eu/doc/document/ST-169-2014-INIT/en/pdf>> last accessed on 16 October 2015.

<sup>103</sup> European Council Conclusions ST 7 2014 INIT and ST 7 2014 REV 1 (CO EUR 2 CONCL 1) of 20/21 March 2014, point 24 <<http://data.consilium.europa.eu/doc/document/ST-7-2014-INIT/en/pdf>> last accessed 10 September 2015.

<sup>104</sup> European Council Conclusions ST 169 2014 INIT (CO EUR 13 CONCL 5) of 23/24 October 2014, point 24.

framework to address this crisis.<sup>105</sup> At a subsequent meeting in 2014, the European Council concluded that it needed a 'comprehensive response' by the EU to dealing with the Ebola crisis by providing urgently needed supplies, expertise and support.<sup>106</sup> Clearly, in the conclusions of the European Council, 'comprehensive' is being used both as a term equating to 'coherence' and as a strategy for achieving it, especially in the foreign policy area. Nevertheless, the relationship between these terms is not clear and the response, particularly if we examine the varying policies of the Member States, has been far from coherent. There is further discussion of this incoherence with respect to Ukraine in our discussion of the CFSP/CSDP below.

### (3) Climate change, energy independence and food security

Another policy area where the EU has been struggling to develop a coherent strategy is in how Europe addresses climate change and the related issues of endeavouring to become energy independent and ensuring food security. The European Council highlighted the need for a coherent European climate and energy policy at its meeting in March 2014 when it concluded that a coherent approach to reducing gas emissions, efficient use of energy resources and renewables should be adopted.<sup>107</sup> At its subsequent meeting in October that year, the European Council again stressed this point when it concluded the EU needed to take a 'comprehensive and technology neutral approach' in its efforts to reduce emissions.<sup>108</sup> It also adopted the ambitious plan to dramatically reduce the EU's greenhouse gas emissions by 40 per cent and to boost the consumption of renewable energy to 27 per cent by 2030.<sup>109</sup> Furthermore, it called on the Commission to produce a 'comprehensive plan' that outlined a strategy for how the EU can reduce its energy dependence, particularly on gas.<sup>110</sup>

At its meeting in June 2014, the European Council again stressed that it was essential for the EU to adopt a coherent strategy, particularly in such foreign policy areas as energy and trade in order for the EU to be a global actor. It also highlighted the need for Member States' foreign policy goals and those of the EU to be consistent in order for the EU to be effective on the global stage.<sup>111</sup> It further concluded that the EU's

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<sup>105</sup> European Council Conclusions ST 163 2014 INIT (CO EUR 11 CONCL 4) of 30 August 2014, point 26.

<sup>106</sup> European Council Conclusions ST 169 2014 INIT (CO EUR 13 CONCL 5) of 23/24 October 2014, point 11.

<sup>107</sup> European Council Conclusions ST 7 2014 INIT and ST 7 2014 REV 1 (CO EUR 2 CONCL 1) of 20/21 March 2014, points 14, 15, 17 <<http://data.consilium.europa.eu/doc/document/ST-7-2014-INIT/en/pdf>> last accessed 10 September 2015.

<sup>108</sup> European Council Conclusions ST 169 2014 INIT (CO EUR 13 CONCL 5) of 23/24 October 2014, points 2, 13 <<http://data.consilium.europa.eu/doc/document/ST-169-2014-INIT/en/pdf>> last accessed on 10 September 2015.

<sup>109</sup> European Council, 'The 2030 climate and energy framework – at a glance' <http://www.consilium.europa.eu/en/policies/climate-change/2030-climate-and-energy-framework/> last accessed 16 October 2015.

<sup>110</sup> European Council Conclusions ST 7 2014 INIT and ST 7 2014 REV 1 (CO EUR 2 CONCL 1) of 20/21 March 2014, point 20 <<http://data.consilium.europa.eu/doc/document/ST-7-2014-INIT/en/pdf>> last accessed 10 September 2015.

<sup>111</sup> European Council Conclusions ST 79/14 2014 INIT (CO EUR 4 CONCL 2) of 26/27 June 2014, point 1, annex 1 <<http://data.consilium.europa.eu/doc/document/ST-79-2014-INIT/en/pdf>> last accessed 10 September 2015.



‘internal market and competition rules’ must be enforced consistently particularly in respect of its energy security strategy.<sup>112</sup>

In October 2014, the European Council argued that it was important to ensure that the EU took a coherent approach to its ‘food security and climate change objectives’. It also stressed that the EU and the Member States should ensure that their messages in regard to energy security were consistent when dealing with outside partners, particularly energy suppliers.<sup>113</sup> The European Council in its conclusion at the December 2014 meeting called on the Commission to produce a ‘comprehensive Energy Union proposal’ which the Commission presented on 25 February 2015 when it launched its policy document entitled ‘A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy’ in which it outlined its plans to establish a fully integrated energy market across EU.<sup>114</sup> Given the difficulties in promoting horizontal coherence in the area of energy (as described in 8.1), it is not surprising that this call for vertical coherence is a long way from being realized.<sup>115</sup>

#### (4) Economic recovery, job growth and industrial competitiveness; international trade agreements

Adopting measures that promote economic growth and competitiveness within the EU have also been highlighted at European Council meetings over the last number of years. Growing the economy through job creation and increasing competitiveness are significant policy areas that have considerable impact on how the EU operates and how it addresses the issues already discussed above. Ensuring that the chosen growth measures are coherent as well as comprehensive is of great concern to the European Council. The Transatlantic Trade and Investment Partnership (TTIP) agreement is one such measure and the negotiations between the EU and the US to conclude it have featured in European Council discussions. At its meeting in December 2014, the European Council described the TTIP as being ‘ambitious, comprehensive and mutually beneficial’ and called on the EU and the US to bring their negotiations on this agreement to a close by the end of 2015.<sup>116</sup> At its subsequent meeting in March 2015, the TTIP, described by the European Council on this occasion as a ‘comprehensive and mutually beneficial agreement’, was discussed again and it reiterated its call on the negotiating partners to conclude the deal

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<sup>112</sup> European Council Conclusions EUCO 79/14 (CO EUR 4 CONCL 2) of 26/27 June 2014, point 22 <<http://data.consilium.europa.eu/doc/document/ST-79-2014-INIT/en/pdf>> last accessed 10 September 2015.

<sup>113</sup> European Council Conclusions ST 169 2014 INIT (CO EUR 13 CONCL 5) of 23/24 October 2014, point 2.14, 5 <<http://data.consilium.europa.eu/doc/document/ST-169-2014-INIT/en/pdf>> last accessed on 10 September 2015.

<sup>114</sup> European Commission, “A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy”, COM(2015) 80 final, Brussels, 25 February 2015 [http://ec.europa.eu/priorities/energy-union/docs/energyunion\\_en.pdf](http://ec.europa.eu/priorities/energy-union/docs/energyunion_en.pdf) last accessed 16 October 2015.

<sup>115</sup> Tamara Lewis and others, ‘Report on Coherence of Human Rights Policymaking in EU Institutions and Other EU Agencies and Bodies’ (European Commission 2014) <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>> 101-104, last accessed on 8 September 2015.

<sup>116</sup> European Council Conclusions ST 237 2014 INIT (CO EUR 16 CONCL 6) of 18 December 2014, point 1.h <<http://data.consilium.europa.eu/doc/document/ST-237-2014-INIT/en/pdf>> last accessed on 10 September 2015.



as soon as possible.<sup>117</sup> The negotiations surrounding the TTIP with its main aim of removing cross-border tariff barriers altogether and reducing non-tariff barriers, in some instances by 50 per cent, have not been without controversy. While it has been claimed that these changes will increase the number of jobs across the EU and the cost of services and consumer products would fall, some have raised concerns over the effects the agreement could potentially have on some important EU regulations, particularly in the areas of food safety and provisions surrounding banking regulations.<sup>118</sup> Fears have also been expressed over the possibility of increased numbers of privatisations as part of this trade deal.

The European Council has also addressed the issue of the EU's industrial competitiveness and has argued that the EU and its Member States should be concerned with adopting a strategy that allows it to be 'systematically mainstreamed across all EU policy areas' in order to establish a stronger industrial capacity.<sup>119</sup>

### (5) Association Agreements/Deep and Comprehensive Free Trade Areas with Former Soviet Republics

Concluding Association Agreements including Deep and Comprehensive Free Trade Areas with a number of former Soviet republics such as the Republic of Moldova, Georgia and Ukraine has also been discussed by the European Council as part of the EU's political strategy. It has been urging the EU to endeavour to complete them as soon as possible and in June 2014 these three former Soviet republics signed their Association Agreements with the EU. As Steven Pifer of the Brookings Institution in the US describes it, this was a milestone for Ukraine but whether it turns out to be as significant a development as becoming an independent country still remains to be seen.<sup>120</sup> Much of this will depend on the effectiveness of how the agreement is implemented and could be further enhanced by Ukrainian citizens being offered visa-free travel into the EU. Pifer argues and notes that the deal is beneficial to the EU in that it is intended to help stabilise Ukraine and boost its economy.<sup>121</sup>

In March 2015, the European Council again referred to the Association Agreements/Deep and Comprehensive Free Trade Areas (AA/DCFTA) and urged all Member States to ratify these with Georgia,

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<sup>117</sup> European Council Conclusions ST 11 2015 INIT (CO EUR 1 CONCL 1) of 19/20 March 2015, point 6 <<http://data.consilium.europa.eu/doc/document/ST-11-2015-INIT/en/pdf>> last accessed on 10 September 2015.

<sup>118</sup> Julia Kollewe, 'What is TTIP? The controversial trade deal proposal explained', *The Guardian*, 3 July 2015 <http://www.theguardian.com/business/2015/jul/03/what-is-ttip-controversial-trade-deal-explained> last accessed 16 October 2015.

<sup>119</sup> European Council Conclusions ST 7 2014 INIT and ST 7 2014 REV 1 (CO EUR 2 CONCL 1) of 20/21 March 2014, point 6 <<http://data.consilium.europa.eu/doc/document/ST-7-2014-INIT/en/pdf>> last accessed 10 September 2015.

<sup>120</sup> Steven Pifer, 'Poroshenko Signs EU-Ukraine Association Agreement', Brookings Institution, 27 June 2014 <<http://www.brookings.edu/blogs/up-front/posts/2014/06/27-poroshenko-signs-eu-ukraine-association-agreement-pifer>> last accessed 16 October 2015.

<sup>121</sup> Steven Pifer, 'Poroshenko Signs EU-Ukraine Association Agreement', Brookings Institution, 27 June 2014 <<http://www.brookings.edu/blogs/up-front/posts/2014/06/27-poroshenko-signs-eu-ukraine-association-agreement-pifer>> last accessed 16 October 2015.

Republic of Moldova and Ukraine as soon as possible.<sup>122</sup> While the ratification process between the three former Soviet republics and the EU Member States is progressing (in the case of the AA between the EU and Ukraine the majority of EU MS have already ratified it), as of September 2015, when trilateral talks between the EU Commission, Ukraine and the Russian Federation took place, the implementation of this particular agreement is still being discussed and efforts continue to be made to address Russian concerns over the DCFTA which is due to come into effect in January 2016. No definitive decisions were arrived at in this instance so the participants agreed to meet again in November 2015.<sup>123</sup> In general, the HR/VP's heightened role in terms of relations with former Soviet Republics and its lack of coordination with the Member States has led to a marked lack of coherence in all aspects of relations, let alone human rights policies, most obviously in the lack of a coherent response to the Ukrainian crisis.

## (6) Cybercrime and cybersecurity

Given the heavy reliance on communicating via the internet in the public and private sectors, the EU is committed to ensuring that the use of cyber space throughout the EU is both safe and secure while still providing open access. In 2013 the EU launched its Cyber Security Strategy in which it addressed the use of cyberspace and related issues as they impact on foreign policy, justice and home affairs as well as the internal market; it noted that being able to access information online was a human right which should not be curtailed through 'censorship or mass surveillance'.<sup>124</sup> The policy area of cybercrime and cybersecurity has also been addressed during European Council meetings in the recent past. As is evident in the previous discussion, the European Council clearly believes that in order for the EU to function effectively and decisively, adopting a coherent and comprehensive approach to addressing policy areas that have a direct impact on the operational capacity of the EU is essential. This is also the case in this particular arena where the European Council concluded that a 'comprehensive approach' is needed in regard to cybersecurity and cybercrime to ensure that national authorities are able to cooperate on matters of justice and policing.<sup>125</sup>

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<sup>122</sup> European Council Conclusions ST 11 2015 INIT (CO EUR 1 CONCL 1) of 19/20 March 2015, point 8 <<http://data.consilium.europa.eu/doc/document/ST-11-2015-INIT/en/pdf>> last accessed on 10 September 2015.

<sup>123</sup> European Commission, "Outcome of the Trilateral Talks on the Implementation of the EU-Ukraine Association/Deep and Comprehensive Free Trade Area", Brussels, 7 September 2015 <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1361> last accessed 16 October 2015.

<sup>124</sup> European Union External Action, "EU Cyber Security Strategy – open, safe and secure", 7 February 2013 [http://eeas.europa.eu/top\\_stories/2013/070213\\_cybersecurity\\_en.htm](http://eeas.europa.eu/top_stories/2013/070213_cybersecurity_en.htm) last accessed 16 October 2015.

<sup>125</sup> European Council Conclusions EUCO 79/14 (CO EUR 4 CONCL 2) of 26/27 June 2014, point 10. <<http://data.consilium.europa.eu/doc/document/ST-79-2014-INIT/en/pdf>> last accessed 10 September 2015.

#### 4. Council of the European Union<sup>126</sup>

##### a) General aspects

The Council of the European Union is one of the crucial bodies tasked with ensuring vertical coherence, since it is there that the Member States meet to agree and adopt EU policies and agreements and it is tasked with coordinating Member State policies in crucial areas like economic, fiscal and employment policies. It is also the body that adopts the Action Plans on Human Rights and Democracy, described in greater detail below, giving it the ultimate pronouncement on the EU's approach to human rights. Despite this role in ensuring vertical coherence, however, the Council is susceptible to disagreements surrounding fundamental and human rights arising from the diverging political interests between Member States. Recently, this was most dramatically the case with Hungary. This case will be further elaborated to demonstrate the difficulties of vertical coherence in human rights policy within the Council.<sup>127</sup>

Back in 2010, the new majority in Hungary, represented by Victor Orbán's party, Fidesz, in coalition with the Christian Democrats, made a series of constitutional changes that resulted in a 'worrying weakening of democratic institutions and what many have interpreted as a significant diminishment of the rule of law.'<sup>128</sup> Among the contested measures were: the displacement of judges by lowering the age of retirement which forced 274 senior judges to retire, including 20 from the Supreme Court,<sup>129</sup> 'circumventing the will of the Constitutional Court by introducing constitutional amendments to replace legislation that had previously been declared unconstitutional' in ways that escaped constitutional control by the courts,<sup>130</sup> limiting freedom of speech and freedom of the media, and restricting conditions under

<sup>126</sup> This section was written by Tamara Lewis and Ricki Schoen.

<sup>127</sup> For a comprehensive discussion of the case of Hungary, see Alexandra Timmer et al, *Critical analysis of the EU's conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law* (2014) Work Package No 3-Deliverable No 2 54 <<http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf> last accessed October 22, 2015.

<sup>128</sup> Nora Hedling, 'Developing Mechanisms for Regional Influence in National Processes of Constitutional Change: The European Union and Hungary' (2014), in *Rule of Law and Constitution Building: The Role of Regional Organizations*, (International Institute for Democracy and Electoral Assistance 2014), 142 <[http://www.idea.int/publications/rule-of-law-and-constitution-building/upload/rule\\_of\\_law\\_chapter\\_6.pdf](http://www.idea.int/publications/rule-of-law-and-constitution-building/upload/rule_of_law_chapter_6.pdf) > last accessed on 12 March 2015. See also Gianluigi Palombella, 'The EU's Sense of the Rule of Law and the Issue of Its Oversight' (2014) Robert Schuman Centre for Advanced Studies Research Paper No 2014/125 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2538086](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2538086)> last accessed on 10 September 2015.

<sup>129</sup> Act XX of 2013 on the legislative amendments relating to the upper age limit applicable in certain judicial legal relations. See Alexandra Timmer et al, *Critical analysis of the EU's conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law* (2014) Work Package No 3-Deliverable No 2 67 <<http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf> last accessed October 22, 2015.

<sup>130</sup> Nora Hedling, 'Developing Mechanisms for Regional Influence in National Processes of Constitutional Change: The European Union and Hungary' (2014), in *Rule of Law and Constitution Building: The Role of Regional Organizations*, (International Institute for Democracy and Electoral Assistance 2014), 142 <[http://www.idea.int/publications/rule-of-law-and-constitution-building/upload/rule\\_of\\_law\\_chapter\\_6.pdf](http://www.idea.int/publications/rule-of-law-and-constitution-building/upload/rule_of_law_chapter_6.pdf) > last accessed on 12 March 2015. For control by the courts, see Alexandra Timmer et al, *Critical analysis of the EU's*

which churches could be legally recognized.<sup>131</sup> The new Hungarian Constitution was in conflict with the fundamental values of the EU—democracy, the rule of law and respect for human rights—and with ‘European standards’.<sup>132</sup> In the words of the EP, these values set out in article 2 TEU ‘have to be addressed politically and legally, this being an indispensable foundation of democratic society, and therefore, Member States, as well as all the EU institutions, must commit themselves to them, clearly and unambiguously’ and that ‘respecting and promoting such common values is not only an essential element of the European Union’s identity but also an explicit obligation deriving from article 3(1) and (5) TEU, and therefore a *sine qua non* for becoming an EU Member State as well as for fully preserving membership prerogatives’.<sup>133</sup>

The Hungarian Government accepted some of the criticism, such as that expressed by the European Commission and the European Court of Justice and declared that it would not act counter to the demands made by the EU and the Council of Europe’s Venice Commission. A further positive step was the adoption, in autumn 2013, of an amendment which made improvements regarding the recognition of religious organisations as churches, the restrictions on ‘election campaign advertising and the transfer of cases within the judiciary’.<sup>134</sup>

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*conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law* (2014) Work Package No 3-Deliverable No 2 51-73 <<http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>> last accessed October 22, 2015.

<sup>131</sup> Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary (the Act on Churches), which was adopted on 30 December 2011 and entered into force on 1 January 2012. See also European Parliament resolution 2012/2130(INI) of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) [2013]; Erin K Jenne and Cass Mudde, ‘Can Outsiders Help?’ (2012) 23 *Journal of Democracy*; and the collection edited by Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law* (CEU Press 2012); on Romania, see Vladimir Tismaneanu, ‘Democracy on the Brink: A Coup Attempt Fails in Romania’ (January/February 2013) 83-87; Venelin I Ganeev, ‘Post-Accession Hooliganism: Democratic Governance in Bulgaria and Romania after 2007’ (2013) 27 *East European Politics and Societies*; and Vlad Perju, ‘Constitutional Coup, Interrupted: Tales from a Romanian Summer’ (on file with author, Massachusetts, October 2013) I-CON Symposium on Constitutionalism in Central and Eastern Europe.

<sup>132</sup> Art 2 TEU. See Alexandra Timmer et al, *Critical analysis of the EU’s conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law* (2014) Work Package No 3-Deliverable No 2 54 <<http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>> last accessed October 22, 2015, citing European Commission for Democracy through Law (Venice Commission), ‘Opinion on the Fourth Amendment to the Fundamental Law of Hungary – Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013)’, Strasbourg 17 June 2013, Council of Europe (CDL-AD(2013)012) CDL-AD(2012)001-e, Conclusions, 31.

<sup>133</sup> European Parliament Motion 2012/2130 (INI) for a European Parliament Resolution on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) [23 June 2013], C, D.

<sup>134</sup> Nora Hedling, ‘Developing Mechanisms for Regional Influence in National Processes of Constitutional Change: The European Union and Hungary’ (2014), in *Rule of Law and Constitution Building: The Role of Regional Organizations*, (International Institute for Democracy and Electoral Assistance 2014), 143 <[http://www.idea.int/publications/rule-of-law-and-constitution-building/upload/rule\\_of\\_law\\_chapter\\_6.pdf](http://www.idea.int/publications/rule-of-law-and-constitution-building/upload/rule_of_law_chapter_6.pdf)> last accessed on 12 March 2015.

This notwithstanding, many contested constitutional provisions remained unchanged and were pointed out in a critical manner by the European Parliament,<sup>135</sup> lawyers<sup>136</sup> and academics, who criticised ‘the degradation of the legal landscape under the new constitution and Hungary’s consequent failure to uphold European values’.<sup>137</sup>

This situation is emblematic of the potential for a clash between the human rights policies of the Council (or, for that matter, the EU institutions) and those of individual states and has triggered questions as to how the EU could best deal with it and whether the current mechanisms are sufficient to prevent violations of fundamental values,<sup>138</sup> and whether the EU has the capacity to promote democracy within the Member States themselves.<sup>139</sup>

### *b) The Action Plan on human rights and democracy (2012-2014)*

In order to provide a strategy that allows the European Union to follow through on its commitment to safeguarding and promoting human rights, the EU adopted the *EU Strategic Framework on Human Rights and Democracy*, published by the Council of the EU in June 2012, as well as the first *Action Plan (2012-2014)*. A new role was also created at this time by appointing an EU Special Representative on Human Rights. This ‘human rights package’<sup>140</sup> provided a roadmap for implementing the EU’s goals in this policy area and outlined its longer-term priorities. The Strategy Framework also provided the EU with the tools

<sup>135</sup> European Parliament resolution 2012/2130(INI) of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) [2013].

<sup>136</sup> András B Göllner, ‘Experts Call for International Action on Hungary’s Rule of Law Violations’ (Hungarian Free Press, 6 March 2015) <<http://hungarianfreepress.com/2015/03/06/experts-call-for-international-action-on-hungarys-rule-of-law-violations/>> last accessed on 14 March 2015.

<sup>137</sup> Nora Hedling, ‘Developing Mechanisms for Regional Influence in National Processes of Constitutional Change: The European Union and Hungary’ (2014), in *Rule of Law and Constitution Building: The Role of Regional Organizations*, (International Institute for Democracy and Electoral Assistance 2014), 141 <[http://www.idea.int/publications/rule-of-law-and-constitution-building/upload/rule\\_of\\_law\\_chapter\\_6.pdf](http://www.idea.int/publications/rule-of-law-and-constitution-building/upload/rule_of_law_chapter_6.pdf)> last accessed on 12 March 2015.

<sup>138</sup> Bojan Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: the Hungarian Challenge’ (2014) LSE ‘Europe in Question’ Discussion Paper Series <<http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper79.pdf>> last accessed on 13 March 2015; Carlos Closa/Dimitry Kochenov/J.H.H. Weiler, ‘Reinforcing Rule of Law Oversight in the European Union’, EUI Working Paper RSCAS 2014/25, Robert Schuman Centre for Advanced Studies Global Governance Programme-87 (2014) <[http://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS\\_2014\\_25\\_FINAL.pdf?sequence=3](http://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS_2014_25_FINAL.pdf?sequence=3)> last accessed on 13 March 2015.

<sup>139</sup> On this see Jan-Werner Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States?’ <<https://www.princeton.edu/~jmueller/ELJ-Democracy%20Protection-JWMueller-pdf.pdf>> last accessed on 13 March 2015.

<sup>140</sup> European Commission, Press release ‘EU proposes new Joint Action Plan on Human Rights and Democracy’ (Brussels, 29 April 2015) <[http://europa.eu/rapid/press-release\\_IP-15-4893\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4893_en.htm)> last accessed 10 September 2015.

‘to enhance the effectiveness of bilateral human rights and democracy work, successfully promote action at the multilateral level, and improve the mainstreaming of human rights across the EU's external action.’<sup>141</sup> We discuss this European Commission document in greater detail in the section on the Commission above, but this role for the Commission in specific areas and the proposing role of the Commission and the High Representative of the EU for Foreign Affairs and Security Policy, described below for the Action Plan of 2015-2019, give some indication of how protecting and promoting human rights by the Council involves a complex political process among the EU institutions and Member States and multiple EU institutions for its implementation. In the area of human and fundamental rights, the Action Plan is a pronouncement of the European Commission, the HR/VP and the EEAS, and the Council. We have included it in this section to indicate the Council’s overarching role in rendering this discourse coherent.

An assessment of the first Action Plan showed that it allowed the EU to implement a human rights policy that is both more accountable and more coherent by adopting, for example, ‘local Human Rights Country Strategies’ that have been developed through the cooperation between EU Delegations and embassies of the Member States as well as input from local civil society organisations. It also initiated the process of ‘mainstreaming human rights considerations’ into the EU’s foreign policy agenda and has led to EU legislative and non-legislative proposals being assessed as to their potential impact on human rights.<sup>142</sup> The review further highlighted that while there have been achievements, more could and should be done in the area of human rights protection both in terms of political commitment and renewed efforts. To ensure this is the case, some of the key human rights policy areas identified in the first Action Plan have been given more prominence in the second edition, particularly those that influence support for democracy. The EU Commission, together with the High Representative of the EU for Foreign Affairs and Security Policy, proposed the new plan in a joint communication entitled, ‘Action Plan on Human Rights and Democracy (2015-2019), “Keeping human rights at the heart of the EU agenda”’ in April 2015.<sup>143</sup> This plan features five strategic areas that require action which the Council of the European Union has highlighted in its conclusions on the Action Plan issued on 20 July 2015,<sup>144</sup> it is then due for an interim

<sup>141</sup> European Union External Action, Fact Sheet ‘EU Action Plan on Human Rights and Democracy 2015-2019’ (Brussels, 20 July 2015) <[http://eeas.europa.eu/factsheets/docs/150720\\_eu\\_action\\_plan\\_on\\_human\\_rights\\_and\\_democracy\\_2015-2019\\_factsheet\\_en.pdf](http://eeas.europa.eu/factsheets/docs/150720_eu_action_plan_on_human_rights_and_democracy_2015-2019_factsheet_en.pdf)> last accessed 10 September 2015.

<sup>142</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, ‘Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda”’ (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 3 <[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)> last accessed 10 September 2015.

<sup>143</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, ‘Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda”’ (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 3 <[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)> last accessed 10 September 2015.

<sup>144</sup> European Council Conclusions ST 10897 2015 ‘Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019’ of 20 July 2015 <http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf> last accessed 14 October 2015

assessment in 2017 which will allow for adjustments to be made if deemed necessary.<sup>145</sup> The Council's approval of the new Action Plan involved a number of changes, which we briefly describe at the end of this section. Nevertheless, to give a sense of the process by which the European Commission and HR/VP proposed the Action Plan that was adopted by the Council (with significant input from the EEAS), we focus on the proposed plan, before describing the changes in the version adopted by the Council.

In keeping with the EU's aim to be an effective champion of human rights, the goals outlined in the new Action Plan are intended to be 'geographically neutral' and to apply globally; they are also designed to be adapted to the specific local issues as identified in the Human Rights Country Strategies.<sup>146</sup> Richard Youngs at Carnegie Europe describes the Action Plan as including 'many admirable elements', but also notes that,

the revised strategy does not indicate exactly how the supposedly upgraded approach will be different from the first action plan. The new plan does not say if the EU will increase resources for democracy support. It gives no detail of how or where support for social movements is to be delivered. Nor does it specify how conditionality will be used[...]EU diplomats acknowledge that the action plan needs stronger buy-in from member states—and they have structured the process to encourage this engagement. However, democracy support is becoming a specialized area involving no more than a handful of EU countries.<sup>147</sup>

Youngs argues that human rights continue to be the main focus of this new Action Plan with less emphasis on strengthening democracy which is an indication that a lot more work needs to be done in this area if the EU is to play an effective role in democracy support. This orientation towards human rights appears to be borne out by Peter Sørensen, Head of Delegation of the EU to the UN, who observes that the

new Action Plan is perhaps not ground-breaking. What it does do, however, is deliver renewed impetus to our human rights policy. The Action Plan, which has been endorsed at the highest political level, will help all relevant parts of the EU – including the European Commission, the European Parliament, the European External Action Service (EEAS) and its network of 139 EU Delegations around the globe – to mainstream human rights even more into their work, and promote coherence in our external action.<sup>148</sup>

Sørensen's statement indicates both the importance of the Council, 'the highest political level', placing its seal on the EU's human rights policy and the role it plays in terms of horizontal coherence between EU

<sup>145</sup> European Commission Press release 'EU proposes new Joint Action Plan on Human Rights and Democracy' 29 April 2015 [http://europa.eu/rapid/press-release\\_IP-15-4893\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4893_en.htm) last accessed on 14 October 2015.

<sup>146</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 'Action Plan on Human Rights and Democracy (2015-2019) "Keeping human rights at the heart of the EU agenda"' (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 5 <[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)> last accessed 10 September 2015.

<sup>147</sup> Richard Youngs, 'Assessing the EU's New Democracy and Human Rights Action Plan', Carnegie Europe, 23 July 2015, <<http://carnegieeurope.eu/strategieurope/?fa=60822>> last accessed 15 October 2015.

<sup>148</sup> Peter Sørensen, 'Reflections on the new EU Action Plan on Human Rights and Democracy', Universal Rights Group, 14 October 2015, <<http://www.universal-rights.org/blog/reflections-on-the-new-eu-action-plan-on-human-rights-and-democracy/>> last accessed 15 October 2015.



institutions. Notably absent is vertical coherence in terms of Member State action—as opposed to endorsement through the Council. Similarly problematic is his focus on human rights. Given the importance of democracy to the enjoyment of human rights, especially rights crucial to democracy like freedom of expression and political participation, this focus on the human rights part of the Action Plan is itself an example of discursive incoherence regarding human rights policies. That some Member States have engaged in democracy promotion more than others suggests that this incoherence has a vertical dimension.

## 1 The Action Plan 2015-2019

Since the Action Plan has been adopted by the Council of the European Union, it is now a policy pronouncement of the Council. We note, however, that there are differences between the draft Action Plan proposed by the European Commission and the HR/VP and the one adopted by the Council and describe these below. Nevertheless, the process by which the Action Plan was formulated was a complex one and this process complicates, in turn, the implementation of human rights. Given the key role played by the European Commission (and the EEAS) in the implementation of the Action Plan as adopted, we take the Action Plan to be both the Commission's commitment to working towards vertical coherence and its understanding of its role regarding human and fundamental rights in light of the overarching role played by the Council. The Council conclusions on the Action Plan note the special role for the European Commission and the HR/VP in 'fostering better coherence and consistency' and the assignment of responsibilities in the Action Plan reflects this.

The draft Action Plan for 2015 to 2019 incorporated a strategy that is designed to ensure that the objectives of the EU's human rights policy are mainstreamed both internally but particularly as part of the EU's external policy. As part of this approach, the EU is committed to implementing its human rights policy by collaborating with local groups and organisations, and by using local mechanisms to secure their sense of ownership and investment in the process. This includes a commitment by the EU to monitor efforts made by new applicant countries (and those potentially seeking EU membership in the near future) to implement changes that support democracy and help safeguard human rights and to provide assistance in achieving this where necessary. Furthermore, as part of the European Neighbourhood Policy, the EU will provide support to those partner countries that adopt reforms which are designed to create an environment where such policy areas as protecting fundamental rights and promoting good governance are strengthened.<sup>149</sup>

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<sup>149</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 'Action Plan on Human Rights and Democracy (2015-2019) "Keeping human rights at the heart of the EU agenda"' (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 5 <[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)> last accessed 10 September 2015.



The draft Action Plan saw the cooperation between EU institutions as crucial in order to be able to implement the actions highlighted in the new plan effectively. It suggested that the institutions should respect their individual roles and that Member States should implement the new Action Plan at national level where this is deemed appropriate.<sup>150</sup> Although the assigning of actions to both the EU institutions and the Member States in the Action Plan suggests that its goal was to achieve vertical coherence, the role of the Member States in implementation ‘where appropriate’ does not completely overcome any pre-existing structural incoherence or any incoherence arising from divergent political interests, should it appear. The five main strategic areas in need of action identified in the draft plan were: boosting ownership of local actors; addressing key human rights challenges; ensuring a comprehensive human rights approach to conflict and crises; fostering better coherence and consistency; and deepening the effectiveness and results culture in human rights and democracy.<sup>151</sup>

### (1) Boosting ownership of local actors

As part of this action, the Commission proposed that local public institutions are to be provided with ‘comprehensive support’ in order to ensure that human rights and democracy are protected and promoted by local stakeholders. To facilitate this action, the Commission proposes that the EU ‘Recognise the crucial role of NHRIs [National Human Rights Institutions] as independent institutions and affirm the EU commitment to support and engage with those institutions which are in line with the Paris Principles; [and to] strengthen the involvement of NHRIs in consultation processes at country level, in particular regarding HR [Human Rights] Dialogues and third countries reforms.’<sup>152</sup>

Included in this section of the new Action Plan are guidelines that are designed to improve the way in which the EU interacts with external partners both at governmental and non-governmental level in addressing human rights concerns, specifically in relation to civil society.<sup>153</sup> For instance, the EU should

<sup>150</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, ‘Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda”’ (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 7 <[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)> last accessed 10 September 2015.

<sup>151</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, ‘Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda”’ (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 6 <[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)> last accessed 10 September 2015.

<sup>152</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, ‘Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda”’ (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 7 <[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)> last accessed 10 September 2015.

<sup>153</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, ‘Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda”’

support efforts that strengthen the role and effectiveness of bodies that manage elections to encourage high levels of participation by the electorate; it should also promote judicial reform to ensure the systems are fair and equitable. Furthermore, the EU should foster stronger links with Civil Society Organisations (CSOs) in third countries, and facilitate the sharing of best practice between civil society and parliament members.<sup>154</sup>

## (2) Addressing key human rights challenges

The Commission set out its strategy to ensure that there is a balance between the protection of civil and political rights as well as cultural and economic rights. It was keen to foster an environment that does not tolerate discrimination on any grounds and enhances gender equality with an emphasis on ‘ensuring coherence with the overall EU gender equality policy’.<sup>155</sup> In an effort to address such issues as torture and the death penalty, the Commission suggested that all dialogues in relation to these issues be conducted in a ‘comprehensive manner’, and that efforts to prevent them should be ‘mainstreamed’ across the relevant EU actions. The Commission also proposed that Economic, Social and Cultural Rights (ESCR) should be promoted through a ‘comprehensive agenda’.<sup>156</sup> It is striking that this chapter on ‘key human rights challenges’, including such broad areas as children’s rights, economic, social and cultural rights and business and human rights, assigned fewer responsibilities to the Member States than other chapters of the document and more to the Council. Vertical incoherence may be produced by this absence of responsibility on the part of the Member States, as they may wish to pursue policies at odds with the Commission and the Council in these areas, possibly as a result of the Member States’ political interests.

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(Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 6  
<[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)>  
last accessed 10 September 2015.

<sup>154</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, ‘Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda”’ (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 9  
<[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)>  
last accessed 10 September 2015.

<sup>155</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, ‘Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda”’ (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 12  
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last accessed 15 October 2015.

<sup>156</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, ‘Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda”’ (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 11, 12, 13  
<[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)>  
last accessed 10 September 2015.

### (3) Ensuring a comprehensive human rights approach to conflicts

The Commission suggested a series of actions that should be used to develop and promote efforts to ensure that human rights violations are addressed and rectified at ‘national, regional and international level’. One such action would be to ensure that human rights reporting is conducted in a coherent manner to allow for potential risks to be highlighted earlier and for preventative measures to be adopted accordingly. It also encouraged the EU and its Member States to adopt security and policing measures that are ‘consistent with the EU’s human rights policies’.<sup>157</sup> As part of the implementation of an EU policy on Transitional Justice (TJ), the Commission urged EU mission staff working in this area to exchange best practices in order to ‘foster coherence and consistency’ across the related services provided by the Commission, the European Union External Action Service (EEAS) and the Member States. The Commission also proposes that all activities linked to the Common Security and Defence Policy (CSDP) should incorporate a coordinated approach to human rights protection and promotion, and that all CSDP missions need to adopt a strategic plan to address the gender imbalance.<sup>158</sup> For ways in which vertical incoherence can arise in the CSDP, see section IV.2 below.

### (4) Fostering better coherence and consistency

The Commission proposed that in order to ensure greater policy coherence in the EU’s efforts to protect human rights as part of its external relations, it, together with the High Representative of the Union for Foreign Affairs and Security Policy/Vice-President of the European Commission (HR/VP), need to mainstream these issues, particularly in relation to such activities as trade and investment, and activities that address migration related concerns. One such concern is ‘people smuggling’: the Commission suggested that there is a need for the human rights aspect of this issue to be ‘consistently addressed’ when EU delegations engage with the authorities in countries that potentially host people smugglers. It also proposed that all EU trade and investment agreements should include international guidelines such as those governing business and human rights as set out by the UN. Furthermore the Commission proposed that the analyses undertaken to assess human rights impacts should ‘ensure policy coherence’

<sup>157</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, ‘Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda”’ (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 15 [http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf) last accessed 15 October 2015.

<sup>158</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, ‘Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda”’ (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 14, 15,16 <[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)> last accessed 10 September 2015.

so that positive impacts can be maximised.<sup>159</sup> Given the special role for the Commission and the EEAS for fostering coherence, it is, perhaps, not surprising that this chapter also assigns few responsibilities to the Member States. It also assigns limited responsibilities to the Council, in the areas of ‘human rights impacts of trade and investment agreements’ (strikingly added in the Council Conclusions), counter terrorism and a rights-based approach to development cooperation.<sup>160</sup> It is striking that the issues assigned to the Council are relatively uncontroversial, whereas the importance of the issue of migration to the electorates and governments of the Member States suggests that the Commission and EEAS’s role will not go uncontested, as has, perhaps, already been borne out in the meetings of the Council.

### (5) Deepening the effectiveness and results culture in human rights and democracy

In order to strengthen and increase EU impact on protecting and promoting human rights, the EU needs to use increasingly limited resources more efficiently by making better, more effective use of existing tools and policies. The proposed Action Plan suggested that one way of addressing this issue would be for ‘cooperation at the UN human rights fora’ to be mainstreamed into ‘bilateral [human rights] and political dialogue and cooperation’.<sup>161</sup> It also urged that reports and suggestions issued by various regional and international human rights organisations and bodies be used more systematically and that a systematic follow-up procedure should be adopted. For instance, the EU needs to ensure that policy tools such as the Human Rights Country Strategies (HRCS) take into account views expressed during discussions with civil societies and local authorities. The proposed Action Plan argued that the impact and visibility of HRCS can be improved through cooperation with strategic partners in order to identify priority issues and by further developing and implementing EU Human Rights guidelines. Furthermore, the Commission

<sup>159</sup>European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, ‘Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda”’ (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 16-19 <[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)> last accessed 10 September 2015.

<sup>160</sup> European Council Conclusions ST 10897 2015 ‘Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019’ of 20 July 2015 23 <<http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf>> last accessed 14 October 2015. Compare European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, ‘Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda”’ (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 18 <[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)> last accessed 10 September 2015.

<sup>161</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, ‘Action Plan on Human Rights and Democracy (2015-2019) “Keeping human rights at the heart of the EU agenda”’ (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 20 <[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)> last accessed 15 October 2015. See also Grażyna Baranowska et al, *Report on the analysis and critical assessment of EU engagement in UN bodies*, (2014) Work Package No 5-Deliverable No 1 <http://www.fp7-frame.eu/wp-content/materiale/reports/13-Deliverable-5.1.pdf> last accessed October 22, 2015.

proposed that in order for EU actions to increase their cohesiveness and effectiveness, tools that promote democracy and human rights and relevant reporting methods that currently exist should be consolidated. It also suggested that a coherent application of human rights clauses that form part of all new international agreements the EU enters into would make them more effective.<sup>162</sup>

## (6) Differences between the proposed and adopted Action Plans

The Action Plan adopted by the Council differs from the proposed Action Plan in some respects. Although many of these are simply changes of wording or the division or combining of individual actions, some changes are worth noting. These chiefly appear in Section II: 'Human Rights Challenges'. In the adopted version, Action II.11.c on data protection emphasises that the EU institutions and Member States must 'work to ensure that the legislation and procedures of States regarding the surveillance of communications uphold obligations under international human rights law', whereas the draft version only mentions that these issues must be 'duly addressed'.<sup>163</sup> In the section on 'non-discrimination', greater emphasis is placed on the rights of minorities.<sup>164</sup> On the other hand, the action on 'gender equality' has been weakened, especially for EU Member States, through the removal of proposed Action II.13.c: 'Lead by example: strengthen gender equality and women's empowerment within the EU and increase accountability, by ensuring coherence with the overall EU gender equality policy.'<sup>165</sup> Perhaps the most important change is the addition of a new set of actions on Freedom of Religion or Belief. These actions, II.12.a-c, involve making sure that freedom of religion or belief remains high on the agenda, both in 'relations with third countries, as well as in multilateral fora' and promoting 'the rights of persons

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<sup>162</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 'Action Plan on Human Rights and Democracy (2015-2019) "Keeping human rights at the heart of the EU agenda"' (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 21 <[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)> last accessed 10 September 2015.

<sup>163</sup> European Council Conclusions ST 10897 2015 'Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019' of 20 July 2015 11 <<http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf>> last accessed 14 October 2015. Compare European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 'Action Plan on Human Rights and Democracy (2015-2019) "Keeping human rights at the heart of the EU agenda"' (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 11 <[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)> last accessed 10 September 2015.

<sup>164</sup> European Council Conclusions ST 10897 2015 'Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019' of 20 July 2015 15 <<http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf>> last accessed 14 October 2015.

<sup>165</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 'Action Plan on Human Rights and Democracy (2015-2019) "Keeping human rights at the heart of the EU agenda"' (Joint Communication to the European Parliament and the Council) JOIN(2015)16 final 15 <[http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy\\_en.pdf](http://ec.europa.eu/europeaid/sites/devco/files/joint-communication-ap-human-rights-and-democracy_en.pdf)> last accessed 10 September 2015.

belonging to religious minorities’ and ‘inter-cultural and inter-religious dialogue’.<sup>166</sup> The only significant change in the other sections is an added set of actions in Section V: ‘A More Effective EU Human Rights and Democracy Support Policy’. These require the actors, which include the EEAS, Commission, Council and the Member States, to ‘Improve public diplomacy and communication on human rights’, by the (Action V.34.a) ‘more effective use of the internet and social media’ and (Action V.34.b) ‘better communication at country level’ on ‘country specific human rights priorities and activities’ by engagement with civil society and the public.<sup>167</sup> Of all these changes, the most significant is the increased reference to minority rights. The greater emphasis on the rights of ethnic and religious minorities presumably reflects the importance attached to these issues by the Council as well as attacks on minorities in various third countries.

## 5. Court of Justice of the European Union<sup>168</sup>

The Lisbon treaty marked a stepping stone in the gradual expansion of EU fundamental rights protection by declaring the Charter of Fundamental Rights of the EU (hereinafter the Charter) to be legally binding.<sup>169</sup> However, this expansion raises questions regarding the interplay of fundamental human rights and free market movement of people, goods and services within the EU. Commentators have questioned ‘how the Court of Justice should balance conflicting economic freedoms with fundamental rights, considering the changed EU legal framework.’<sup>170</sup> This section highlights some of the critical considerations that showcase the challenges associated with vertical coherence vis-a-vis the CJEU’s treatment of human rights, including this question of ‘balance’ between economic freedoms and fundamental rights, and the coherence between CJEU’s rulings and those of international, regional and domestic courts.

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<sup>166</sup> European Council Conclusions ST 10897 2015 ‘Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019’ of 20 July 2015 12 <<http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf>> last accessed 14 October 2015.

<sup>167</sup> European Council Conclusions ST 10897 2015 ‘Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019’ of 20 July 2015 31 <<http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf>> last accessed 14 October 2015.

<sup>168</sup> This section was written by Karen Murphy.

<sup>169</sup> Albertine Veldman, ‘The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR’, (2013) 9 Utrecht Law Review, 104.

<sup>170</sup> Sybe A De Vries, ‘Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice’, (2013) 9 Utrecht Law Review, 169. Many of the more recent judgments of the ECJ are not yet published on open source databases and are therefore difficult to navigate. Thus, there may be more recent case law to illustrate the points raised here, but that are not explicitly cited by this note.

### *a) Conceptual problems & the margins of fundamental rights*

De Vries highlights two important issues, regarding the distinction between rights and freedoms and the hierarchies between them. First, the Charter distinguishes between rights and principles, while only rights are justiciable. This distinction is both hard to define and therefore difficult to apply, and it also appears to violate one fundamental trait of human rights - their indivisibility.

Principles are, contrary to rights, only judicially cognisable when they have been implemented by legislative or executive acts. The important question is, of course, which of the fundamental rights in the Charter should be regarded as rights and which as principles? And are there fundamental rights which were previously or according to the ECJ's case law to be considered as rights but should now be regarded as principles?<sup>171</sup>

Moreover,

the fact that fundamental rights may conflict with the 'economic' Treaty freedoms raises the question as to how the tension between fundamental rights and economic freedoms can actually be seen: as a conflict between two 'constitutional' principles that are both fundamental?<sup>172</sup>

While the TEU underlines the important status of fundamental rights in EU law<sup>173</sup>, on the other hand, arguments to support the fundamental character of freedoms include that these are economic freedoms which are:

integral to the protection of human dignity, and as indicative of a free society, as political freedoms, which are themselves liberal in nature and which therefore underscore individual economic freedoms' [...] economic freedoms can often be defined in terms of the freedom to pursue a trade or profession, which is a fundamental right laid down in Article 16 of the Charter of Fundamental Rights. Lastly and very importantly, rights that are implicit in the economic freedoms, such as the right to equal treatment (non-discrimination), the right to move and reside in

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<sup>171</sup> Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9 Utrecht Law Review, 177.

<sup>172</sup> Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9 Utrecht Law Review, 175.

<sup>173</sup> 'The same legal value as the Treaties; that the 'Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms' and that 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'; Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9 Utrecht Law Review, 169.



another Member State, transcend beyond the economic dimension of the free movement rules.<sup>174</sup>

Second, the hierarchy between fundamental rights and the four freedoms (movement of goods, service, people and capital) of the internal market is unclear. Of critical importance for human rights considerations is the idea that the EU framework confers an artificial priority for market freedoms, to the extent that the court has to balance market freedoms with fundamental rights. It is this 'competing claims' argumentation that the court has to consider, and has had to use a balancing test to draw conclusion. Thus, while at the European Court of Human Rights (ECtHR), 'the proponents of economic rights might have to justify a restriction on human rights, in [the ECJ] the fundamental, human rights proponents will have to justify their actions and establish that the restriction on free movement is justified on the basis of protecting fundamental rights.' Critically, the burden of proof has then shifted.<sup>175</sup> The key challenge for vertical coherence then is that this language suggests that a *prima facie* breach of economic rights (violating one of the four freedoms) is fundamentally wrong, but tolerated in some instances, which is a view that 'sits rather uneasily with the State's paramount constitutional obligation to protect human rights. After all, the very fact that the protection of fundamental rights in cases where a conflict with fundamental freedoms arises must be justified in the light of the economic freedoms could jeopardise the equality or indivisibility of fundamental rights and economic freedoms.'<sup>176</sup> Notwithstanding this, the court has thus far incorporated fundamental rights in its free movement case law and thereby provided for a 'human rights dimension' of the internal market.<sup>177</sup>

According to the Charter, the exercise of fundamental rights can only be limited subject to the limitation being provided by law, and subject to the limitations being necessary and proportionate.<sup>178</sup> From a human rights perspective, human rights should also supersede competing goals: 'fundamental freedoms have a fundamental character, they should not be given 'a higher status than that awarded to other fundamental rights and values in the Community legal order.'<sup>179</sup> At the same time, 'the economic origins of the

<sup>174</sup> Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9 Utrecht Law Review, 176.

<sup>175</sup> Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9 Utrecht Law Review, 187.

<sup>176</sup> Christopher Brown, 'Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria. Judgment of 12 June 2003, Full Court' (2003) 40 CML Rev, 1508, cited in Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9 Utrecht Law Review, 187.

<sup>177</sup> Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9 Utrecht Law Review, 187.

<sup>178</sup> Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9 Utrecht Law Review, 170; Charter Art 52(1).

<sup>179</sup> Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9 Utrecht Law Review, 177-178; Miguel Poiares Maduro, *We the Court. The European Court of Justice and the European Economic Constitution* (Hart 1998), 166-168.



European Union and the freedoms, which continue to remain the backbone – or spine – of the Union, entail that fundamental rights do not prevail over economic freedoms, at least not in the Union model.<sup>180</sup>

The Court has sought to determine the margins of fundamental rights protection by Member States within the EU internal market framework through a number of cases:

- In *Schmidberger*, the ECJ ruled that the free movement of goods had been restricted, but that this restriction was justified to protect fundamental rights, which formed an integral part of the general principles of EU law, and that this was deemed to be in the public interest. This case granted member states a wide margin of discretion in deciding what best served the public interest.<sup>181</sup>
- In *Omega*, the ECJ again held that the free movement of services was affected, but could be justified. According to the Court it was clear that the action in question (the commercial exploitation of games involving the simulated killing of human beings using a laser sensory tag) infringed a fundamental value enshrined in the national constitution, namely human dignity.<sup>182</sup>
- In *Sayn-Wittgenstein*, the court accepted the state's argument that their decision to disallow an individual from registering the name of choice was in the interest of public policy, again allowing the state party a wide margin of discretion in interpreting the interest of public policy.<sup>183</sup>

However, in *Viking* (which concerned strike action and collection bargaining), the ECJ stated that the European Community not only has an economic, but also a social purpose and that social policy interests must be balanced with the free movement rules.<sup>184</sup> It is clear that the court is still in the process of establishing a robust proportionality test against which to test competing claims of rights and freedoms.

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<sup>180</sup> Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9 Utrecht Law Review, 177-178.

<sup>181</sup> Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9 Utrecht Law Review, 178; Case C-112/00 *Eugen Schmidberger Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

<sup>182</sup> Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9 Utrecht Law Review, 179; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs- GmbH v Oberbürgermeisterin des Bundesstadt Bonn* [2004] ECR I-9609.

<sup>183</sup> Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9 Utrecht Law Review, 179-180; Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECR I-13693.

<sup>184</sup> Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9 Utrecht Law Review, 182.

*b) Expanded powers of the court and inconsistencies with the ECtHR and international bodies: implications for coherence with member state judicial decision making*

Notably, at the same time as the ECJ was delivering this ruling in *Viking*, the ECtHR delivered its benchmark rulings in *Demir and Baykara* and *Enerji Yapi-Yol Sen*.<sup>185</sup> These ECtHR judgments gave full protection to the right to collective bargaining and collective action with extensive reference to the standards of the ILO and the European Social Charter (ESC), as interpreted by their respective international supervisory committees.<sup>186</sup> This is noteworthy given the CJEU's recent (apparent) reluctance to refer to the case law of the ECtHR and other international judicial bodies, like these bodies.

In a survey of the CJEU's output since the Lisbon Treaty came into effect in 2009, De Búrca observed 'a remarkable lack of reference on the part of the Court of Justice to other relevant sources of human rights and jurisprudence.'<sup>187</sup> The CJEU has made only 'occasional and increasingly selective use' of the jurisprudence of the ECtHR in its rulings, and 'virtually no reference' to the other human rights jurisprudence.<sup>188</sup> The reasons given for this trend include (i) a historically minimalist adjudication style based on the continental European minimal reasoning, as opposed to discursive, style, which has been maintained as a means to protect the court's judgements from contestation and challenge; (ii) procedural rules which limit the access of external experts – NGOs, national human rights institutions, and others – to intervene or participate in proceedings; and (iii) a failure to engage with the jurisprudence of national courts.<sup>189</sup> The limited reference to international human rights protection mechanisms is surprising given the expansion of its opportunity to do so. This expanded opportunity was brought about by:

repealing the constraints under the former Article 68 of the EC Treaty as regards the making of preliminary references by national courts in the area of freedom, security and justice, by including the acts of EU agencies such as FRONTEX and the Asylum Support Office within the scrutiny powers of the Court, and by strengthening the application of the accelerated procedure and the urgent preliminary ruling procedure for cases where a person is in custody. The combination of these various features – the binding force of the Charter of Rights, the ever-expanding scope of EU powers and competences, and the extension of the

<sup>185</sup> *Demir and Baykara v Turkey*, ECtHR (Grand Chamber) 12 November 2008, Appl. No. 34503/97; *Enerji Yapi-Yol Sen v Turkey*, ECtHR 21 April 2009, Appl. No. 68959/01.

<sup>186</sup> Albertine Veldman, 'The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR', (2013) 9 *Utrecht Law Review*, 104, 105.

<sup>187</sup> Gràinne De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 2, 168, 173.

<sup>188</sup> Gràinne De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 2, 168, 173-174.

<sup>189</sup> Gràinne De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 2, 168, 176-178. These reasons have been challenged by De Búrca and others. See, for example, V.F. Perju, 'Reason and Authority in the European Court of Justice', (2009), 49 *Virginia Journal of International Law* 2, 307.

Court's jurisdiction by the Lisbon Treaty – heralds a growing role for the Court as a human rights tribunal.<sup>190</sup>

De Búrca presents key arguments in favour of more consideration being given by the CJEU to other international and comparative jurisprudence, including the importance of learning, consistency with regard to the treatment of human rights issues across the globe, and the court's growing international role and profile.<sup>191</sup> In addition, the question of coherence should also be considered here, both with regard to coherence of case law between the CJEU and domestic courts (many of which refer to international and regional jurisprudence in their adjudications) and between the CJEU and its sister courts (in the sense of their being regional and international bodies tasked with upholding and protection human rights protections) – in particular the ECtHR and international courts and UN treaty bodies. Internal coherence with the EU's own interests and policies is also important here:

We do not [...] think of the EU as a polity which is in any way hostile to or suspicious of international and comparative law, nor do we generally think of its highest court as a judicial body which is resistant to the invocation and citation of international and comparative law. On the contrary, the EU officially presents itself as an entity which is firmly committed to the observance and development of international law, and which is entirely open to transnational cooperation of all kinds, political, legal and indeed judicial. [...] If the EU perceives of itself as a uniquely internationally engaged entity, and as a political system founded on the idea of transnational legal and political cooperation, we would be inclined to expect that its Court of Justice would reflect something of this internationalist orientation too.<sup>192</sup>

This question is all the more important given the (albeit slow, but envisaged) progress towards accession of the EU to the ECHR despite the considerable obstacle posed by the CJEU's Opinion 2/13, discussed below.<sup>193</sup> The majority of case-law under review in the sections above date from prior to the adoption of the Lisbon Treaty, which has the potential - in theory - to give 'a new impetus by the inclusion of Article 6 TEU,' which (as stated above) gives binding force to the Charter, the ECHR and the ECJ jurisprudence. The crucial question for the CJEU in the coming years is 'whether the Charter is still merely a codifying document adding little to the existing case law or an autonomous, self-standing source of law generating its own meaning.'<sup>194</sup> Interestingly, in a review of case law in the three years post-Lisbon, 'the CJEU is referring even less now to the ECHR than it did before, and even more rarely to the case law of the Court

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<sup>190</sup> Gràinne De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 2, 168, 170.

<sup>191</sup> Gràinne De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 2, 168, 181-182.

<sup>192</sup> Gràinne De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 2, 168, 183.

<sup>193</sup> Opinion Pursuant to Article 218(11) TFEU, CJEU Case C-2/13 (18 December 2014).

<sup>194</sup> Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9 Utrecht Law Review, 183-184.

of Human Rights.<sup>195</sup> This raises questions for the future coherence of judicial decision making across European/EU courts and between EU and domestic courts (given the ECtHR's legally binding authority). Veldman has speculated about the potential that 'adjudication by the ECtHR could possibly distress the decisions of the EU institutions after the accession of the EU to the ECHR, due to the apparent conflict between the line of reasoning of the ECtHR and the ECJ.'<sup>196</sup> De Boer offers normative recommendations to the CJEU, arguing that 'a distinction needs to be made between different values or interests which the Treaty freedoms can be seen to protect, i.e. equal opportunity and wealth maximization, and that [...] Only in the case where the Treaty freedoms protect equal opportunity should they be seen as fundamental rights.'<sup>197</sup>

Because the legal coherency problems discussed hide a long-term political struggle over the lines that run between the EU single market and the social dimension at the national level, one may conclude that a regulatory solution is not within reach. Hence, the chances of the ECJ and the ECtHR having their 'high noon conflict' in the end do not seem that remote. Although it may take a while before the EU actually accedes to the ECHR, there are certainly interesting times ahead.<sup>198</sup>

In its Opinion 2/13 of 18 December 2014, the CJEU raised a large number of objections to the draft accession agreement on the EU's accession to the ECHR.<sup>199</sup> These objections are based on concerns about the CJEU's autonomy and constitutional role in the EU, and the threat posed to that role by accession to the ECHR. Thus the CJEU wants to retain its 'exclusive competence[...] to decide on the division of competences between the EU and its Member States.'<sup>200</sup> It also reserved the power to check EU law with compatibility with the ECHR before the ECHR does and expressed a number of concerns about how accession might threaten the relationship between the CJEU and the apex courts of the Member States

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<sup>195</sup> Gràinne De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 2, 168, 184.

<sup>196</sup> Albertine Veldman, 'The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR', (2013) 9 Utrecht Law Review, 104, 112. Veldman is speaking here about the right to strike.

<sup>197</sup> Albertine Veldman, 'The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR', (2013) 9 Utrecht Law Review, 104, 117.

<sup>198</sup> Nik J. de Boer, 'Fundamental Rights and the EU Internal Market: Just how Fundamental are the EU Treaty Freedoms? A Normative Enquiry Based on John Rawls' Political Philosophy', (2013) 9 Utrecht Law Review 1, 148, 166. 'The EU Treaty freedoms can be seen as fundamental rights where they protect the value of equality of opportunity. This is where they prohibit the – direct or indirect – discrimination of market participants from other Member States on grounds of nationality, or where they prohibit these market participants from being subjected to double regulatory burdens. In these situations the Treaty freedoms can be said to protect the right of out-of-state market participants to compete equally with domestic market participants and therefore their equality of opportunity. However, in certain cases the CJEU seems to adopt a broader market-access test. There the question seems not so much whether national measures impinge on the equal opportunity of all market actors, but rather whether the national regulation increases costs or reduces the width of the market for those market actors without sufficient justification.' *Id.*, at 166-167.

<sup>199</sup> Opinion Pursuant to Article 218(11) TFEU, CJEU Case C-2/13 (18 December 2014)

<sup>200</sup> Christoph Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13', 16 German LJ 149.

and ‘mutual trust between the Member States.’<sup>201</sup> While the CJEU’s opinion is very controversial, it nevertheless exhibits further tensions in the Court’s pronouncements.<sup>202</sup> The Court clearly sees itself as perhaps the crucial institution for maintaining and promoting vertical coherence, not least for structural reasons. Nevertheless, the Court’s protection of its structural autonomy leads to further tensions in the area of conceptual or discursive coherence, adding to the tensions internal to its own understanding of human rights discussed above. While the Court’s concern for its own autonomy is, perhaps, understandable and helps to explain its increasing reluctance to engage with international human rights jurisprudence, the Court’s opinion sets it at odds with the conceptual development of human rights in other fora, not least by the European Court of Human Rights. If, as De Vries has argued (see below), the Court is developing its understanding of the principles of proportionality and sincere cooperation along lines pursued by the ECHR, then it could benefit from learning from and coordinating its own decisions along the lines developed by the Strasbourg court. The conceptual pressures on the Court should press the Court to pursue this line, rather than act as an obstacle to it.

### *c) Conclusion: Capitalising on the value of the Charter*

The Charter (as the case law demonstrates) has the capacity to go further than simply codifying existing case law, to entrench fundamental rights that are captured by the ECHR, for example:

The Volker & Shecke case is of particular interest here. This case concerned the publication of information on beneficiaries of agricultural aid, which is provided for by an EU Regulation. The Regulation required the publication of the names of the beneficiaries receiving certain agricultural aids. The question was whether this requirement was not contrary to the right to have one’s private life respected (Article 7 of the Charter) and the right to the protection of personal data (Article 8(1) of the Charter)[...] In assessing the validity of these provisions of the Regulation, which require the dissemination of the information on the beneficiaries of agricultural aid, in the light of fundamental rights, the Court only briefly referred to the European Convention and decided the case by applying the Charter instead..... It has therefore been argued that the Charter ‘may contribute significantly to the discovery of general principles’.<sup>203</sup>

To avoid an outcome that sets fundamental rights on par with economic freedoms (as distinct from economic rights), the CJEU should ‘consider fundamental rights as self-standing justification grounds,

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<sup>201</sup> Christoph Krenn, ‘Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13’, 16 German LJ 149.

<sup>202</sup> See Jed Overmatt, ‘A Giant Step Backwards? Opinion 2/13 on the EU’S Accession to the European Convention on Human Rights’ (2015) FRAME Working Paper No. 150/2015 11, <http://www.fp7-frame.eu/wp-content/materiale/wp-papers/WP150-Odermatt.pdf> last accessed 22 October 2015.

<sup>203</sup> Sybe A De Vries, ‘Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice’, (2013) 9 Utrecht Law Review, 185.

which, similar to the Treaty exceptions....may allow for the adoption of national discriminatory measures if deemed necessary.’<sup>204</sup> Otherwise, ‘the existence of a hierarchical relationship between fundamental rights and fundamental freedoms’ would seriously jeopardize the idea that no a priori hierarchy exists between them.’<sup>205</sup>

De Vries argues that the European Court of Justice, as the crucial component of the Court of Justice of the European Union for determining the role of fundamental rights and freedoms in the evolution of EU law, continues to work towards reducing conceptual incoherence, although its reluctance to utilise normative reasoning developed by other international bodies might challenge this assertion (as discussed in section 2, above). Looking to the future, it is worth noting De Vries’ conclusions that this evolution is, in some ways, analogous to how the problem of proportionality has been approached by other courts:

In balancing fundamental rights and fundamental freedoms the Court draws inspiration from its case law on fundamental freedoms and public interests. Furthermore, the balancing exercise by the ECJ through the application of the proportionality test appears to be – at least in some cases – rather similar to the ‘margin of appreciation test’ applied by the ECtHR. Where typically national or sensitive interests and values are involved, like ‘gambling’ or public health, Member States have a greater margin of discretion than in cases where more ‘holistic’ or universal values, like the protection of consumers, are at issue.<sup>206</sup>

Thus the proportionality test will be critical in the establishment of jurisprudence as the body of case law evolves post-Lisbon. Nevertheless, there is much more work to be done in identifying which interests and values fall into De Vries’s two categories of rights and freedoms, how any potential ‘margin of appreciation’ is to be allowed to Member States, and to what extent the jurisprudence will be coherent with other international, regional (and by extension, domestic) jurisprudence.

## 6. Conclusion regarding the discourse of EU institutions

The pronouncements of the EU institutions show a wide variety of emphasis and awareness of the problems of vertical coherence in the promotion of human and fundamental rights. Incoherence appears even in these pronouncements, however, whether conceptual or discursive (the distinction between rights and principles), structural (as the inability of the EU institutions to address the problem posed by Hungary’s constitutional changes shows) and in terms of interests (in areas like migration and TTIP). The principles that are supposed to guide EU-Member State interaction—proportionality, subsidiarity and sincere cooperation—do not figure centrally in the discourse of the EU’s institutions, with the possible

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<sup>204</sup> Sybe A De Vries, ‘Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice’, (2013) 9 Utrecht Law Review, 188.

<sup>205</sup> Sybe A De Vries, ‘Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice’, (2013) 9 Utrecht Law Review, 188.

<sup>206</sup> Sybe A De Vries, ‘Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice’, (2013) 9 Utrecht Law Review, 191.

exception of the European Commission (see above). Their role in the implementation of fundamental and human rights is, at least partly, unclear as a result and, as we have seen in the evolving role of proportionality in the case law of the European Court of Justice, still in development. If De Vries is right about the direction of this development, the principle of proportionality could eventually come into tension with the principle of sincere cooperation, which itself has been extended to the external actions of the EU and to the CFR by the Lisbon Treaty. This is because the former principle is increasingly interpreted as extending discretion to states in their implementation of common policies and values, whereas the latter is the principle that requires consistency and coherence in the internal and external action of the EU and the Member States. This development is further complicated by the ECJ's concern for its autonomy, because discursive or conceptual incoherence could appear between its practice and the wider development of human rights by other courts and international fora.

Even if it is, at best, complex, discourse is important in setting agendas and presenting an image of the EU and the Member States as engaged with the promotion of human and fundamental rights. The pronouncements of the EU institutions are generally consistent in their articulation of this task, but vertical incoherence arises when the other forms of incoherence we have identified come into play. As a result, efforts to coordinate action and to implement policy can often differ greatly from the discourse. This possible disparity is the subject of the next section, where we see that, even in areas where the competences conferred on the EU or the Member States are different, incoherence still arises.

## IV. Part Three: Case studies: trade and development and the CSDP/CFSP

Two policy areas can serve as examples of how well vertical coherence is achieved by the Union and by Member States. In the area of trade, the Union has exclusive competence and, in the area of development, the Union exercises shared competence. With its renewed emphasis on Policy Coherence for Development, the EU has tried to bring vertical coherence to the development cooperation activities of both the EU and the Member States. In the CSDP and CSFP, the Member States have largely retained their competence, even if there are trade related aspects to, in our example, sanctions on the Russian Federation. This section looks at both of these policy areas and demonstrates that no matter the distribution of competences among actors, incoherence in the vertical dimensions can still be observed.

### A. Trade and Development<sup>207</sup>

The Common Commercial Policy (CCP) endows the Union with the authority to handle all aspects of external trade relations of the EU. de Búrca explains that the CCP ‘covers both unilateral EU measures, for example anti-dumping instruments, and conventional measures negotiated with third countries and international organizations, such as trade agreements.’<sup>208</sup> The Lisbon Treaty made certain reforms to the CCP. Those new provisions are codified in Articles 206 and 207 of the Treaty on Functioning of European Union (TFEU):

#### **Article 206**

By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.

#### **Article 207**

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

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<sup>207</sup> This section was written by Tamara Lewis and Ricki Schoen.

<sup>208</sup> Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (OUP 2011), 320.



2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.

For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

- (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
- (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

Scholars agree that the Lisbon Treaty transformed the CCP by granting a co-decision role to the Parliament on legislative acts implementing the CCP, requiring its consent for most types of international agreements,

including all trade agreements and augmenting its role in trade negotiations.<sup>209</sup> Additionally, Lisbon places services, intellectual property and investment explicitly within the exclusive competence of the Union. Unanimity of voting is narrowed to services, intellectual property and investment (where required for the adoption of internal rules.)<sup>210</sup> WTO agreements are no longer ratified by national parliaments.<sup>211</sup> Moreover, where human rights are concerned, the Lisbon Treaty placed the CCP under the EU's external action powers thereby positioning it squarely among the policy areas to be guided by the principles and objectives of the general provisions 'laid down in Chapter 1 of Title V of the Treaty on European Union: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.'<sup>212</sup>

The Council and Commission determined that coherence in commercial policy is best carried out in the larger process of Policy Coherence for Development (PCD). This means that the EU weds trade and development and encourages coherence in these areas both horizontally at the institutional level and vertically between the Member States and the institutions. This is despite trade being an exclusive competence and development being a shared competence. As pointed out in the Council conclusions of May 2005, twelve areas are encompassed in PCD: 'trade, environment, climate change, security, agriculture, fisheries, the social dimension of globalization (including employment and decent work), migration, research and innovation, information society, transport, and energy.'<sup>213</sup> PCD was originally formulated in the Maastricht Treaty in 1992 and has been reiterated in the Treaty on the Functioning of the European Union, Article 208. Coherence of human rights policy under the CCP is briefly discussed in the 2013 Report on Policy Coherence for Development.<sup>214</sup> Because PCD in the EU context 'encompasses a wide range of policy areas', effective coordination between parties is essential.<sup>215</sup> Vertical PCD refers to the Member States' decision-making role on the Council and the duty to ensure that 'national policies are PCD-compatible.'<sup>216</sup> While there is no information regarding the compatibility of Member State trade instruments with those of the EU and other third countries, the Commission's 2013 report on PCD does indicate that Member States are urged to encourage companies to adopt corporate social responsibility in business operations.<sup>217</sup> The report further states that 23 Member States have agreed to update national

<sup>209</sup> Arne Niemann, 'The Common Commercial Policy: From Nice to Lisbon' in Finn Laursen (ed), *The EU's Lisbon Treaty: Institutional Choices and Implementation* (Ashgate 2012), 209; Gonzalo Villalta Puig and Bader Al-Haddab, 'The common commercial policy after Lisbon: an analysis of the reforms' (2011) 36 *European Law Review*, 290.

<sup>210</sup> Arne Niemann, 'The Common Commercial Policy: From Nice to Lisbon' in Finn Laursen (ed), *The EU's Lisbon Treaty: Institutional Choices and Implementation* (Ashgate 2012), 209.

<sup>211</sup> Arne Niemann, 'The Common Commercial Policy: From Nice to Lisbon' in Finn Laursen (ed), *The EU's Lisbon Treaty: Institutional Choices and Implementation* (Ashgate 2012), 209.

<sup>212</sup> Arne Niemann, 'The Common Commercial Policy: From Nice to Lisbon' in Finn Laursen (ed), *The EU's Lisbon Treaty: Institutional Choices and Implementation* (Ashgate 2012), 210. See also Laura Beke et al, *Report on the integration of human rights in EU development and trade policies* (2014) Work Package No 9-Deliverable No 1 available at < <http://www.fp7-frame.eu/wp-content/materiale/reports/07-Deliverable-9.1.pdf>> last accessed 22 October 2015.

<sup>213</sup> European Commission, 'EU 2013 Report on Policy Coherence for Development' SWD (2013) 456 final, 20.

<sup>214</sup> European Commission, 'EU 2013 Report on Policy Coherence for Development' SWD (2013) 456 final, 1-173.

<sup>215</sup> European Commission, 'EU 2013 Report on Policy Coherence for Development' SWD (2013) 456 final, 19.

<sup>216</sup> European Commission, 'EU 2013 Report on Policy Coherence for Development' SWD (2013) 456 final, 19.

<sup>217</sup> European Commission, 'EU 2013 Report on Policy Coherence for Development' SWD (2013) 456 final, 12.

action plans on corporate social responsibility.<sup>218</sup> According to the report, legal commitments by Member States to PCD are increasing:

A growing number of Member States have in recent years introduced legal commitments to PCD in their domestic legislation. Eight reported that they have a law (mostly on development cooperation) or a government decree in place which obliges governments and public administrations to pursue the objective of PCD. For instance, most recently (in March 2013), the Belgian Parliament adopted a new Law on Development Cooperation which identifies PCD as one of six overarching objectives. In addition, the Law contains three specific operational proposals: setting up an institutional mechanism within the federal government to monitor progress on PCD; obligatory ex-ante examination of the impact of new federal policies on developing countries; and the inclusion of a specific chapter on PCD in the annual report of the Belgian Development Cooperation. Other Member States which have made PCD-related legal commitments recently include Luxembourg and Denmark.<sup>219</sup>

To further coordinate Member State action, the staff working document, Policy Coherence for Development Work Programme 2010-2013<sup>220</sup> was developed to give an operational framework to the political principles enunciated in PCD. The report further indicates that Member States have made political commitments to PCD:

Of the 28 Member States, 17 reported that they had entered into political commitments to make progress on PCD and take account of development objectives in other policies. Such objectives are often incorporated as guiding principles in a government programme (e.g. in Finland, Spain, Portugal and Poland) or set out in strategic documents on development cooperation (e.g. Ireland's 2012 Aid White Paper, Austria's new three-year (2013-15) strategy for development policy and *The right to a better life*, Denmark's 2012 strategy for development cooperation). In several cases, the commitments are reflected in a 'whole-of government' approach. Some Member States (e.g. Denmark, Finland, Sweden, Belgium and the Czech Republic) have translated their political commitments to PCD into plans of action and/or identified PCD priority areas. Frequently mentioned priority areas include trade, taxation, food security, environment, health, migration and security. A number of Member States have also established policy coordination mechanisms and systems for monitoring and reporting, including, in several cases, to national parliaments.<sup>221</sup>

In its most recent report on PCD issued in August 2015<sup>222</sup>, the Commission acknowledged that while progress had been made as regards the implementation of some of the recommendations included in the

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<sup>218</sup> European Commission, 'EU 2013 Report on Policy Coherence for Development' SWD (2013) 456 final, 12.

<sup>219</sup> European Commission, 'EU 2013 Report on Policy Coherence for Development' SWD (2013) 456 final, 20.

<sup>220</sup> SEC (2010) 421 final.

<sup>221</sup> European Commission, 'EU 2013 Report on Policy Coherence for Development' SWD(2013) 456 final, 23 last accessed 3 August 2015.

<sup>222</sup> European Commission, 'Policy Coherence for Development/2015 EU Report', SWD(2015) 159 final (Brussels, 3 August 2015) last accessed 3 August 2015.

2013 report, a number of issues have yet to be addressed satisfactorily in order to ensure that the EU's development policies are effectively integrated into all EU policy areas that affect developing countries. For instance, the Commission notes that

At the national level, several Member States indicate that among others institutional barriers in national administrations need to be addressed and systems of coordination between Ministries further consolidated. They also put forward that national Parliaments should be involved more in their Policy Coherence for Development agenda.[...] [In addition they suggest a] more systematic measurement of impacts and of progress on PCD in a way which demonstrates clear development results is a long-term challenge. [One aspect] of this could be...to promote external evaluation of PCD to assess progress and shortcomings as a step towards improvement.<sup>223</sup>

As part of the 2015 report, the Commission reviewed to what extent PCD has been adopted in addressing the five main challenges identified in 2009, the year in which the 12 areas initially deemed to be encompassed by PCD were consolidated into the new overall priority clusters; the five main challenges now being targeted are: trade and finance, food security, climate change, migration and security. Taking the 'migration' cluster as an example, the 2015 report notes that while progress has been made in regard to fulfilling EU development objectives 'many issues require further implementation.' These include:

- Maximising the impact of the interventions for refugees, IDPs [Internally Displaced Person] and returnees, in particular by strengthening the developmental approach to IDP and refugee displacement.
- Addressing underlying drivers of displacement, including investing in resolving and preventing new conflicts.
- Strengthening self-reliance and livelihoods for refugees, IDPs and returnees to reduce continued dependency on humanitarian aid.<sup>224</sup>

The EU is committed to ensuring that the post-2015 development agenda – which has at its centre the EU's pledge that it will strive to 'eradicate poverty and boost sustainable development'<sup>225</sup> – will be different from what has gone before in that the goal of global 'sustainable development' – encompassing economic, social and environmental dimensions – will be supported by 'a set of Sustainable Development Goals (SDGs)' and that these will have an implementation framework in place which will include a system

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<sup>223</sup> European Commission, 'Policy Coherence for Development/2015 EU Report', SWD(2015) 159 final (Brussels, 3 August 2015) last accessed 3 August 2015.

<sup>224</sup> European Commission, 'Policy Coherence for Development/2015 EU Report', SWD(2015) 159 final (Brussels, 3 August 2015) last accessed 3 August 2015.

<sup>225</sup> European Commission, Press Release, Brussels, 5 February 2015. Available at [http://europa.eu/rapid/press-release\\_IP-15-4141\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4141_en.htm) last accessed 4 Sept 2015.

that provides for this agenda to be monitored and reviewed regularly to ensure it is effective and that progress in being made.<sup>226</sup> The two challenges of poverty eradication and sustainable development are clearly interlinked, however, as the 2015 Commission report points out,

For the global partnership to succeed, all policies at national and subnational level need to contribute coherently to the achievement of the SDGs both domestically and internationally... The main messages coming across are that sustainable development requires: (i) policy integration and policy coordination at all levels, for all actors and across sectors, (ii) new and more horizontal institutional structures and (iii) capable institutions up to the task at all levels, including at global level and at the UN-system level.<sup>227</sup>

Interestingly, the Commission concludes its 2015 report by noting that in June 2014 a group of high level experts participated in a workshop organised by DG DEVCO (Directorate-General for International Cooperation and Development). They discussed how policy coherence could and should be promoted as part of the post-2015 development agenda. One of the key findings that came out of the meeting was that 'The EU's experience shows that PCD is not just a technical issue, but a political one, too. Only if the political will exists can institutional mechanisms be improved. There is a need to talk about PCD. PCD must be built into everyday political choices.'<sup>228</sup> Thus, even the EU recognises that the greatest obstacle to the successful promotion of the PCD is the incoherence caused by clashing political interests between the EU and the Member States and between the Member States.

## 1. Some critical analyses of PCD

From the previous discussion it is clear that the EU is strongly emphasising the need for policy coherence where sustainable development is concerned because if that is lacking then progress will at best be slow and at worst could be detrimental. Some scholarly reviews of PCD and the potential of employing the process effectively as part of the post-2015 agenda have pointed out that while the EU has put forward ambitious plans, the mechanisms to implement them are as yet not fully apparent. Knoll, for instance, notes that, 'Going forward there is thus so far little conceptual clarity on how PCD fits in the current deliberations on the post-2015 framework with regards to narrative, goals and targets, and what the prospects are for bringing PCD and post-2015 closer together.'<sup>229</sup> She also observes that EU political

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<sup>226</sup> European Commission, 'Policy Coherence for Development/2015 EU Report', SWD(2015) 159 final (Brussels, 3 August 2015) last accessed 3 August 2015.

<sup>227</sup> European Commission, 'Policy Coherence for Development/2015 EU Report', SWD(2015) 159 final (Brussels, 3 August 2015) last accessed 3 August 2015.

<sup>228</sup> European Commission, 'Policy Coherence for Development/2015 EU Report', SWD(2015) 159 final (Brussels, 3 August 2015) last accessed 3 August 2015.

<sup>229</sup> Anna Knoll, 'Bringing Policy Coherence for Development into the post-2015 agenda: Challenges and Prospects' (2014) European Centre for Development Policy Management Discussion Paper No. 163, 1 <<http://ecdpm.org/wp-content/uploads/DP-163-Policy-Coherence-for-Development-Post-2015-Agenda-Challenges-Prospects-2014.pdf>> last accessed on 6 September 2015.

leadership in regard to policy coherence for development has declined in recent years and that the evidence for progress has been limited despite tools and mechanisms having been adopted to allow for more credible sustainable development. However, she nonetheless concludes that: ‘the potential value of more coherent approaches to sustainable development remains unquestioned, particularly in an environment of declining utility of aid alone to promote development.’<sup>230</sup>

Other academic assessments<sup>231</sup> of PCD have analysed some of the tools created to allow for this process to be carried out effectively, such as impact assessment (IA) and the biennial PCD reports published by the Commission. It has been noted that evidence of incoherence is often more visible than coherence in these reviews and that although monitoring the progress of the EU’s approach to ensuring that its policies take into account the needs of developing countries when it formulates its policies, its reports on these efforts are often viewed as lacking substantive content.<sup>232</sup> There is also evidence that suggests that while impact assessment may have been adopted by the EU as a means to debate and assess policy coherence for development, it has actually provided a mechanism that has allowed previous disagreements to be merely reproduced rather than addressed and that they ultimately strengthen those actors who are already dominant players in their policy area: ‘Advocates of policy coherence in general and PCD in particular should therefore be mindful that the toolbox of implementing instruments in the EU may be more limited than sometimes assumed.’<sup>233</sup> Furthermore it has been argued that including the Commission’s DG DEVCO on the Impact Assessment (IA) Board<sup>234</sup> (which became the Regulatory Scrutiny Board (RSB) in July 2015) would strengthen their findings as it could contribute a quality control function

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<sup>230</sup> Anna Knoll, ‘Bringing Policy Coherence for Development into the post-2015 agenda: Challenges and Prospects’ (2014) European Centre for Development Policy Management Discussion Paper No. 163, 1 <<http://ecdpm.org/wp-content/uploads/DP-163-Policy-Coherence-for-Development-Post-2015-Agenda-Challenges-Prospects-2014.pdf>> last accessed on 6 September 2015, 14.

<sup>231</sup> For a selection of academic reviews of PCD see Jeske van Seters with Greta Galeazzi, Damien Helly, Anna Knoll, Brecht Lein, Anna Rosengren and Andrew Sherriff, “Use of PCD indicators by a selection of EU Member States,” ECDPM Discussion Paper No. 171, January 2015 <https://www.shareweb.ch/site/Development-Policy/Documents/DP-171-PCD-Indicators-EU-Member-States-January-2015.pdf> last accessed 18 October 2015; Charlotte Bretherton and John Vogler, “Towards an EU Policy for Sustainable Global Development?”, *The European Union and Global Development: An 'Enlightened Superpower' in the Making?* (2012): 153; and Michael King, Keijzer, Eunike Spierings and Alan Matthews. “Measuring Policy Coherence for Development”, Report commissioned by BMZ (German Federal Ministry of Economic Cooperation and Development) and DGIS (Directorate-General for International Cooperation of the Dutch Ministry of Foreign Affairs) (2012).

<sup>232</sup> James Mackie, Presentation ‘The European Experience on PCD: Lessons Learned and Challenges for the Future’, (2014), European Centre for Development Policy Management, slide 20 <<http://ecdpm.org/publications/european-experience-pcd-lessons-learned-challenges-future/>> last accessed on 6 September 2015; see also Duncan Green’s blog, Oxfam GB <http://oxfamblogs.org/fp2p/what-is-the-point-of-the-european-report-on-development-2013/> last accessed 18 October 2015.

<sup>233</sup> Camilla Adelle and Andrew Jordan, ‘Policy Coherence for Development in the European Union: Do New Procedures Unblock or Simply Reproduce Old Disagreements?’ (2014) 36 *Journal of European Integration*, (375-391), 375.

<sup>234</sup> For further information on the role and composition of the IA/RSB see European Commission, Better Regulation, Impact Assessment [http://ec.europa.eu/smart-regulation/impact/iab/iab\\_en.htm](http://ec.europa.eu/smart-regulation/impact/iab/iab_en.htm) last accessed 18 October 2015.

to the process.<sup>235</sup> In addition, as Adelle and Jordan point out, by seeking to implement PCD, the EU has added yet another element to its strategic policy coherence agenda: 'By attempting to marry the internal and external aspects of its policies, the EU must now not only coordinate horizontally (i.e. between different policy sectors) and vertically (i.e. between the different levels of governance), it must also coordinate the impacts of its policies both inside and outside Europe.'<sup>236</sup> They conclude that 'to be a credible leader in the eyes of the world, especially the developing world, the Union has "to get its internal policies right and create linkages with a coherent set of external policies" [...] A continuing inability to practice what it preaches will undermine the credibility and legitimacy that the EU seeks in its interactions with other global actors.'<sup>237</sup>

Given that the issue of migration is very much at the top of the EU policy agenda at the present time, it is interesting to note that a recent review<sup>238</sup> of migration and development (M&D) policies adopted and implemented by a number of EU Member States as well as the Commission found that while the EU is committed to developing coherent policies that bring together migration and development concerns, the approaches taken to achieve this goal can still differ widely. The study found that

Denmark and Sweden, who are considered pioneers in PCD, increasingly include migration as a pivotal area. At the time of data collection, PCD did not rank particularly high on the national political agenda in countries such as Belgium, Italy, the Netherlands or the UK. Migration was often either not considered as an area which is crucial for attaining PCD, or one where the level of political sensitivity does not allow for much progress to be made.<sup>239</sup>

It also noted that while the countries which were included in the analysis had made commitments to ensure that the policies they adopted facilitated cooperation in regard to development, projects that focused on development and migration were still largely based on national concerns and domestic considerations. Furthermore, the study concluded that "[t]hose countries that have adopted specific policies or strategies on M&D acknowledge the inter-linkages between development and migration and the role to be played by policy to promote positive outcomes for development, but limited evidence on the exact nature of these inter-linkages and conflicting visions of the objectives to be pursued through

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<sup>235</sup> Camilla Adelle and Andrew Jordan, 'Policy Coherence for Development in the European Union: Do New Procedures Unblock or Simply Reproduce Old Disagreements?' (2014) 36 *Journal of European Integration*, 388.

<sup>236</sup> Camilla Adelle and Andrew Jordan, 'Policy Coherence for Development in the European Union: Do New Procedures Unblock or Simply Reproduce Old Disagreements?' (2014) 36 *Journal of European Integration*, 388.

<sup>237</sup> Camilla Adelle and Andrew Jordan, 'Policy Coherence for Development in the European Union: Do New Procedures Unblock or Simply Reproduce Old Disagreements?' (2014) 36 *Journal of European Integration*, 389.

<sup>238</sup> Niels Keijzer, Julie Héraud and Malin Frankhauser, 'Theory and Practice? A Comparative Analysis of Migration and Development Policies in Eleven European Countries and the European Commission.' (2015) *International Migration* <http://dx.doi.org/10.1111/imig.12191> last accessed 18 October 2015.

<sup>239</sup> Niels Keijzer, Julie Héraud and Malin Frankhauser, 'Theory and Practice? A Comparative Analysis of Migration and Development Policies in Eleven European Countries and the European Commission,' (2015) *International Migration*, 8.

M&D policies has hampered PCD.”<sup>240</sup> For many Member States, migration is considered to be a challenge or a burden rather than a potential enhancement for the destination country; this has resulted in M&D being treated as a policy to reduce poverty with the focus being on economic concerns while neglecting the need for human development to be considered as well.<sup>241</sup>

## B. CFSP/CSDP

This policy area contrasts to the area of trade and development because this is where the Member States fully retain their powers. The Common Foreign and Security Policy (CFSP) was the second pillar of the three pillars that made up the EU prior to the Lisbon Treaty (TEU) coming into force in 2009.<sup>242</sup> Following the adoption of the Lisbon Treaty, which sought to remove the distinction between ‘the European Community; the Common Foreign and Security Policy (CFSP); [and] police and judicial cooperation in criminal matters’,<sup>243</sup> the EU has endeavoured to become a more unified and engaged actor in international affairs. The decision-making process in regard to foreign and security issues remains unchanged: it is still conducted by the European Council and Council of the EU, and the principle of unanimity continues to apply. However crucially, the EU now has ‘legal personality’ distinct from that of its Member States which strengthens its external role and gives it new rights at international level; as part of this enhanced capacity, the EU can now become a member of an international organisation for example. The changes adopted by the Lisbon Treaty in the area of security and defence were designed to address some of the criticisms that had been levelled against the EU of not having effective or coherent external policies.<sup>244</sup> By adopting these changes, the EU has increased its ability to have a more prominent international role and has simultaneously created a stronger identity for itself. The TEU defines the EU as an international actor by setting out specific guidelines in this regard:

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and

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<sup>240</sup> Niels Keijzer, Julie Héraud and Malin Frankhauser, ‘Theory and Practice? A Comparative Analysis of Migration and Development Policies in Eleven European Countries and the European Commission,’ (2015) *International Migration*, 10.

<sup>241</sup> Niels Keijzer, Julie Héraud and Malin Frankhauser, ‘Theory and Practice? A Comparative Analysis of Migration and Development Policies in Eleven European Countries and the European Commission,’ (2015) *International Migration*, 10.

<sup>242</sup> The Lisbon Treaty amends the two founding treaties that form the basis of the European Union (the Treaty establishing the European Economic Community (1957) and the Treaty on European Union (1992)); it was further consolidated in 2012 (Consolidated Version of the Treaty on European Union [2012] OJ C 326/01).

<sup>243</sup> Common Foreign and Security Policy (Summaries of EU legislation) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:ai0025>> last accessed on 12 September 2015.

<sup>244</sup> Derek E Mix, ‘The European Union: Foreign and Security Policy’ (2013) Congressional Research Service <<https://www.fas.org/sgp/crs/row/R41959.pdf>> last accessed on 14 August 2015.



solidarity, and respect for the principles of the United Nations Charter and international law.<sup>245</sup>

With the TEU coming into force, the Common Security and Defence Policy (CSDP) replaced the existing European Security and Defence Policy (ESDP). The CSDP, which covers the EU's military operations and civilian missions, continues to be a fundamental component of the CFSP and the ultimate aim of these recent modifications is to create an overarching 'common European defence policy' that is both more politically coherent and more internationally visible. Some new provisions linked to European defence concerns were introduced in the Lisbon Treaty such as Member States now being bound by 'a mutual assistance and a solidarity clause, the creation of a framework for Permanent Structured Cooperation, the expansion of the Petersberg tasks and the creation of the European External Action Service (EEAS) under the authority of the High Representative for Foreign Affairs and Security Policy [HR/VP].'<sup>246</sup>

Furthermore, as was the case prior to the Lisbon Treaty coming into force, the CSDP continues to be an 'intergovernmental issue' but the Member States individually provide the financial and operational support for missions which operate under the auspices of the CSDP.<sup>247</sup> The Lisbon Treaty also stipulates that the European Parliament has the right to review the CSDP and it has authority over its budget; it meets twice a year to discuss developments in the CSDP as well as the CFSP and publishes reports based on matters raised at these meetings. Since 2012, two inter-parliamentary conferences have been organised every year where the Parliament and representatives of the Member States' national parliaments debate issues linked to CFSP concerns.<sup>248</sup>

As part of the innovations introduced by the Lisbon Treaty, the solidarity clause contained in Declaration No. 37 stipulates that the EU will 'comply with its solidarity obligation towards a Member State which is the object of a terrorist attack or the victim of natural or man-made disaster',<sup>249</sup> the reference in Article 42(7) to being bound to offer mutual assistance means that

if a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter [which provides a state with the right to defend itself]. This shall not prejudice the specific character of the security and defence policy of certain Member States.<sup>250</sup>

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<sup>245</sup> European Union External Action, 'About the European External Action Service (EEAS)' <[http://eeas.europa.eu/background/about/index\\_en.htm](http://eeas.europa.eu/background/about/index_en.htm)> last accessed on 12 September 2015.

<sup>246</sup> European Union External Action, 'About CSDP - The Treaty of Lisbon'. <[http://eeas.europa.eu/csdp/about-csdp/lisbon/index\\_en.htm](http://eeas.europa.eu/csdp/about-csdp/lisbon/index_en.htm)> last accessed 12 September 2015.

<sup>247</sup> Common Security and Foreign Policy (Summaries of EU legislation) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:ai0026>> last accessed 10 September 2015.

<sup>248</sup> European Parliament: Common Security and Defence Policy (Fact Sheets on the European Union – 2015) <[http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_6.1.2.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_6.1.2.pdf)> last accessed on 12 September 2015.

<sup>249</sup> Consolidated Version of the Treaty on European Union [2012] OJ C 326/351; Declaration 37 on Art 222 of the TFEU.

<sup>250</sup> Consolidated Version of the Treaty on European Union [2012] OJ C 326/39, Art. 42.7.

The article also stipulates however that those Member States which are part of NATO (North Atlantic Treaty Organisation) will continue to adhere to these regulations should they differ from those contained in the TEU; it also exempts Member States which are traditionally neutral if the Treaty provisions contravene the security and defence policies of these states.

While the original Petersberg tasks<sup>251</sup> agreed to in 1992 referred to military action including peacekeeping and peacemaking tasks that the EU could engage in, a number of new tasks were added under the new CSDP as incorporated in the TEU: 'joint disarmament operations; military advice and assistance tasks; [and] tasks in post-conflict stabilization.'<sup>252</sup> Following the TEU coming into force, Member States that are willing and have the military capacity can be asked to carry out these tasks by the Council of the European Union. In order to implement the CSDP, the TEU provides for Member States to combine their military capabilities and resources and thereby create different types of 'Euroforces' that include Eurofor, Eurocorps, Euromarfor, and the European Air Group.<sup>253</sup> The Treaty also modifies the European Defence Agency by extending its competencies which include monitoring and assessing the contributions made by Member States towards greater military cooperation; the aim of the Agency is to increase the military capacities of the Member States by setting 'common objectives' and devising programmes that will assist in achieving them. Furthermore, the Agency aims to 'harmonise Member States' operational needs and improve the methods for procuring military equipment; manage defence technology research activities; [and] contribute to strengthening the industrial and technological base of the defence sector and improving the effectiveness of military expenditure.'<sup>254</sup> This will also assist in the creation of a framework for 'Permanent Structured Cooperation' (Article 42(6) in the Lisbon Treaty).<sup>255</sup> The inclusion of this provision in the TEU highlights the importance the EU is placing on allowing it to take on a more significant role in the area of security and defence in the international arena. Whether more 'enhanced cooperation' is to be set up between Member States is decided on by the European Council but it is one of the few areas in the CSDP where qualified majority voting rather than unanimity is applied.<sup>256</sup>

As previously noted, the EU has placed increasing emphasis on devising institutional mechanisms that ensure its policies are coherent and it does attempt, if not always successfully, to exploit synergies

<sup>251</sup> Western European Union, 'The Petersberg Declaration' (Bonn, 19 June 1992) <<http://www.weu.int/documents/920619peten.pdf>> last accessed on 10 September 2015.

<sup>252</sup> European Union External Action, 'About the CSDP – the Petersberg Tasks' <[http://www.eeas.europa.eu/csdp/about-csdp/petersberg/index\\_en.htm](http://www.eeas.europa.eu/csdp/about-csdp/petersberg/index_en.htm)> last accessed on 10 September 2015; also, Common Security and Foreign Policy (Summaries of EU legislation) < <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:ai0026>> last accessed on 12 September 2015.

<sup>253</sup> Common Security and Foreign Policy (Summaries of EU legislation) < <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:ai0026>> last accessed on 12 September 2015.

<sup>254</sup> Common Security and Foreign Policy (Summaries of EU legislation) < <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:ai0026>> last accessed on 12 September 2015.

<sup>255</sup> Consolidated Version of the Treaty on European Union [2012] OJ C 326/01, Art 42.6: 'Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework.'

<sup>256</sup> European Union External Action, 'About CSDP – The Treaty of Lisbon' <[http://eeas.europa.eu/csdp/about-csdp/lisbon/index\\_en.htm](http://eeas.europa.eu/csdp/about-csdp/lisbon/index_en.htm)> last accessed on 10 September 2015.

between policies where possible. Its efforts to do so are supported by the fact that the role of the HR/VP was enhanced by the Lisbon Treaty and that he/she is now acting as a bridge between the European Council and the Commission (the role is outlined in Art. 18(4) and the collaborative nature of the position is outlined in Art. 21(3)).<sup>257</sup> As part of the role's re-formulation, the appointee to this position 'is both the High Representative for foreign affairs and security policy and the Vice-President of the Commission in charge of external relations, thus a key player of EU's external policies' and furthermore chairs the Foreign Affairs Council.<sup>258</sup> That is, the HR/VP coordinates the foreign and security policy of the EU and as such is seen to play a significant role in shaping and developing both the CSDP and the CFSP. He/she coordinates the EU's foreign policy tools and is responsible for developing consensus among the Member States in their approach to the EU's foreign policy.<sup>259</sup>

This coordinating role for the HR/VP, and the tools available to them, show how pursuing a more coherent strategy in the EU's external policies goes beyond the confines of the CFSP. It is evident that developing a more comprehensive and coherent approach to how the EU formulates and develops its external policies is central to the mandate of the HR/VP. The effort to fulfil this objective is demonstrated by the Commission and the HR issuing a Joint Communication in December 2013<sup>260</sup> in which they outlined how the EU would collectively respond to conflict and crisis in the international arena in future using the various tools at its disposal.<sup>261</sup> Some of the EU's most integrated foreign policy tools involve its engagement in international trade agreements, humanitarian aid and assistance to developing countries, and most particularly the European Neighbourhood Policy (ENP) which focuses on economic and political relationships with the EU's southern and eastern neighbours.<sup>262</sup> These involve the different competences assigned to each area of action, as in the example of the relation between trade and development above. By enhancing the responsibilities of the High Representative and establishing the EEAS in a supporting role, the Lisbon Treaty has strengthened the ability of the HR to implement these policy tools more coherently. With the formal launch of the European External Action Service in 2011, the EU now has an increased capacity to deliver a more coherent and comprehensive foreign policy.

However, although it was envisaged that by acting as a bridge between the European Council and Commission on matters of security and foreign policy, the fact that the HR/VP is not a full-time member of either institution is seen by some as a flaw and if this is perceived as weakening the role, then it will

<sup>257</sup> Consolidated Version of the Treaty on European Union [2012] OJ C 326/01, Arts 18.4, and 21.3.

<sup>258</sup> Anne-Claire Marangoni 'One Hat Too Many for the High Representative – Vice President? The Coherence of EU's External Policies after Lisbon' (2012) EU External Affairs Review, 5 <[http://www.global-europe.org/articles\\_pdf/500137-review-issue02\\_marangoni\\_july2012.pdf](http://www.global-europe.org/articles_pdf/500137-review-issue02_marangoni_july2012.pdf)> last accessed on 20 August 2015.

<sup>259</sup> European Union External Action, 'The post of High Representative of the Union for Foreign Affairs and Security Policy' <[http://eeas.europa.eu/background/high-representative/index\\_en.htm](http://eeas.europa.eu/background/high-representative/index_en.htm)> last accessed on 23 August 2015.

<sup>260</sup> European Commission and Parliament, 'The EU's Comprehensive Approach to External Conflict and Crisis' (Joint Communication to the European Parliament and the Council) JOIN (2013) 30 final.

<sup>261</sup> Council of the European Union, 'Outcome of Proceedings' (Brussels, 23 July 2014) 12094/14 <<http://data.consilium.europa.eu/doc/document/ST-12094-2014-INIT/en/pdf>> last accessed on 10 September 2015.

<sup>262</sup> See European Union External Action, 'European Neighbourhood Policy (ENP)' <[http://eeas.europa.eu/enp/about-us/index\\_en.htm](http://eeas.europa.eu/enp/about-us/index_en.htm)> last accessed on 15 August 2015.

impact on its effectiveness.<sup>263</sup> Furthermore, the EEAS, the creation of which was aimed at developing a more coherent approach to the formulation of EU foreign policy, has not been able to fully reach its envisaged potential. The negative reaction to it by other EU services that were affected by the establishment of the EEAS is partly responsible for this: 'the service is considered an outsider by both the Commission and the Council, [which] has disrupted the management of external policies thus actually challenging institutional coherence.'<sup>264</sup> Whether or not the EEAS is effective depends very much on the willingness of Member States to cooperate with it by sharing information and by appointing their diplomats to the service. While the EEAS has been accepted on a political level by the Member States, the legal implications of the creation of the EEAS are as yet unclear.<sup>265</sup> If it turns out that by establishing the EEAS the external actions of Member States are constrained because they are now carried out by the EEAS instead, then its creation will have improved vertical coherence.<sup>266</sup> This improvement in structural coherence, however, may be at the cost of greater political incoherence arising from the differing foreign policies of the Member States.<sup>267</sup>

Having to find consensus among all 28 EU Member States has also been a challenge to further develop the CSDP into a more coherent, common response, using the mechanisms of the CFSP. Nonetheless, there are mechanisms and tools that have been adopted which are designed to make this process more efficient and effective. To this end, the CFSP provides the instruments with which EU external policy is formulated and implemented; the Treaty of Amsterdam in 1997 first identified four main instruments: principles and guidelines; common strategies (objectives); joint actions (which address specific concerns); and a common approach. These were further modified in the Lisbon Treaty by being described as four types of 'decisions' which provide policy direction... '(1) on the strategic objectives and interests of the EU, (2) on common positions, (3) on joint actions, and (4) on the implementing arrangements for common positions and actions.'<sup>268</sup> Together with the EU's institutional structures, these instruments provide the framework which allows for the implementation of the CFSP by providing humanitarian aid, development assistance and responding to crisis situations beyond the borders of the EU. However, with the continued requirement for unanimity among the Member States in shaping the CFSP, there remains a major potential challenge given that finding consensus among all 28 Member States on certain issues has proved impossible in the past. For instance, some analysts have criticised the EU for adopting a strategic approach towards its relationship with China as well as Russia that is both not defined clearly enough and which

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<sup>263</sup> Anne-Claire Marangoni, 'One Hat Too Many for the High Representative – Vice President? The Coherence of EU's External Policies after Lisbon' (2012) *EU External Affairs Review*, July, 10, 11 [http://www.global-europe.org/articles\\_pdf/500137-review-issue02\\_marangoni\\_july2012.pdf](http://www.global-europe.org/articles_pdf/500137-review-issue02_marangoni_july2012.pdf) last accessed 18 October 2015.

<sup>264</sup> Anne-Claire Marangoni, 'One Hat Too Many for the High Representative – Vice President? The Coherence of EU's External Policies after Lisbon' (2012) *EU External Affairs Review*, 14.

<sup>265</sup> Anne-Claire Marangoni, 'One Hat Too Many for the High Representative – Vice President? The Coherence of EU's External Policies after Lisbon' (2012) *EU External Affairs Review*, 16.

<sup>266</sup> Anne-Claire Marangoni, 'One Hat Too Many for the High Representative – Vice President? The Coherence of EU's External Policies after Lisbon' (2012) *EU External Affairs Review*, 16.

<sup>267</sup> Anne-Claire Marangoni, 'One Hat Too Many for the High Representative – Vice President? The Coherence of EU's External Policies after Lisbon' (2012) *EU External Affairs Review*, 16.

<sup>268</sup> Derek E Mix, 'The European Union: Foreign and Security Policy' (2013) Congressional Research Service, 6, 7 <<https://www.fas.org/sgp/crs/row/R41959.pdf>> last accessed on 14 August 2015.

lacks coherence. This latter issue arises because different Member States place different emphases on the importance of trade and economic concerns as compared to concerns linked to human rights and democracy. Whereas some Member States may have concerns as to how Russia and China address human rights issues, they believe that reforms in this area can only be achieved through continued engagement with both. Other Member States might prefer different tactics but without a coherent EU strategy it is less likely that they will be prepared to take a more vocal stand. As Mix points out, the 'CFSP remains a common policy, not a single policy—the EU is not a sovereign state, and its member countries will continue to have their own national foreign ministries and their own national foreign policies.'<sup>269</sup>

Furthermore, although the Lisbon Treaty eliminated the three-pillar structure for EU foreign policy formulation that had existed before, as Portela and Raube argue, '[the] competences of different actors and decision-making still vary from one policy field to another. Hence, the occurrence of incoherence is more likely than in other international entities.'<sup>270</sup> As already noted, the Treaty also introduced some significant institutional changes which include the re-formulation of the post of HR and the establishment of the EEAS. By creating the latter, the EU is now represented as a single entity in third countries rather than through multiple actors and it is described as a 'functionally autonomous body' in its foundation document.<sup>271</sup> Nonetheless, grey areas remain as to how the EU acts externally which are created by 'double-hatting' as is the case in regard to the position of the HR who is both responsible for steering the foreign policy of the EU and is Vice-President of the Commission:

To an extent, double hatting is being (ab)used by the EU in the expectation that it will ensure co-ordination in the absence – or in lieu - of legal-institutional reform. As has often been the case in the past, the overly ambitious “synergy” arrangements might eventually lead to an uncomfortable grey area.<sup>272</sup>

Conducting a coherent strategy in applying sanctions is not only a challenge when it comes to the EU's CCP as highlighted earlier, but it can also be an issue when the EU engages in civilian crisis management. Here the EU is striving to adopt policies that ensure foreign policy coherence and which illustrate how it is attempting to increasingly act as a state rather than an international organisation. With the adoption of the innovations introduced in the Lisbon Treaty, the EU is going beyond intergovernmental actions towards operating in a more state-like fashion particularly in the area of imposing sanctions on third

<sup>269</sup> Derek E Mix, 'The European Union: Foreign and Security Policy' (2013) Congressional Research Service, 9 <<https://www.fas.org/sgp/crs/row/R41959.pdf>> last accessed on 14 August 2015.

<sup>270</sup> Clara Portela and Kolja Raube 'Coherence in EU Foreign Policy: What Kind of Polity?' (2011) Leuven Centre for Global Governance Studies Working Paper No. 68 – June 2011, 4 <[https://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp61-70/wp68.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp61-70/wp68.pdf)> last accessed on 19 August 2015.

<sup>271</sup> Council Decision 2010/427/EU of 26 July 2010 Establishing the Organisation and Functioning of the European External Action Service [2010] OJ L 201/30 <[http://www.eeas.europa.eu/background/docs/eeas\\_decision\\_en.pdf](http://www.eeas.europa.eu/background/docs/eeas_decision_en.pdf)> last accessed on 10 September 2015.

<sup>272</sup> Clara Portela and Kolja Raube 'Coherence in EU Foreign Policy: What Kind of Polity?' (2011) Leuven Centre for Global Governance Studies Working Paper No. 68 – June 2011, 12 <[https://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp61-70/wp68.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp61-70/wp68.pdf)> last accessed on 19 August 2015).

countries.<sup>273</sup> However, challenges as to the effectiveness of sanctions remain as there continue to be instances when some Member States choose not to comply with them as happened in the case of France inviting President Mugabe from Zimbabwe to the French African summit in 2002 despite a visa ban being in place. This forced the EU to allow states the ability to grant exemptions which undermined the credibility of the ban.<sup>274</sup>

The policy of civilian crisis management also still shows that while the EU is increasingly acting as a single, coherent entity, there are instances when this is not the case. An illustrative example is the EU's response to the Georgian-Russian conflict where the EU did establish a monitoring mission but still has issues with presenting a unified approach to its relationship with Russia itself (see below). Furthermore, in the case of recognising Kosovo's independence in 2008: 'a vertically coherent civilian crisis-management will only get up and running if the Member States are convinced by the potential of EU action.'<sup>275</sup> Nonetheless, overall the EU is increasingly becoming an international actor that behaves more like a state than an organisation that develops and conducts its foreign policy through an intergovernmental framework:

While in the initial treaty reforms – Maastricht and Amsterdam – the methods used for co-ordination can be clearly associated with those of an intergovernmental organisation, the latest reforms display an increasingly institutionalized trend, even state-like features. The creation of a HR and the EEAS, whose functions clearly approximate those of a foreign minister and a ministry of foreign affairs illustrate this trend.<sup>276</sup>

As is clearly apparent from the previous discussion, the EU is becoming more state-like in its approach to conducting not only its Common Commercial Policy but also its Common Foreign and Security Policy. It is doing so by adopting more mechanisms and tools that transfer powers from the Member States to the EU institutions and allow it to act in a more coherent manner in these policy areas. Given that the EU is increasingly linking trade and development issues, it is also seeking to ensure that the Member States and the EU institutions address them in a coherent manner. Both the Council and the Commission have deemed PCD to be the most effective process with which to achieve this but in order for it to function

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<sup>273</sup> Clara Portela and Kolja Raube 'Coherence in EU Foreign Policy: What Kind of Polity?' (2011) Leuven Centre for Global Governance Studies Working Paper No. 68 – June 2011, 23 <[https://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp61-70/wp68.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp61-70/wp68.pdf)> last accessed on 19 August 2015.

<sup>274</sup> Clara Portela and Kolja Raube 'Coherence in EU Foreign Policy: What Kind of Polity?' (2011) Leuven Centre for Global Governance Studies Working Paper No. 68 – June 2011, 15 <[https://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp61-70/wp68.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp61-70/wp68.pdf)> last accessed on 19 August 2015.

<sup>275</sup> Clara Portela and Kolja Raube 'Coherence in EU Foreign Policy: What Kind of Polity?' (2011) Leuven Centre for Global Governance Studies Working Paper No. 68 – June 2011, 21 <[https://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp61-70/wp68.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp61-70/wp68.pdf)> last accessed on 19 August 2015.

<sup>276</sup> Clara Portela and Kolja Raube 'Coherence in EU Foreign Policy: What Kind of Polity?' (2011) Leuven Centre for Global Governance Studies Working Paper No. 68 – June 2011, 23 <[https://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp61-70/wp68.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp61-70/wp68.pdf)> last accessed on 19 August 2015.

properly, the stakeholders need to act in a coordinated fashion. Furthermore, as Adelle and Jordan argue, 'achieving greater coherence is, of course, not a new challenge for the EU: PCD is just one of a growing list of coherence (or integration) issues which the EU is wrestling with.'<sup>277</sup> Nonetheless, striving to achieve vertical coherence continues to be a goal the EU is pursuing as it formulates its external policies and it has had some success in this area, particularly in foreign policy, by enhancing the role of the HR/VP and creating the EEAS in support of his/her work, especially in promoting human rights. However, this transformation is still far from complete and as long as Member States continue to retain significant degrees of competencies and independence in this area, particularly defence, the EU's foreign and security policy will remain a common rather than a single one. As Mix observes,

national defense is one of the core elements of state sovereignty. Although EU Member States view pooling, coordination, and integration as important ways to maximize defense capabilities, national governments can be expected to insist on retaining the decisive role when it comes to controlling their military forces and assets.<sup>278</sup>

Producing a CSDP/CFSP that displays true vertical coherence is clearly still some way off despite significant progress having been made with the adoption of the changes contained in the Lisbon Treaty.

### **C. An example involving trade, the CSDP/CFSP and vertical incoherence**

As noted above, the very different competences assigned to EU institutions and Member States in the areas of trade, development and the CSDP/CFSP can collide when concerted action in external policies is required. In the case below, we examine the case when trade and CFSP sanctions are both sought to respond to recent actions of the Russian Federation. As noted above, trade is normally governed by the common commercial policy. The common commercial policy represents 'one of the main pillars of the EU's relations with the rest of the world'<sup>279</sup> and is the counterpart to the customs union' between Member States.<sup>280</sup>

In the field of the common commercial policy there is little possibility, in theory, to find coherence issues regarding human rights policies pursued by the Member States, on the one hand, and by the EU, on the other. Pursuant to article 3(1)(e) of the TFEU, the EU has exclusive competence in the area of the common

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<sup>277</sup> Camilla Adelle and Andrew Jordan, 'Policy Coherence for Development in the European Union: Do New Procedures Unblock or Simply Reproduce Old Disagreements?' (2014) 36 *Journal of European Integration*, 388.

<sup>278</sup> Derek E Mix, 'The European Union: Foreign and Security Policy' (2013) Congressional Research Service, 17 <<https://www.fas.org/sgp/crs/row/R41959.pdf>> last accessed on 14 August 2015.

<sup>279</sup> Art 207 TFEU. See also [http://europa.eu/legislation\\_summaries/glossary/commercial\\_policy\\_en.htm](http://europa.eu/legislation_summaries/glossary/commercial_policy_en.htm) last accessed 14 March 2015.

<sup>280</sup> European Commission, 'The EU customs union: protecting people and facilitating trade' (2014) <[http://europa.eu/pol/pdf/flipbook/en/customs\\_en.pdf](http://europa.eu/pol/pdf/flipbook/en/customs_en.pdf) htm> last accessed 22 October 2015.

commercial policy. Member States have little to no leeway to adopt legally binding acts in this respect – they can do so only if they are specifically empowered by the Union.<sup>281</sup> The common commercial policy presupposes that Member States have a ‘uniform conduct of trade relations with third countries, in particular by means of a common customs tariff and common import and export regimes’<sup>282</sup> and, pursuant to the Treaty of Lisbon, regarding direct foreign investments.<sup>283</sup>

An interesting aspect for coherence is the economic sanctions area, which, admittedly, appertains to foreign policy, but affects trade as well. In this sense, we are going to analyse the recent economic sanctions imposed on Russia over the Ukrainian crisis, which have shown a gap between the rhetoric of the EU as a whole and the practice of (some) individual Member States. The situation is complicated by the fact that trade sanctions—e.g. involving tariffs—form part of the EU’s exclusive competence, whereas other sanctions—embargoes and asset freezes—fall under the CFSP, see below. In their political responses to the crisis, Member States adopted positions on all these measures despite these differing competences.

To begin with, consequent to the annexation of Crimea and the destabilisation of a neighbouring country, the EU imposed restrictive measures against the Russian Federation. These measures range from diplomatic ones, asset freezes and visa bans, to measures targeting sectoral cooperation and exchanges with Russia (‘economic’ sanctions) and measures concerning economic cooperation.

The Council of the EU held an extraordinary meeting on 3 March 2014 and issued a condemnation of the ‘clear violation of Ukrainian sovereignty and territorial integrity by acts of aggression by the Russian armed forces’<sup>284</sup> and of the authorisation given by Russia for the use of armed forces in Ukraine. Because Russia did not take any measures to improve the situation in Ukraine, the EU imposed, on 17 March 2014, travel bans and asset freezes against some Russian and Ukrainian officials.<sup>285</sup>

Among measures targeting sectoral cooperation and exchanges with Russia, it is worth mentioning the prohibition on exports of dual goods and technology for military use in Russia, embargo on the import and export of arms and similar materials from or to Russia, the prohibition imposed on EU nationals and companies to buy or sell new bonds, equity or similar financial instruments with a maturity exceeding 30 days, issued under specific conditions, curtailing Russian access to sensitive technologies, such as the oil sector etc.<sup>286</sup> By so reacting, the EU aimed at sending a:

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<sup>281</sup> Art 2(1) TFEU.

<sup>282</sup> [http://europa.eu/legislation\\_summaries/glossary/commercial\\_policy\\_en.htm](http://europa.eu/legislation_summaries/glossary/commercial_policy_en.htm) last accessed 14 March 2015.

<sup>283</sup> See European Commission, ‘Trade’ <<http://ec.europa.eu/trade/policy/accessing-markets/investment/>> last accessed on 14 March 2015.

<sup>284</sup> European Union Newsroom, ‘EU Sanctions against Russia over Ukraine Crisis’ [http://europa.eu/newsroom/highlights/special-coverage/eu\\_sanctions/index\\_en.htm](http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm) last accessed on March 2015.

<sup>285</sup> See Council of The European Union, ‘Factsheet on EU Restrictive Measures’ (Brussels, 29 April 2014) <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/135804.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/135804.pdf)> last accessed on 14 March 2015.

<sup>286</sup> See Council Regulation (EU) No. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilizing the situation in Ukraine [2014] OJ L229; European Council, ‘Statement by the President of the



powerful signal to the leaders of the Russian Federation: destabilising Ukraine or any other Eastern European neighbouring state, will bring heavy costs to its economy. Russia will find itself increasingly isolated by its own actions. The EU remains ready to reverse its decisions and reengage with Russia when it starts contributing actively and without ambiguities to finding a solution to the Ukrainian crisis.<sup>287</sup>

Very recently, on 14 September 2015, the Council extended the sanctions regime until 15 March 2016 and revised the entry for targeted individuals.<sup>288</sup> It is foreseen that interesting developments are going to take place in this area, with the sanctions' impact on the EU economy having risen to around €21bn (in lost exports).<sup>289</sup>

Although the manifold economic sanctions imposed on Russia seem to indicate that the EU Member States speak together with one voice concerning the situation in Ukraine, the positions of the individual Member States have sometimes been criticised and labelled as hypocritical and incoherent. For example, the UK took a contradictory stand when, on the one hand, it attempted to act as a dominant EU Member, by pressing reluctant states to impose even wider-ranging sanctions against Russia, demanding France 'scrap plans to export two warships to Russia',<sup>290</sup> and, on the other, continuing to supply Russia with arms and to provide shelter to Russian oligarchs.<sup>291</sup> A strong reaction, in this regard, came from Jean-Cristophe

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European Council Herman Van Rompuy and the President of the European Commission in the Name of the EU on the Agreed Additional Restrictive Measures against Russia' (Brussels, 29 July 2014) <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/144158.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/144158.pdf)> last accessed on 14 March 2015; European Commission, 'Commission Guidance Note on the Implementation of Certain Provisions of Regulation (EU) No 833/2014', [2014] C(2014)9950; European Union Newsroom, 'EU Sanctions against Russia over Ukraine Crisis' [http://europa.eu/newsroom/highlights/special-coverage/eu\\_sanctions/index\\_en.htm](http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm) last accessed on March 2015.

<sup>287</sup> European Council, 'Statement by the President of the European Council Herman Van Rompuy and the President of the European Commission in the Name of the EU on the Agreed Additional Restrictive Measures against Russia'

<sup>288</sup> Council of the European Union, 'EU restrictive measures in response to the crisis in Ukraine' <http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/> last accessed 18 October 2015. See also Council Implementing Regulation (EU) 2015/427 of 13 March 2015, implementing Council Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2015] OJ L70; and Council Decision (CFSP) 2015/432 of 13 March 2015 amending Council Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2015] OJ L70.

<sup>289</sup> Nigel Wilson, 'EU Passes, then Postpones Tighter Russia Sanctions', (*International Business Times*, 9 February 2015) <<http://www.ibtimes.co.uk/eu-passes-then-postpones-tighter-russia-sanctions-1487217>> last accessed on 16 March 2015; Maya Lester and Michael O'Kane 'European Sanctions: Law and Practice' <<http://europeansanctions.com/>> last accessed on 16 March 2015.

<sup>290</sup> Despite the many critical voices coming from the EU, France went ahead with the sale of a Mistral warship to Russia. See The Telegraph 'German Newspaper Accuses David Cameron of "Gross Hypocrisy" over EU Sanctions' (*The Telegraph*, 24 July 2014) <<http://www.telegraph.co.uk/news/worldnews/europe/germany/10989184/German-newspaper-accuses-David-Cameron-of-gross-hypocrisy-over-EU-sanctions.html>> last accessed on 16 March 2015.

<sup>291</sup> The Telegraph 'German Newspaper Accuses David Cameron of "Gross Hypocrisy" over EU Sanctions' (*The Telegraph*, 24 July 2014) <<http://www.telegraph.co.uk/news/worldnews/europe/germany/10989184/German-newspaper-accuses-David-Cameron-of-gross-hypocrisy-over-EU-sanctions.html>> last accessed on 16 March 2015; Nick Assinder, 'David Cameron's "Hypocrisy" over Russia Sanctions Underlines European Union Rift' (*International*

Cambadelis, the leader of the French ruling socialist party, who stated that this was a ‘false debate led by hypocrites’, stressing that ‘when you see how many [Russian] oligarchs have sought refuge in London, David Cameron should start by cleaning up his own backyard.’<sup>292</sup> Other criticism addressed to the UK refers to the failure to tackle dirty Russian money in London and to the much-postponed inquiry into the death of ex-KGB spy Alexander Litvinenko, who died in London nine years ago.<sup>293</sup>

There are also mixed signals from EU leaders as to whether they are willing to go further than the existing sanctions, taking into consideration that Germany, France and Italy are dependent on gas supplies from Russia.<sup>294</sup> The Czech, Hungarian and Slovak leaders have also pointed to the discrepancy between rhetoric and practice, between the overall economic sanctions imposed by the EU in areas in which the Western countries do not have deals with Russia, but in which the Eastern countries would have to suffer more significantly. In this sense, Slovak Prime Minister, Robert Fico, stated at the Globsec security conference<sup>295</sup> that:

We are talking about solidarity and France is selling warships to Russia. We are talking about how to help Ukraine with its energy security and the very same day we are taking fundamental decisions at the European Council’ while Russian gas exporter OAO Gazprom ‘signed a contract on South Stream with German, French and Italian companies. We are prepared to show solidarity, be united players (...), but I want to see this solidarity everywhere in Europe.’<sup>296</sup>

Polish Prime Minister, Donald Tusk, also affirmed, with regard to France’s selling of warships to Russia, that:

If we drop the hypocrisy, we could build a common position on energy and defence (...) When I listen to discussions about the energy union, that it’s difficult or even impossible,

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*Business Times*, 22 July 2014) < <http://www.ibtimes.co.uk/david-camerons-hypocrisy-over-russia-sanctions-underlines-european-union-rift-1457818>> last accessed on 15 March 2015.

<sup>292</sup> Nick Assinder, ‘David Cameron’s “Hypocrisy” over Russia Sanctions Underlines European Union Rift’ (*International Business Times*, 22 July 2014) < <http://www.ibtimes.co.uk/david-camerons-hypocrisy-over-russia-sanctions-underlines-european-union-rift-1457818>> last accessed on 15 March 2015.

<sup>293</sup> Tabatha Kinder, ‘Public Inquiry into Death of Alexander Litvinenko to be Finally Announced’ (*International Business Times*, 22 July 2014) <<http://www.ibtimes.co.uk/public-inquiry-into-death-alexander-litvinenko-be-finally-announced-1457692>> last accessed 15 March 2015. See also Jamie Grierson, ‘Alexander Litvinenko lawyer points finger at Putin as inquiry ends’ (*The Guardian*, 31 July 2015) <http://www.theguardian.com/world/2015/jul/31/alexander-litvinenko-inquiry-ends-lawyer-blames-vladimir-putin> last accessed 18 October 2015; and the Litvinenko Inquiry website <https://www.litvinenkoquiry.org> last accessed 18 October 2015.

<sup>294</sup> Nick Assinder, ‘David Cameron’s “Hypocrisy” over Russia Sanctions Underlines European Union Rift’ (*International Business Times*, 22 July 2014) < <http://www.ibtimes.co.uk/david-camerons-hypocrisy-over-russia-sanctions-underlines-european-union-rift-1457818>> last accessed on 15 March 2015.

<sup>295</sup> See the Globsec website <<http://www.globsec.org/globsec2015/>> last accessed on 16 March 2015.

<sup>296</sup> Zoltan Simon, Radoslav Tomek and Peter Laca, ‘East Europe Leaders Decry EU “Hypocrisy” in Russia Rift’ (*Bloomberg Business*, 15 May 2014) <<http://www.bloomberg.com/news/articles/2014-05-15/east-europe-leaders-decry-eu-hypocrisy-in-russia-rift>> last accessed on 15 March 2015.

that the costs are too high, the only honest answer, which stems from our historical experience, is that solidarity doesn't come cheap.<sup>297</sup>

Hungary's Prime Minister Viktor Orbán took a rather different path, switching from the solidarity discourse to the unfairness aspect (it being unfair for the Western states to take advantage of the deals sealed with Russia in EU-sanctions free areas, while the central or Eastern countries would need to suffer from the EU sanctions in areas in which they have economic interests): 'Why should central Europe lose out on the chances for economic cooperation when the economic cooperation' [with Russia] 'is uneven in Europe? Currently Germany is the one profiting the most'.<sup>298</sup>

Greece was another critical voice regarding the economic sanctions imposed on Russia. Alexis Tsipras, the current Greek Prime Minister, accused Brussels of double standards and stated that it was unfair not to pursue Russian oligarchs with money invested abroad:

If you want to punish Russia, you need to punish all the countries where Russian multi-billionaires have invested their assets. I want the EU to speak with one voice, but Greece is also suffering from sanctions – Russian tourists are staying away, our agricultural sector is suffering.<sup>299</sup>

Greece also urged for delaying the process of taking tighter sanctions on Russia, an initiative which was apparently favoured by Italy and Austria.<sup>300</sup>

Although Greece denounced the sanctions and implied that this was too detrimental to the Greek economy as well,<sup>301</sup> it finally took the common position of the EU: it agreed on the expansion of the list of sanctioned individuals and on the six-month extension of the economic sanctions. The European's Union HR/VP stated, with regard to Greece, that while 'sticking to their position, their attitude was extremely

<sup>297</sup> Zoltan Simon, Radoslav Tomek and Peter Laca, 'East Europe Leaders Decry EU "Hypocrisy" in Russia Rift' (*Bloomberg Business*, 15 May 2014) <<http://www.bloomberg.com/news/articles/2014-05-15/east-europe-leaders-decry-eu-hypocrisy-in-russia-rift>> last accessed on 15 March 2015.

<sup>298</sup> Zoltan Simon, Radoslav Tomek and Peter Laca, 'East Europe Leaders Decry EU "Hypocrisy" in Russia Rift' (*Bloomberg Business*, 15 May 2014) <<http://www.bloomberg.com/news/articles/2014-05-15/east-europe-leaders-decry-eu-hypocrisy-in-russia-rift>> last accessed on 15 March 2015.

<sup>299</sup> Nigel Wilson, 'Greek PM Alexis Tsipras Condemns EU Sanctions on Russia' (*International Business Times*, 18 February 2015) <<http://www.ibtimes.co.uk/greek-pm-alexis-tsipras-condemns-eu-sanctions-russia-1488509>> last accessed on 16 March 2015.

<sup>300</sup> Robin Emmott and Pavel Polityuk, 'EU Wins Greek Backing to Extend Russia Sanctions, Delays Decision on New Steps' (*Reuters*, 29 January 2015) <<http://www.reuters.com/article/2015/01/29/us-ukraine-crisis-idUSKBN0L22B720150129>> last accessed on 16 March 2015.

<sup>301</sup> James MacKenzie, 'Greece Misinterpreted Over Russia Sanctions' (*Reuters*, 29 January 2015) <<http://www.reuters.com/article/2015/01/29/us-ukraine-crisis-greece-idUSKBN0L214020150129>> last accessed on 16 March 2015.

constructive',<sup>302</sup> and optimistically interpreted the EU's unanimous vote to extend economic sanctions against Russia as a sign that Europe retained its unity.

However, such unity is debatable, given the vertical incoherence issues, the gap between the EU's position as a whole and the individual Member State's actions and policies. There is pressure on the EU to condemn Russia's actions with one voice, but there is also growing frustration that, first, the EU actions might be inefficient and detrimental for the EU's economy as a whole, and second, that these actions are unfair to Central or Eastern EU Member States, whose economies are affected more severely by the EU sanctions. Even more worryingly, the divergent individual Member States' rhetoric and actions, such as the UK, France, and Greece indicate a lack of commitment to the overall EU policies and unwillingness to take actions locally. Nevertheless, Member States must remember that 'within their own frontiers, the EU and its Member States are committed to be exemplary in ensuring respect for human rights. Outside their frontiers, promoting and speaking out on human rights and democracy is a joint responsibility of the EU and its Member States.'<sup>303</sup>

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<sup>302</sup> Andrew Higgins, 'Greece Steps Back Into Line With European Union Policy on Russia Sanctions', (*New York Times*, 29 January 2015) < [http://www.nytimes.com/2015/01/30/world/europe/european-union-russia-sanctions-greece.html?\\_r=0](http://www.nytimes.com/2015/01/30/world/europe/european-union-russia-sanctions-greece.html?_r=0) > last accessed on 12 September 2015.

<sup>303</sup> EU Strategic Framework and Action Plan on HR and Democracy, 2 See also Inter-parliamentary Committee Meeting with National Parliaments, 25 September 2013, Directorate-General for External Policies of the Union Secretariat of the Sub-Committee on Human Rights, 2.

## V. Part Four: Case study of vertical coherence/incoherence—protecting economic social and cultural rights during times of crisis<sup>304</sup>

In times of crisis, human rights protections are often subjected to increased pressure and are at a higher risk of erosion. Scholars and practitioners have recognised that this is the case since the international human rights framework was developed.<sup>305</sup> This is particularly visible with regard to civil and political rights, where official and unofficial derogations are usually easier to identify and to challenge (through the available judicial systems) than is the case with economic, social and cultural rights (hereinafter ESCR). This latter group of rights is also vulnerable to erosion. However, when economic, social or cultural supports, services and protections are reduced or dismantled, this is not always viewed as a reduction in human rights protection by policy makers. This is in part a consequence of the fact that ESCR are often perceived to be non-justiciable rights,<sup>306</sup> and because the extent of protection associated with each right is difficult to quantify given the ‘progressive realisation’ obligation.

This chapter considers the protection afforded to ESCR within the EU during and since the global financial crisis which started in 2007/2008, examining the Irish situation as a case study. By examining the extent to which ESC rights were/were not protected in the face of the crisis (and by which mechanisms), the chapter highlights inconsistencies with regard to EU-wide human rights obligations in theory, and their protection in practice, within structures, policies and rhetoric. Against this background, vertical (and to a lesser extent horizontal) incoherence is evidenced in the EU’s handling of at least some aspects of the financial crisis, impacting significantly on ESCR protection.

The chapter focuses on the case of the EU-backed financial bailout package agreed between Ireland and the troika of the European Central Bank, the European Commission and the International Monetary Fund (hereinafter ECB/EU/IMF), and discusses (i) the human rights implications of the package and the

<sup>304</sup> This section was written by Karen Murphy.

<sup>305</sup> The seminal work of Joan Fitzpatrick addresses human rights in times of security crisis/emergency: Fitzpatrick, J. *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency (Procedural Aspects of International Law)* (University of Pennsylvania 1994); OHCHR has documented the challenges associated with protection of rights in times of economic crisis: UN Office of the High Commissioner for Human Rights, ‘Report on austerity measures and economic and social rights,’ (2013) <[http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82\\_en.pdf](http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf)>.

<sup>306</sup> Article 52(3)(4)(5) distinguishes between rights and principles within the EU Charter, giving more concrete direction for the protection of ‘rights’. Article 52(2) states: ‘The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.’ Charter of Fundamental Rights of the European Union (2000/C 364/01). Thus, while it ‘abandons the traditional distinction between, on the one hand, civil and political rights and, on the other, economic and social rights,’ it ‘makes a clear distinction between rights and principles. The latter, according to Article 52(5), are to be implemented through additional legislation and only become significant for the courts in cases involving the interpretation and legality of such laws.’ Sy, S. ‘Fact sheets on the European Union: The EU Charter of Fundamental Rights’ (European Parliament 2015) <[http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuld=FTU\\_1.1.6.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuld=FTU_1.1.6.html)>

associated policies adopted by the Irish State, and (ii) the inconsistencies observed within the EU system vis-a-vis human rights obligations and financial stability objectives. Section 1 provides a brief contextual overview – of the economic and social context in Ireland and of the ESCR obligations of Ireland and the EU. Section 2 suggest vertical structural and policy incoherence by identifying inconsistencies between economic and financial measures undertaken by the State -and backed by the EU- and State and EU human rights obligations. Section 3 provides some concluding remarks which are intended to initiate further discussion. This chapter is intended to spark reflection on inconsistencies with regard to how the EU treats ESCR protection and financial stability and how its impact at domestic level is inconsistent with States' human rights obligations. It is not an exhaustive review of the causes of violations of ESCR, nor does it attempt to assign responsibility for rights violations to financial stability/austerity policies and programmes. Its findings are ultimately suggestive, rather than conclusive. Ultimately, it identifies vertical incoherence arising in policies adopted and interests evidenced by EU institutions and one EU member state (Ireland) with regard to protection of ESCR in times of economic crisis.

## **1. The case of Ireland**

### **1.1 The Irish financial crisis & EU intervention**

In December 2010, more than two years after the beginning of the global financial crisis, the Irish government entered into a financial assistance programme with the European Central Bank (ECB), European Commission (EC) and the International Monetary Fund (IMF). Through the programme, the government was granted an €85 billion bailout/policy package for the period 2010-2013 (47.5% of which came from EU institutional financing and 6% from bilateral loans from EU Member States). As part of the programme, the government implemented a National Recovery Plan 2011-2014, which comprised €10 billion in expenditure cuts and €5 billion in tax increases. This plan served as a basis for the policy conditionality of the financial assistance programme. The bailout/policy package was publicly supported by the Eurogroup and the ECOFIN Council. The package was adopted by the Irish Parliament in December 2010.<sup>307</sup> The key objective of the programme was to 'restore financial market confidence in the Irish

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<sup>307</sup> European Commission Directorate-General for Economic and Financial Affairs, 'The Economic Adjustment Programme for Ireland,' (2011) Occasional Paper 76, 18 <[ec.europa.eu/economy\\_finance/publications](http://ec.europa.eu/economy_finance/publications)> last accessed on 11 September 2015.

economy's banking sector and the sovereign.<sup>308</sup> Four key elements were adopted to achieve that objective:

- (i) Downsizing and reorganising of the banking sector;
- (ii) Restoring fiscal sustainability – which included ‘expenditure restraint’ and broadening of the tax base;
- (iii) Structural reform to underpin growth – which included removing ‘potential structural impediments to competitiveness and employment creation,’ including adjusting the minimum wage and intensification of activation measures; and,
- (iv) Support through external financial assistance.<sup>309</sup>

Some of the budgetary policies and changes that have resulted from the response to the financial crisis in Ireland have included the capping of public sector wage bills, reductions in social protection and assistance, and regressive taxation measures such as increases on VAT on basis goods.<sup>310</sup> In 2013, the National Economic and Social Council documented the social impacts of the financial crisis and the subsequent fiscal adjustments, highlighting an increase in unemployment, underemployment and precarious employment; a decrease in household wealth and income, particularly affecting the most

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<sup>308</sup> European Commission Directorate-General for Economic and Financial Affairs, ‘The Economic Adjustment Programme for Ireland,’ (2011) Occasional Paper 76, 19 <[ec.europa.eu/economy\\_finance/publications](http://ec.europa.eu/economy_finance/publications)> last accessed on 11 September 2015.

<sup>309</sup> European Commission Directorate-General for Economic and Financial Affairs, ‘The Economic Adjustment Programme for Ireland,’ (2011) Occasional Paper 76, 19 <[ec.europa.eu/economy\\_finance/publications](http://ec.europa.eu/economy_finance/publications)> last accessed on 11 September 2015.

<sup>310</sup> Aoife Nolan, Rory O'Connell and Colin Harvey (eds) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart 2013), 1.

vulnerable; an increase in poverty and deprivation; reduction in public spending in some areas (such as health), or lack of increase in spending to match increased demand in other areas (such as education).<sup>311</sup>

## 1.2 ESCR obligations in Ireland and the European Union

Ireland has obligations to respect, protect and fulfill ESCR, as provided by international, European and domestic law.

**Table 2: ESCR Obligations**

<ul style="list-style-type: none"> <li>➤ Obligations under International Law:             <ul style="list-style-type: none"> <li>○ International Covenant on Economic, Social &amp; Cultural Rights (ICESCR)</li> <li>○ other International human rights treaties (Children, Women)</li> </ul> </li> <li>➤ Obligations under European Law:             <ul style="list-style-type: none"> <li>○ EU law i.e. EU Charter of Fundamental Rights</li> <li>○ Council of Europe Law (European Social Charter &amp; European Convention on Human Rights)</li> </ul> </li> <li>➤ Obligations under Irish Law:             <ul style="list-style-type: none"> <li>○ Constitution</li> <li>○ Legislation</li> </ul> </li> </ul>
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A central component of ESCR is the progressive realisation of rights using the maximum available resources. This means that States have time to move towards eventual full realisation of the rights enshrined in the conventions. To this end, States must work as quickly and effectively as possible towards the full achievement of ESC obligations for all, using the ‘maximum of available resources’, which means the totality of actual resources available, and not necessarily the total amount of resources that governments wish to make available. This includes the responsibility to generate sufficient revenues to fund essential services, through taxation and also by regulating markets in ways that serve social goals.<sup>312</sup>

Once ESC rights are provided by a State, then ‘any retrogressive measures that dilute, limit or reduce current ESC rights, require exceptionally strong justifications.’<sup>313</sup> The principles of equality and non-

<sup>311</sup> National Economic and Social Council, ‘The Social Dimensions of the Crisis: The Evidence and its Implications,’ (May 2013) No 134 <[http://files.nesc.ie/nesc\\_reports/en/NESC\\_134\\_The\\_Social\\_Dimensions\\_of\\_the\\_Crisis\\_Main\\_%20Report.pdf](http://files.nesc.ie/nesc_reports/en/NESC_134_The_Social_Dimensions_of_the_Crisis_Main_%20Report.pdf)>. last accessed on 11 September 2015.

<sup>312</sup> Alice Donald, ‘Austerity opposition needs a coherent narrative. Human rights provides one’ (*The Guardian*, 25 January 2011) <<http://www.theguardian.com/commentisfree/libertycentral/2011/jan/25/human-rights-fairness-austerity-cuts>> last accessed on 11 September 2015.

<sup>313</sup> Emphasis added.



discrimination underpin ESCR and States can only make distinctions with regard to ESCR, provided that these are reasonable, legitimate and proportionate.<sup>314</sup> Furthermore, even when resources are severely constrained, the most vulnerable members of society must be protected.<sup>315</sup>

The Irish State has maintained that in accordance with its dualist legal system, Ireland is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) without incorporating it into its domestic law.<sup>316</sup> The UN Committee on Economic, Social and Cultural Rights – tasked with monitoring the implementation of the ICESCR by its States Parties – has reminded the Irish government that ‘irrespective of the system through which international law is incorporated in the domestic legal order (monism or dualism), following ratification of an international instrument, the State party is under an obligation to comply with it and to give it full effect in the domestic legal order.’<sup>317</sup> This position is articulated in General Comment No 9 of the ICESCR<sup>318</sup> and was repeated by the UN Independent Expert on Human Rights and Extreme Poverty in her country report in 2011:

given the character of international human rights obligations and the principle of good faith elaborated in the Vienna Convention on the Law of Treaties, it should comply with its treaty obligations in all spheres of activity, at the national and international levels, whether or not the specific wording of the treaty has been incorporated in domestic laws.<sup>319</sup>

However, despite their grounding in international, regional and domestic treaties and Constitutions, ESCR have been difficult to enforce in practice.

Despite the development of international legal mechanisms and a stream of ground-breaking court adjudications, political accountability of governments and other economic and social policy-makers remains elusive. At both the national and

<sup>314</sup> UN Office of the High Commissioner for Human Rights, ‘Report on austerity measures and economic and social rights,’ (2013), 18-19 <[http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82\\_en.pdf](http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf)> last accessed on 10 September 2015; See also: Liam Thornton, ‘The Constitutional Convention: What are Economic, Social & Cultural Rights?’ (*Human Rights in Ireland*, 22 February 2014) <<http://humanrights.ie/constitution-of-ireland/the-constitutional-convention-what-are-economic-social-cultural-rights/>> last accessed on 11 September 2015.

<sup>315</sup> UN Office of the High Commissioner for Human Rights, ‘Report on austerity measures and economic and social rights,’ (2013), 25 <[http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82\\_en.pdf](http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf)> last accessed on 10 September 2015.

<sup>316</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), ‘List of issues in relation to the third periodic report of Ireland: Addendum: Replies of Ireland to the list of issues,’ (8 April 2014), E/C 12/IRL/Q/3/Add 1, para 1.

<sup>317</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), ‘Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland’ (5 June 2002) E/C 12/1/Add 77, para 23.

<sup>318</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment No. 9: The domestic application of the Covenant’ (3 December 1998) E/C 12/1998/24, para 3.

<sup>319</sup> UN Human Rights Council, ‘Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona: Addendum: Mission to Ireland.’ (17 May 2011) A/HRC/17/34/Add.2, para 7.

international level, economic and social rights are still far from being guiding principles of public policy, particularly in the areas of governance where they are most relevant, such as poverty reduction, health, housing, education and other forms of social protection. While judges in some jurisdictions have become increasingly sensitive to economic and social rights claims, political decision-makers in most countries remain wilfully oblivious to their economic and social rights obligations. These are rarely invoked or perceived as being of relevance to the task of economic and social policy-making.<sup>320</sup>

Regardless of the implementation of ICESCR provisions or not, Ireland has international legal human rights obligations arising from international human rights law, including the provisions of customary international law, even if these provisions have not all been incorporated into domestic legislation. Article 45 of the Constitution sets out guiding principles on social policy. These are not enforceable by the judicial system and are intended as guidance only.<sup>321</sup>

Given the challenge with enforcement, any demonstrable erosion of ESCR in times of crises cannot be attributed to economic policies alone. With that in mind, the sections that follow provide a cursory examination of the relationship between ESCR protection at domestic level and austerity policies at EU and Member State level and to what extent, ESCR inform policy making around austerity at structural or policy level.

## 2. Vertical incoherence: EU structures and EU Member States

This section presents a number of ways in which ESCR were eroded in Ireland in part due to the ECB/EC/IMF backed policies and subsequent reforms. This section does not refer explicitly to the aspects of ESCR that were violated by each process mentioned; rather, each type of erosion referred to should be understood as a compromise of Ireland's international and regional ESCR obligations. This section

<sup>320</sup> Ignacio Saiz, 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis,' (2009) 1 J of Human Rights Practice, 277, 278.

<sup>321</sup> 'Like other common law legal systems, the Irish legal system is a dualist one. This means that the terms of an international agreement do not become part of the domestic law of the State unless expressly incorporated by or under an Act of the Oireachtas. This principle is contained in article 29.6 of the Constitution.' Department of Foreign Affairs and Trade, 'Treaties', < <https://www.dfa.ie/our-role-policies/international-priorities/international-law/treaties/>> See also Constitution of Ireland (1937) Article 29.

discusses erosion of accountability mechanisms, the failure at State level to protect ESCR using the maximum available resources, and the eclipsing of the right to non-discrimination by economic policies.

### **2.1 Erosion of accountability mechanisms at domestic level and absence of complaints/oversight mechanisms and budgetary oversight at EU level**

The poorest 10% of our population suffered most due to the choices made by Government during the economic recession. The State focused on the protection of the banks. People were told they had no choices.<sup>322</sup>

As discussed in the sections that follow, ESCR were eroded by policies adopted in part, or in totality, as a result of the EU-backed austerity programme. However, not only were budgetary decisions unresponsive to some ESCR obligations, they also served to erode the very accountability mechanisms that hold policy makers accountable for ESCR provision. Significant budgetary cuts affected the functioning of the Irish Human Rights Commission, the Equality Authority, the Ombudsman for Children and the National Disability Authority. 'These cuts have substantially reduced Ireland's capacity to protect the most disempowered segments of Irish society at a time when they are particularly susceptible to violations of their rights, and will have a negative impact on their enjoyment of economic, social and cultural rights in the long-term.'<sup>323</sup> The Irish Human Rights Commission has claimed that these cuts had the consequence of 'silencing statutory voices on human rights and equality at the outset of Ireland's recent economic crisis, when the introduction of austerity budgets and retrogressive cuts were set to result in widespread effects to the most vulnerable and those most at risk of discrimination.'<sup>324</sup>

These accountability-supporting mechanisms play an essential role in promoting and protecting ESCR. They promote 'rights-compliant responses to the crisis and protect people from discriminatory measures which result in inequalities. They can take an active role in assessing policies and budgets according to human rights standards and create platforms for civil society and government to debate austerity measures.' In this way, they protect individuals from infringements of their rights resulting from austerity

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<sup>322</sup> Noeline Blackwell (Director of the Free Legal Advice Centre) speaking to the UN Committee for ESCR in June 2015, cited in Liam Thornton, '#UNIRL Update 2: Views from Civil Society – Ireland and ICESCR' (*Human Rights in Ireland*, 8 June 2015) <<http://humanrights.ie/socio-economic-rights/unirl-update-2-views-from-civil-society-ireland-and-icescr/>> last accessed on 11 September 2015.

<sup>323</sup> UN Human Rights Council, 'Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona: Addendum: Mission to Ireland' (17 May 2011) A/HRC/17/34/Add 2, para 11.

<sup>324</sup> Irish Human Rights Commission, 'Submission to the UN Committee on Economic, Social and Cultural Rights on Ireland's Third Periodic Report on the International Covenant on Economic, Social and Cultural Rights - List of Issues Stage,' (October 2014), para 4 <[http://www.ihrec.ie/download/pdf/ihrec\\_ireland\\_list\\_of\\_issues\\_1oct14.pdf](http://www.ihrec.ie/download/pdf/ihrec_ireland_list_of_issues_1oct14.pdf)> last accessed 11 September 2015.

policies.<sup>325</sup> Thus, while accountability structures at EU (horizontal) level were largely absent to prevent erosion of ESCR,<sup>326</sup> accountability mechanisms at State level were eroded in response to the financial crisis and subsequent economic policies.

In the political sphere, a parliamentary sub-committee on Human Rights and Equality was established to examine how issues, themes and proposals take account of human rights provision. The sub-committee reviews legislation, and reports to the Joint Oireachtas Committee on Justice, Defence and Equality.<sup>327</sup> This tool does not address budgetary decisions however, which, as illustrated above, are critical to the progressive realisation of ESCR. The State's response to the financial crisis, and the programme agreed with the ECB, EC and IMF,<sup>328</sup> did not encompass a human rights or equality assessment.<sup>329</sup> No human rights or equality assessment was undertaken by the EU or by the Irish authorities in advance of the adoption of the EU-backed austerity programme, to ascertain the potential impact of this decision on the most marginalised sections of society. While the Government's National Recovery Plan adopted in 2011 described the measures adopted as 'proportionate', 'it is clear, however, that this was not the case as austerity measures have been most detrimental to the poorest ten per cent of the population who suffered an 18 per cent reduction in 'average real income' from 2008 to 2011.'<sup>330</sup>

While human rights do not dictate exactly what policy and budgetary measures States should pursue, such measures must comply with States' international human rights

<sup>325</sup> Council of Europe Commissioner for Human Rights, 'Safeguarding human rights in times of economic crisis,' (2013), 8 <<https://wcd.coe.int/ViewDoc.jsp?id=2130915>> last accessed on 11 September 2015.

<sup>326</sup> See section 2.2.

<sup>327</sup> Irish Human Rights Commission, 'Ireland and the International Covenant on Economic, Social and Cultural Rights' (2015), 12-13 <[http://www.ihrec.ie/download/pdf/ihrec\\_report\\_ireland\\_and\\_the\\_international\\_covenant\\_on\\_economic\\_social\\_and\\_cultural\\_rights.pdf](http://www.ihrec.ie/download/pdf/ihrec_report_ireland_and_the_international_covenant_on_economic_social_and_cultural_rights.pdf)> last accessed 11 September 2015.

<sup>328</sup> See section 1.1 of this chapter.

<sup>329</sup> Irish Human Rights Commission, 'Ireland and the International Covenant on Economic, Social and Cultural Rights' (2015), 12 <[http://www.ihrec.ie/download/pdf/ihrec\\_report\\_ireland\\_and\\_the\\_international\\_covenant\\_on\\_economic\\_social\\_and\\_cultural\\_rights.pdf](http://www.ihrec.ie/download/pdf/ihrec_report_ireland_and_the_international_covenant_on_economic_social_and_cultural_rights.pdf)> last accessed 11 September 2015.

<sup>330</sup> Free Legal Advice Centres (FLAC), 'Our Voice, Our Rights: A Parallel Report in response to Ireland's Third Report under the International Covenant on Economic, Social and Cultural Rights' (2014). The Dept of Social Protection utilises a 'social impact assessment' but this does not explicitly refer to human rights; Dept of Social Protection, 'Social Impact Assessment of the Main Welfare and Tax Measures' <<http://www.welfare.ie/en/Pages/Social-impact-assessment-of-the-main-.aspx>> last accessed on 11 September 2015.

obligations. Human rights are not a policy option, dispensable during times of economic hardship.<sup>331</sup>

An economic council, the ‘Economic Management Council’ comprising four high-ranking government Ministers was established in 2011. The Council ‘meets in private to make decisions related to ‘economic planning and budgetary matters, the economic recovery programme.’ According to the Free Legal Aid Centres (FLAC), ‘This decision-making forum has a significant impact on the socio-economic rights of many people reliant on State services including healthcare, social security, housing and education. But there is little or no evidence that the human rights of those affected have been taken into account by the Council.’<sup>332</sup>

Finally, civil society has widely criticised the failure to engage with citizens on economic decision making that affects ESCR. While previous national economic strategies had been negotiated with social partners, the National Recovery Plan 2011-2014 (NRP) which implemented the new economic policies was negotiated only with the ECB, IMF and the EC.<sup>333</sup> The UN Independent Expert on human rights and extreme poverty has noted that the principles of participation, transparency and accountability should be central to the design, implementation and evaluation of State policies. These principles are ‘integral both to ensuring effectiveness of the adopted policy, and responding to the obligations of States with regard to the rights to take part in public life, seek and receive information, and have access to effective remedies in cases of violation.’<sup>334</sup> The independent expert notes with concern the lack of a meaningful effort to

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<sup>331</sup> UN Human Rights Council, ‘Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona: Addendum: Mission to Ireland’ (17 May 2011) A/HRC/17/34/Add 2, para 21.

<sup>332</sup> Free Legal Advice Centres (FLAC), ‘Our Voice, Our Rights: A Parallel Report in response to Ireland’s Third Report under the International Covenant on Economic, Social and Cultural Rights’ (2014), 12.

<sup>333</sup> Irish Human Rights Commission, ‘Ireland and the International Covenant on Economic, Social and Cultural Rights’ (2015) [http://www.ihrec.ie/download/pdf/ihrec\\_report\\_ireland\\_and\\_the\\_international\\_covenant\\_on\\_economic\\_social\\_and\\_cultural\\_rights.pdf](http://www.ihrec.ie/download/pdf/ihrec_report_ireland_and_the_international_covenant_on_economic_social_and_cultural_rights.pdf) last accessed 11 September 2015.

<sup>334</sup> UN Human Rights Council, ‘Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona: Addendum: Mission to Ireland’ (17 May 2011) A/HRC/17/34/Add 2, paras 36-37.

ensure national dialogue when formulating its budgetary responses to the crises, and entering into the ECB/EC/IMF programme.<sup>335</sup>

## 2.2 Failure to dedicate maximum available resources to ESC rights provision

The UN independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, has examined the obligation of governments to use their maximum available resources to realise ESCR as expeditiously and effectively as possible and concluded that funds earmarked for ESCR must not be diverted elsewhere and that governments that introduce regressive measures must demonstrate that they have used the maximum of available resources before taking that step.<sup>336</sup> The Committee on Economic, Social and Cultural Rights has further confirmed that this is the case ‘even during ‘times of severe resources constraints whether caused by a process of adjustment, economic recession, or by other factors.’<sup>337</sup>

Austerity measures have the potential to challenge the protection of economic, social and cultural rights, including with regard to the principles of non-retrogression, progressive realization, non-discrimination and minimum core obligations.<sup>338</sup> The margin of appreciation afforded to States with regard to ESCR

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<sup>335</sup> UN Human Rights Council, ‘Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona: Addendum: Mission to Ireland’ (17 May 2011) A/HRC/17/34/Add 2, paras 36-37.

<sup>336</sup> Diane Elson, Radhika Balakrishnan & James Heintz, ‘Public Finance, Maximum Available Resources and Human Rights,’ in Aoife Nolan, Rory O’Connell and Colin Harvey (eds) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart 2013), 16.

<sup>337</sup> UN Human Rights Council, ‘Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona: Addendum: Mission to Ireland’ (17 May 2011) A/HRC/17/34/Add 2, para 12.

<sup>338</sup> UN Office of the High Commissioner for Human Rights, ‘Report on austerity measures and economic and social rights,’ (2013), 8 < [http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82\\_en.pdf](http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf)> last accessed on 10 September 2015.

implementation is limited to the measure that is least restrictive to ESC rights.<sup>339</sup>

**Table 3: Maximum available resources<sup>340</sup>**

<p>1. While noting the unprecedented economic and financial crisis that the State party went through and its exit from the bailout programme during the reporting period, the Committee notes with concern that, in spite of the social transfers made by the State party to mitigate the impact of austerity measures,:</p> <ul style="list-style-type: none"> <li>a) The State party's response to the crisis has been disproportionately focused on instituting cuts to public expenditure in the areas of housing, social security, health care and education, without altering its tax regime;</li> <li>b) Many austerity measures have been adopted during and after the crisis without proper assessments of their impact on economic, social and cultural rights;</li> <li>c) The austerity measures, which continue to be applied, have had significant adverse impact [sic] on the entire population, particularly on disadvantaged and marginalized individuals and groups, in enjoying their economic, social and cultural rights; and</li> <li>d) No review has been carried out of such measures in a comprehensive and human rights based manner, since the State party's exit from the bailout programme.</li> </ul>
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EU backed and designed policies have directly impacted the dedication of maximum available resources for ESCR at national level, demonstrating both horizontal and vertical coherence vis-à-vis human rights protection and economic policies. Article 3 of the Treaty of the European Union calls for the EU to promote economic, social and territorial cohesion, and solidarity among Member States. However, EU-level measures have been blamed for a failure of State parties to use their maximum available resources to implement ESCR. Of particular relevance is the so-called 'six pack', a series of secondary legislation adopted in December 2011 to supplement the Treaty on the Functioning of the European Union, and the Treaty on Stability, Coordination and Governance (TSCG) which introduced expenditure benchmarks as well as new minimum standards for budgetary frameworks.

In 2012, Ireland ratified the Fiscal Compact Treaty, a mechanism developed to strengthen fiscal surveillance among Member States. Compliance with this Treaty means Ireland has to reduce its deficit to three per cent of Gross Domestic Product (GDP) by 2015, and will face sanctions if its public debt rises above 60 per cent of GDP. In 2013, the 'Two Pack Regulations' were introduced in Eurozone States to

<sup>339</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), 'An Evaluation of the Obligation to take steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant' (10 May 2007), E/C 12/2007/1, para 11-12.

<sup>340</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), 'Concluding observations on the third periodic report of Ireland,' (19 June 2015) *Advanced version*, para 11.

provide closer budgetary monitoring by the European Commission. These measures have led to the introduction of expenditure ceilings to reduce budget deficit. The introduction of expenditure ceilings has impacted on the level of funding available to specific Government Departments and resulted in harsh cuts within a relatively short period of time.<sup>341</sup>

In 2013, the European Commission acknowledged its own need to consider the impact of legislation on fundamental rights, noting that '[a]ny impact on fundamental rights needs to be carefully considered during legislative procedures, especially at the stage of elaborating final compromise solutions' and that '[a] strong inter-institutional commitment is required to achieve this goal.'<sup>342</sup> This commitment has not been evident in practice, and some commentators have noted that the economic crisis has put the spotlight on the 'absence of political accountability for economic and social rights'.

The current global economic downturn, coming at the confluence of the financial, food and fuel crises of 2008 and 2009, has potentially devastating implications for the realization of economic and social rights. What began as a financial crisis is rapidly turning into a global human rights crisis.<sup>343</sup>

To date, the bulk of academic and political analysis regarding ESCR implementation and protection centres on the role of the courts. Less focus has been given to the role of government and policy makers of the State.<sup>344</sup> While the EU institutions do not have direct competency over ESCR realisation in Member States, this does not relieve the institutions of their responsibilities under the charter, the ICESCR and (when the EU accedes to it) the ECHR and ESC.

The lack of a treaty provision stating that the Union has competence in human rights does not signify that the Union lacks authority to promote or protect human rights. To the contrary, the fact that the Union has been conferred an exclusive, shared or complementary competence in a policy domain also gives it indirect competence to protect and promote respect for human rights within that policy domain due to the general

<sup>341</sup> Free Legal Advice Centres (FLAC), 'Our Voice, Our Rights: A Parallel Report in response to Ireland's Third Report under the International Covenant on Economic, Social and Cultural Rights,' (2014), 18-19.

<sup>342</sup> Commission, 'Report on the Application of the EU Charter of Fundamental Rights' COM(2014) 224 final <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0224&from=EN>> last accessed on 11 September 2015; FRAME, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies' (2014) Work Package No 8– Deliverable No 1.

<sup>343</sup> Ignacio Saiz, 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis,' (2009) 1 J of Human Rights Practice, 279.

<sup>344</sup> Aoife Nolan, Rory O'Connell and Colin Harvey (eds) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart 2013).



provisions regarding promotion and protection of human rights as general principles of the Union.<sup>345</sup>

While EU incoherence is evident with regard to the approach that different EU institutions take to protecting ESCR, this is arguably eclipsed by the impact of incoherent approaches to ESCR at domestic level. In practice, the effect of the measures was that Ireland retained its attractive 12.5% corporation tax rate throughout the period of economic crisis and the implementation of austerity measures, with the Taoiseach stating on October 1<sup>st</sup> 2014 that ‘we still have the lowest corporate tax rate in the OECD and these rates are matter of national sovereignty [...] our tax rate is 12.5 per cent and it will remain so.’<sup>346</sup> This policy choice, leaving Ireland with among the lowest corporate tax rates in the developed world, is a cornerstone of Ireland’s industrial policy, and it appears that any potential negative impact on the realisation of ESCR from such a low level of government revenue has not been considered by the Government. By contrast, when considering Ireland’s income tax regime, the picture is far less clear. A recent study from KPMG has shown that, for workers earning less than €18,000, the tax burden in Ireland is the lowest among eight developed countries in the study. However, for workers at income levels above €35,000, €75,000 and €150,000, the effective tax burden experience in Ireland rises to 67<sup>th</sup>, 4<sup>th</sup> and 3<sup>rd</sup> in the sample, respectively, suggesting that the austerity era has been accompanied by tax policy choices that have favoured raising income tax revenue from these most able to shoulder the burden.<sup>347</sup> A recent study from the Nevin Institute of Economic Research (NERI) suggests that indirect tax contributions are highest among the poorest households, which somewhat erodes the progressive nature of the Irish income tax system; however, crucially, the NERI study still shows that, when all tax contributions are accounted for, the tax burden is still increasing with household income, outside of the poorest 20 per cent of households.<sup>348</sup>

One offshoot of the era of European austerity has been the focus of EU institutions on long-term fiscal sustainability, which has been written into European treaty via the Fiscal Compact, which was ratified in Ireland under the *Thirtieth Amendment of the Constitution (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) Bill 2012*. The Treaty enshrines in national law that the ‘structural deficit’ in any given year must not exceed 0.5% of GDP, and where it is exceeded, the Government must act to move towards that target. Similarly, if the stock of government debt is above 60% of GDP, it must be reduced by one-twentieth a year until the target is met. Such a set of policies

<sup>345</sup> Tamara Lewis et al, ‘Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies’ (2014) Work Package No 8– Deliverable No 1, 17, 33.

<sup>346</sup> Roche, B. ‘Taoiseach defends Ireland’s corporate tax rate’ (The Irish Times, 2 October 2014) <<http://www.irishtimes.com/news/ireland/irish-news/taoiseach-defends-ireland-s-corporate-tax-rate-1.1949813>> last accessed on 11 September 2015.

<sup>347</sup> Rooney, M. ‘Rewards are low for Ireland’s risk takers’ (KPMG 2014) <<http://www.kpmg.ie/budget2015/sbp-rewards-are-low-for-irelands-risk-takers.htm>> last accessed on 11 September 2015.

<sup>348</sup> Collins, M.L. ‘Total Direct and Indirect Tax Contributions of Households in Ireland: Estimates and Policy Simulations,’ (NERI 2014) <[http://www.neriinstitute.net/download/pdf/household\\_tax\\_contributions\\_neri\\_wp18.pdf](http://www.neriinstitute.net/download/pdf/household_tax_contributions_neri_wp18.pdf)> last accessed on 11 September 2015.

commit Ireland to keeping its budget close to balanced over the next number of decades, which suggests that many of the erosions of ESCR that have become apparent during the period 2008-2014 will be more difficult to undo than would have been the case in previous eras. Economic commentators have strongly questioned the logic of imposing such a set of fiscally tight rules on EU nations, which will preclude countries from 'borrowing to better themselves.'<sup>349</sup>

The idea of the desirability of balancing the national budget may appear self-evident to its designers... However, an economy is not a single household and, as we know from the paradox of thrift, these comforting comparisons can be highly misleading when applied at an aggregate level... Once passed into treaty form, it will be extremely difficult for European citizens to change these rules.<sup>350</sup>

Such commentary has suggested that spending on social, infrastructural and redistributive items, all key to the realisation of ESCR, could be maintained at higher levels by using low-interest-rate government borrowing, rather than having to forego certain expenditures in order to meet the rules of the Compact. It again appears that there is little evidence of a linking of thought between those in charge of the EU's fiscal sustainability and those in charge of the EU's mandate on ESCR. This is problematic because while the State is afforded discretion with regard to the scale and pace of adjustments, 'seeking to achieve adjustments primarily through expenditure cuts rather than tax increases might have a major impact on the most vulnerable segments of society.'<sup>351</sup> Ireland has an international obligation to deliver essential services to the greatest extent possible, using its reduced expenditure. 'Even during times of severe resource constraints, Ireland must demonstrate that every effort has been made to use all resources that are at its disposal, in an effort to satisfy, as matter [sic] of priority, minimum essential levels of human rights.'<sup>352</sup> In this context, the rights of the most vulnerable are most at risk, including those that require disability services, community and voluntary services, and Traveller supports.

Evidence suggests that the Government's austerity policies have affected 'the whole spectrum of human rights [...] from the rights to decent work, an adequate standard of living and social security to access to justice, freedom of expression and the right to participation, transparency and accountability.'<sup>353</sup> As

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<sup>349</sup> Lyons, R. 'Send Merkozy back to Econ101 – Economic illiteracy and the EU fiscal compact' (March 2012) <<http://www.ronanlyons.com/2012/03/05/send-merkozy-back-to-econ101-economic-illiteracy-and-the-eu-fiscal-compact/>> last accessed on 11 September 2015.

<sup>350</sup> Whelan, K. 'Golden rule of golden straightjacket?' (VOX 2012) <<http://www.voxeu.org/article/golden-rule-or-golden-straightjacket-critique-europe-s-fiscal-compact>> last accessed on 11 September 2015.

<sup>351</sup> UN Human Rights Council, 'Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona: Addendum: Mission to Ireland' (17 May 2011) A/HRC/17/34/Add 2, paras 22-24.

<sup>352</sup> UN Human Rights Council, 'Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona: Addendum: Mission to Ireland' (17 May 2011) A/HRC/17/34/Add 2, paras 27-29.

<sup>353</sup> Council of Europe Commissioner for Human Rights, 'Safeguarding human rights in times of economic crisis,' (2013), 7 <<https://wcd.coe.int/ViewDoc.jsp?id=2130915>> last accessed on 11 September 2015.

warned by the UN Independent Expert on human rights and extreme poverty, vulnerable and marginalised groups of people were disproportionately negatively affected, compounding pre-existing patterns of discrimination in the political, economic and social spheres. Poverty and child deprivation levels grew, and in some cases, the economic crisis undermined ‘the very capacity of central and local authorities to deliver on the basic promises of a social welfare state and ensure human rights protection for all.’<sup>354</sup>

Responsibility for the economic decisions that have undermined ESC rights in Ireland in recent years cannot be simply laid at the feet of government, or its ECB/EC/IMF backers, but these players – and their policies and structures- should be understood to have contributed to the erosion of these rights. Indeed, while the fiscal consolidation was implemented from the outset of the ECB/EC/IMF-backed programmes and the National Recovery Plan, budgetary decisions are always available to decision makers to ensure that ESCR of the most vulnerable are protected.<sup>355</sup> At the same time, this does not reduce the responsibility of EU institutions, given their stated commitment and obligation to respect, protect and fulfil ESCR. This fact serves to remind us of the need for robust accountability structures to go hand-in-hand with economic policies and mechanisms.

In the documents that set out the ECB/EC/IMF Irish fiscal correction programme, almost no reference is made to the social implications of the planned and implemented policies, and no reference at all is made to ESCR. For example, in the initial report on ‘the economic programme adjustment for Ireland,’ the European Commission set out plans for a downward adjustment of the minimum wage. There were no references made to the implications that this would have at the individual-level, although the report did note that a decrease in average nominal wage levels coupled with deflation would offset the consequences. In fact, when the report does list the ‘key risks’ associated with the programme, it makes no mention of ESCR or vulnerable individuals.<sup>356</sup>

At domestic level, the Irish Government’s Memorandum of Economic and Financial Policies set out at the outset of the programme a commitment to protecting the socially vulnerable as a central policy goal, but it did not specify how it envisaged doing this.<sup>357</sup> While the governments’ memorandum does make narrow

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<sup>354</sup>Council of Europe Commissioner for Human Rights, ‘Safeguarding human rights in times of economic crisis,’ (2013), 7 <<https://wcd.coe.int/ViewDoc.jsp?id=2130915>> last accessed on 11 September 2015.

<sup>355</sup> Irish Human Rights Commission, ‘Ireland and the International Covenant on Economic, Social and Cultural Rights’ (2015), 12-13.<[http://www.ihrec.ie/download/pdf/ihrec\\_report\\_ireland\\_and\\_the\\_international\\_covenant\\_on\\_economic\\_social\\_and\\_cultural\\_rights.pdf](http://www.ihrec.ie/download/pdf/ihrec_report_ireland_and_the_international_covenant_on_economic_social_and_cultural_rights.pdf)> last accessed 11 September 2015.

<sup>356</sup> European Commission Directorate-General for Economic and Financial Affairs, ‘The Economic Adjustment Programme for Ireland’ (2011) Occasional Paper 76, para 71 <[ec.europa.eu/economy\\_finance/publications](http://ec.europa.eu/economy_finance/publications)> last accessed on 11 September 2015.

<sup>357</sup> European Commission Directorate-General for Economic and Financial Affairs, ‘The Economic Adjustment Programme for Ireland’ (2011) Occasional Paper 76, para 56 <[ec.europa.eu/economy\\_finance/publications](http://ec.europa.eu/economy_finance/publications)> last accessed on 11 September 2015.

references to ‘the social fallout of the crisis’, this is not in response to accountability mechanisms inherent in the structure of its relationship with EU partners.

The ex-post review conducted by the EC concluded that, while the crisis had caused significant hardship in Irish society ‘[t]he burden of adjustment was quite widely shared across Irish society and Ireland's social safety net continued to function effectively, though deprivation has risen. The programme avoided sharp across-the-board reductions in social support. As a result, the comprehensive social safety net that Ireland had in place prior to the programme remained intact.’<sup>358</sup> However, this is disputed by civil society organisations working in the area of human rights. While an exhaustive study providing evidence for causal effect has not been carried out to date, leading commentators have assigned responsibility to austerity policies for the erosion of human rights protections. The Irish Human Rights Commission has asserted that ‘since 2008, austerity-led cuts to budgets have severely impacted on economic and social rights due to the fact that in Ireland the enjoyment of those rights often relies on discretionary decision-making not amenable to judicial review.’<sup>359</sup>

One form of discretionary decision-making is in relation to State funding of non-State bodies which provide many of the health, education and social services in the State. Such services may include residential or day services for persons with intellectual disabilities, children with care needs, some older persons in nursing homes, asylum seekers in for-profit Direct Provision centres, schools to provide primary or post-primary education (schooling in Ireland occurs under patronage of mainly religious bodies), hospital trusts to provide health and social services. Decisions on budgets for funding such bodies is subject to variance and have been subject to cuts since 2008.<sup>360</sup>

In summary then, the negative impact on ESCR in Ireland, while broadly a result of the financial crisis and the consequent austerity policies, was facilitated by (i) a lack of horizontal and vertical coherence at EU level with regard to austerity policies and enforcement mechanisms that do not include – or are not linked to – human rights risk assessment or vulnerability or equality assessment; and (ii) the discretionary nature

<sup>358</sup> European Commission Directorate-General for Economic and Financial Affairs, ‘Ex post Evaluation of the Economic Adjustment Programme: Ireland, 2010-2013’ (July 2015) Institutional Paper 004, 15, 94 <[http://ec.europa.eu/economy\\_finance/publications/](http://ec.europa.eu/economy_finance/publications/)> last accessed on 11 September 2015.

<sup>359</sup> Irish Human Rights Commission, ‘Ireland and the International Covenant on Economic, Social and Cultural Rights’ (2015), para 10 <[http://www.ihrec.ie/download/pdf/ihrec\\_report\\_ireland\\_and\\_the\\_international\\_covenant\\_on\\_economic\\_social\\_and\\_cultural\\_rights.pdf](http://www.ihrec.ie/download/pdf/ihrec_report_ireland_and_the_international_covenant_on_economic_social_and_cultural_rights.pdf)> last accessed 11 September 2015.

<sup>360</sup> Irish Human Rights Commission, ‘Ireland and the International Covenant on Economic, Social and Cultural Rights’ (2015), para 6 <[http://www.ihrec.ie/download/pdf/ihrec\\_report\\_ireland\\_and\\_the\\_international\\_covenant\\_on\\_economic\\_social\\_and\\_cultural\\_rights.pdf](http://www.ihrec.ie/download/pdf/ihrec_report_ireland_and_the_international_covenant_on_economic_social_and_cultural_rights.pdf)> last accessed 11 September 2015.

of decision making at State level, which is particularly relevant in a context in which the UN ESCR treaty has not been implemented in legislative provisions.

### 2.3 Non-discrimination

The failure to prioritise the rights of the most vulnerable and excluded in society - despite a strong body of equality legislation - has been observed by independent experts and civil society organisations since the early days of the financial crisis in Ireland. The most affected groups include single mothers, children, Travellers, persons with disabilities, migrants, asylum-seekers and the homeless. These groups were affected by economic measures such as reductions in child benefits and benefits for job seekers, carers, single parent families, persons with disabilities and blind persons.<sup>361</sup>

Scarcity of resources is not 'an acceptable justification for failing to implement the duty of non-discrimination, which must take precedence, both formally and substantively, in all recovery measures' and the State must ensure enjoyment of human rights equally and without discrimination of any kind.<sup>362</sup> This responsibility requires deliberate and positive measures to protect groups in society that have suffered from structural discrimination and to diminish or eliminate conditions that cause or help to perpetuate discrimination. In times of crisis, the principle of non-discrimination requires that policies do not arbitrarily affect women, minorities and vulnerable groups disproportionately, 'as well as adopting targeted measures to lift the barriers to access of basic goods and services that deny them full equality.'<sup>363</sup>

EU framework legislation confers competence on the union to ensure gender equality. For example the TFEU states:

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of

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<sup>361</sup> UN Human Rights Council, 'Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona: Addendum: Mission to Ireland' (17 May 2011) A/HRC/17/34/Add 2, paras 32-34.

<sup>362</sup> UN Human Rights Council, 'Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona: Addendum: Mission to Ireland' (17 May 2011) A/HRC/17/34/Add 2, para 32.

<sup>363</sup> Ignacio Saiz, 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis,' (2009) 1 J of Human Rights Practice.

men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.<sup>364</sup>

In spite of this commitment, the Irish Human Rights and Equality Commission has cited the ‘levelling down’ of the employment gap between men and women, as a result of a decrease in men’s employment levels rather than as an increase of women’s employment levels, and the continued gender pay gap as a direct outcome of the economic downturn.<sup>365</sup> This suggests vertical incoherence in the EU’s commitment to non-discrimination with regard to protection of ESCR.

## 2.4 Political Rhetoric

The structures that failed to protect ESCR in a time of crisis and the policies that eroded those rights were facilitated in part by a political rhetoric that placed prudent macroeconomic decision making as morally superior to competing priorities. Decisions regarding whether a budget deficit or public spending cuts were the appropriate action were presented as ‘value neutral’, when they are, in reality, inherently political choices which ‘should be advanced and judged on their merits, as substantive normative positions, rather than being shrouded in the veil of technocracy.’<sup>366</sup> Consistently, the language used to describe these measures, including phrases about ‘stability’ and ‘correction’ present the measures as morally optimal.

The economic crisis has exposed the bankruptcy of values by which we have chosen to order our societies. It has therefore opened the space for debate about principles: the principles which should underpin our economic order; the principles guiding the regulatory role of the state; and the principles on which institutions of international economic governance should be based. We must seize the opportunity to put human rights at the centre of these debates, and the human being and respect for their human dignity at the centre of policy responses.<sup>367</sup>

In its post-programme report, in which the European Commission has critically assessed the decisions taken and policies implemented, it has written in largely positive terms about the programme and its

<sup>364</sup> Art 157(3) of the TFEU, cited in FRAME, ‘Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies’ (2014) Work Package No 8– Deliverable No 1, 33.

<sup>365</sup> Irish Human Rights Commission, ‘Ireland and the International Covenant on Economic, Social and Cultural Rights’ (2015), 48  
<[http://www.ihrec.ie/download/pdf/ihrec\\_report\\_ireland\\_and\\_the\\_international\\_covenant\\_on\\_economic\\_social\\_and\\_cultural\\_rights.pdf](http://www.ihrec.ie/download/pdf/ihrec_report_ireland_and_the_international_covenant_on_economic_social_and_cultural_rights.pdf)> last accessed 11 September 2015.

<sup>366</sup> Paul O’ Connell, ‘Let them eat cake’ in Aoife Nolan, Rory O’Connell and Colin Harvey (eds) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart 2013), 70.

<sup>367</sup> Ignacio Saiz, ‘Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis,’ (2009) 1 J of Human Rights Practice, 280.

impacts.<sup>368</sup> This does not tally with the plethora of analysis by civil society organisations and independent experts that have documented the negative impact these decisions and policies have had on rights protections.

However, positive reform may be in sight. In 2014, European Commission President Jean-Claude Juncker stated that ‘in the future, any support and reform programme [should go] not only through a fiscal sustainability assessment; but through a social impact assessment as well’, and to ensure that ‘the social effects of structural reforms [are] discussed in public.’<sup>369</sup> Consequently, in recent weeks, the EC has released an Assessment of the Social Impact of the new Stability Support Programme for Greece.<sup>370</sup> This is a positive development, even though the language of the report is not framed in the language of human rights and its impacts not yet discernible.

### 3. Concluding remarks regarding social policy and vertical incoherence

In the early years of this financial crisis, commentators warned that while the crisis posed a severe threat to economic and social rights, it was also an opportunity to rethink how we hold States accountable for their fulfilment.<sup>371</sup> Evidence suggests that policy makers failed to heed that warning and in doing so revealed an incoherent approach to ESCR protection in the face of economic interests and pressures.

A starting point is to affirm in rhetoric and policy the positive duties that States have ‘to fulfil economic and social rights, as well as obligations to respect them (by refraining from deliberate infringement of those rights) and to protect rights against abuses by corporate and other private actors’ - regardless of EU-led economic and financial policies - and the duty to fulfil which requires ‘actively putting in place the

<sup>368</sup> European Commission Directorate-General for Economic and Financial Affairs, ‘Ex post Evaluation of the Economic Adjustment Programme: Ireland, 2010-2013’ (July 2015) Institutional Paper 004 <[http://ec.europa.eu/economy\\_finance/publications/](http://ec.europa.eu/economy_finance/publications/)> last accessed on 11 September 2015. See also Charlie Taylor, ‘EC says bailout programme ‘helped Ireland return to growth,’ (*The Irish Times*, 16 July 2015) <<http://www.irishtimes.com/business/economy/ec-says-bailout-programme-helped-ireland-return-to-growth-1.2287249>> last accessed on 11 September 2015.

<sup>369</sup> European Commission, ‘Assessment of the Social Impact of the new Stability Support Programme for Greece,’ (19 August 2015) Commission Staff Working Document, 3 <[http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/greek\\_loan\\_facility/pdf/assessment\\_social\\_impact\\_en.pdf](http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/assessment_social_impact_en.pdf)> last accessed on 11 September 2015.

<sup>370</sup> European Commission, ‘Assessment of the Social Impact of the new Stability Support Programme for Greece,’ (19 August 2015) Commission Staff Working Document, 3.3 <[http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/greek\\_loan\\_facility/pdf/assessment\\_social\\_impact\\_en.pdf](http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/assessment_social_impact_en.pdf)> last accessed on 11 September 2015.

<sup>371</sup> Ignacio Saiz, ‘Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis,’ (2009) 1 J of Human Rights Practice, 277.

conditions and systems necessary for all members of the population to be able to fully exercise and progressively realize their rights.<sup>372</sup>

Beyond affirming its commitment to ESCR, the State should learn from this exceptional experience. The Irish State should consider (i) reviewing the human rights impact of austerity measures and (ii) design and implement a human rights impact assessment to be used in future budgetary decision making. This is all the more pressing in light of the fiscal compact obligations, described in section 2, above.

The Constitutional Convention,<sup>373</sup> which ran in Ireland from 2012-2014, voted that ESCR should be strengthened in the Constitution. Arguing in favour of this position, Amnesty International Ireland Director, Colm O' Gorman, asserted that:

What we are advocating is neither radical, not revolutionary. We are in a moment of change. We are emerging from some of our darkest economic days, while looking to the centenary of our birth. We must consider how we might do things differently. How we ensure that our country serves its entire people, and makes decisions in our collective interest. Placing ESC rights in our constitution will not cure all our ills. But it will require that government design systems that prioritise good, evidence based decisions, in the interest of all our people.<sup>374</sup>

The findings outlined in this discussion chapter suggest that Ireland would benefit from enshrining ESCR so that they cannot be so easily eroded, and that any enhanced protections also require robust accountability mechanisms, to hold the legislature and executive to account and to strengthen the judicial apparatus to do so.

This recommendation, and the wider issues outlined above, will have further relevance when the EU accedes to the ECHR which should have the effect of giving further protection to (at least some) ESCR, although that may take not take place in the short or medium term.

Regardless of their binding ECHR obligations, State parties themselves have obligations under the European Social Charter, whose monitoring committee has found that State parties, by acceding to the charter 'have accepted to pursue by all appropriate means the attainment of conditions in which, inter alia, the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realised.' Accordingly, measures taken in

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<sup>372</sup>Ignacio Saiz, 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis,' (2009) 1 J of Human Rights Practice, 282.

<sup>373</sup> For further see Convention of the Constitution < <https://www.constitution.ie/>> last accessed on 11 September 2015.

<sup>374</sup> The Convention of the Constitution, 'Constitutional Convention Votes in Favour of Reforming Economic, Social and Cultural Rights in the Constitution', 1 <<https://www.constitution.ie/AttachmentDownload.ashx?mid=adc4c56a-a09c-e311-a7ce-005056a32ee4>> last accessed on 11 September 2015.



response to an economic crisis ‘should not have as a consequence the reduction of the protection of the rights recognised by the Charter.’ Hence, ‘the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need protection the most.’<sup>375</sup>

When tough decisions need to be made, particularly on the allocation of resources, a principled, outcomes-focussed and robust framework is required to guide government decision making. Human rights offer such a framework. Human rights are the decades-old consensus of nations on how people deserve to live and be treated, and how governments can and must make that happen. Human rights do not exist in some idealist abstract, divorced from economics and hard political choices. They were designed to be, and are in reality, highly achievable. They recognise that states do not have infinite amount of resources and that the full enjoyment of many ESC rights cannot be achieved overnight. But they also lock in the need for non-discrimination and for the protection of a basic standard of living for everyone, no matter what the resource challenges.’<sup>376</sup>

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<sup>375</sup> *Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v. Greece*, European Social Rights Committee Complaint No. 79/2012, para 70.

<sup>376</sup> Amnesty International Ireland, ‘Bringing ESC rights home: The case for legal protection of Economic, Social and Cultural Rights in Ireland’, (2014), 1  
<[https://www.amnesty.ie/sites/default/files/news/2012/04/AI\\_ESC\\_Rights\\_Report.pdf](https://www.amnesty.ie/sites/default/files/news/2012/04/AI_ESC_Rights_Report.pdf)> last accessed on 11 September 2015.

## VI. Part Five: Coherence in data protection: the case of data retention after *Digital Rights Ireland*<sup>377</sup>

### 1. Introduction

This section examines vertical policy coherence<sup>378</sup> in the context of data protection: specifically, EU and Member State policies on surveillance in the wake of the judgment of the CJEU in *Digital Rights Ireland and Seitlinger and Others*<sup>379</sup> invalidating the Data Retention Directive.<sup>380</sup> That judgment has been described as a 'landmark decision marking a constitutional moment in striking a balance between fundamental rights and security in the digital age'<sup>381</sup> and in this analysis we will put it into a wider context and assess the issues which it raises for coherence between EU and Member State norms regarding privacy, data protection and mass surveillance. In particular, we will summarise the legal framework around data protection in Europe; describe the development of data retention laws and the adoption of the Data Retention Directive; discuss the decision in *Digital Rights Ireland*; assess the way in which that decision impacts on national surveillance practices; and consider to what extent Member States can rely on national security arguments to insulate surveillance practices against scrutiny under the Charter of Fundamental Rights. The section concludes by finding that there is a disconnect between EU and national standards governing surveillance, and that national surveillance systems which do not meet the standards articulated by the CJEU may nevertheless escape scrutiny where the Commission fails to act to ensure that Member States comply with the Charter of Fundamental Rights.

### 2. Background and legal context

Data protection as a distinct concept, separate from the right to privacy, has its origins in fears regarding the impact of computerised record keeping on individuals – for example, that the large scale aggregation

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<sup>377</sup> This section was written by T.J. McIntyre. Disclosure: the author is the chair of Digital Rights Ireland which is involved in ongoing litigation against the Irish state challenging domestic data retention laws.

<sup>378</sup> Using the analysis developed in Tamara Lewis et al, 'Report on Coherence of Human Rights Policymaking in EU Institutions and Other EU Agencies and Bodies' (European Commission 2014) <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>> last accessed on 8 September 2015.

<sup>379</sup> Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others*. For background see T.J. McIntyre, 'Data Retention in Ireland: Privacy, Policy and Proportionality' (2008) 24 Computer Law & Security, 326.

<sup>380</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 105/54.

<sup>381</sup> Tuomas Ojanen, 'Privacy Is More Than Just a Seven-Letter Word: The Court of Justice of the European Union Sets Constitutional Limits on Mass Surveillance: Court of Justice of the European Union Decision of 8 April 2014 in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others*', (December 2014) 10 European Constitutional Law Review (EuConst), 539.

of information and automatic processing of that information could promote surveillance of the entire population, or that individuals could be prejudiced by having important decisions about their lives made on an automated basis. At the outset the resulting laws focused on large databases held by governments and major corporations – the only entities which could afford the large scale computer systems required – but with the growth of minicomputers and eventually personal computers the laws came to be adapted to address records held by smaller businesses and other entities as well. As a result, Mayer-Schönberger has described the evolution of several different generations of data protection laws which have progressively moved towards greater individual protection and integration with the right to privacy.<sup>382</sup> Despite this, the key defining aspect of data protection, as compared to the right to privacy, still lies in its scope: data protection laws generally apply to all personal information and not merely that information which is confidential, intimate or sensitive in some way.<sup>383</sup>

The role of the European Union in protection of personal data can be traced to the early 1970s<sup>384</sup> and in particular the Commission's 1973 communication titled *Community policy on data processing* which pointed out the need for 'common measures for the protection of the citizen' and the 'basic constitutional importance' of the subject.<sup>385</sup> It was not until 1995, however, that this was reflected in Community law with the adoption of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the 'Data Protection Directive'). Since then, a complicated and fragmented data protection framework has developed at EU level, which we can broadly summarise as having five distinct aspects.

First, as regards the general obligations of Member States the main source of law is the Data Protection Directive. This also creates an important policy actor – the Article 29 Data Protection Working Party which is made up of representatives from each national supervisory authority, from the European Data Protection Supervisor and from the Commission.<sup>386</sup> While the Article 29 Working Party formally only has advisory status, in practice its representative nature and unique expertise and authority ensure that it is one of the most influential bodies in the space. The Data Protection Directive has been supplemented by a sector specific law in the field of telecommunications: initially by the 1997 ePrivacy Directive<sup>387</sup> ('the first ePrivacy Directive') which was later replaced with the 2002 ePrivacy Directive<sup>388</sup> ('the second ePrivacy

<sup>382</sup> Victor Mayer-Schönberger, 'Generational Development of Data Protection in Europe,' in Agre P and Rotenberg M (eds) *Technology and Privacy: The New Landscape* (MIT Press, 1997)

<sup>383</sup> See e.g. Juliane Kokott and Christoph Sobotta, "The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR," *International Data Privacy Law* 3, no. 4 (November 1, 2013): 222–28, doi:10.1093/idpl/ipt017.

<sup>384</sup> Though it might be said that it was presaged by the decision of the Court of Justice in Case 26/69, *Stauder v. City of Ulm* [1969] ECR 419 which recognised that the inclusion of the name of welfare recipients on butter coupons was capable of prejudicing the "fundamental human rights enshrined in the general principles of Community law".

<sup>385</sup> See generally the discussion in Gloria González-Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Law, Governance and Technology Series, volume 16, Springer 2014), chap 5.

<sup>386</sup> Established by Article 29 of Directive 95/46/EC.

<sup>387</sup> Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector [1997] OJ L 24.

<sup>388</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [2002] OJ L 201.

Directive'). The Data Protection Directive itself is now set to be replaced by a proposed General Data Protection Regulation – an ambitious document which is intended in part to remedy differing interpretations and implementations of the Data Protection Directive across Member States.<sup>389</sup>

Second, data protection by the EU institutions themselves is regulated by Article 16 of the Treaty on the Functioning of the European Union and by Regulation (EC) 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, which also established the office of the European Data Protection Supervisor ('EDPS').

Third, a distinct set of data protection rules has developed in the areas of police and judicial cooperation in criminal matters. The Data Protection Directive – as a first pillar instrument under the pre-Treaty of Lisbon pillar system – excluded these areas from its scope. Instead, data protection under the third pillar developed on an *ad hoc* basis with the various legal instruments (for example, the Europol Convention) incorporating their own specific data protection rules.<sup>390</sup> These have since been extended by Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, which applies to data transmitted between Member States. The 2008 Framework Decision is in turn to be replaced by a proposed Police and Criminal Justice Data Protection Directive – under negotiation as part of the wider package of reform including the proposed General Data Protection Regulation – which will cover domestic processing of data also, and will begin the process of integrating the current patchwork of rules in this area.<sup>391</sup>

Fourth, in a similar way, distinct data protection rules have evolved in the context of the Schengen area.<sup>392</sup> This originally took place outside the European Union (it was only with the Amsterdam Treaty that the Schengen Treaty and rules were incorporated into European Union law) and the establishment of data protection rules under Schengen predated the adoption of the Data Protection Directive.<sup>393</sup> In particular, the 1990 Convention implementing the Schengen Agreement required parties to the Agreement to adopt national data protection measures equivalent to those set out in the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.<sup>394</sup> However, even

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<sup>389</sup> See Paul De Hert and Vagelis Papakonstantinou, 'The Proposed Data Protection Regulation Replacing Directive 95/46/EC: A Sound System for the Protection of Individuals' (April 2012) 28 *Computer Law & Security Review*, 130–4.

<sup>390</sup> Gloria González-Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Law, Governance and Technology Series, volume 16, Springer 2014), 145–146; Paul De Hert, Vagelis Papakonstantinou and Cornelia Riehle, 'Data Protection in the Third Pillar: Cautious Pessimism' in Martin Maik (ed), *Crime, Rights and the EU: The Future of Police and Judicial Cooperation* (Justice 2008).

<sup>391</sup> See Paul De Hert and Vagelis Papakonstantinou, 'The Police and Criminal Justice Data Protection Directive: Comment and Analysis' (2012) 22 *Computers and Law*, 1.

<sup>392</sup> Hielke Hijmans and Alfonso Scirocco, 'Shortcomings in EU Data Protection in the Third and the Second Pillars: Can the Lisbon Treaty Be Expected to Help?', (2009) 46 *Common Market Law Review*, 1485–1525.

<sup>393</sup> Paul De Hert, Vagelis Papakonstantinou and Cornelia Riehle, 'Data Protection in the Third Pillar: Cautious Pessimism' in Martin Maik (ed), *Crime, Rights and the EU: The Future of Police and Judicial Cooperation* (Justice 2008).

<sup>394</sup> See Chapter 3 of the Convention, especially Art 117.

following the incorporation of the Schengen acquis into the EU framework, data protection in this context (such as the rules governing the Schengen Information System) continues to be largely separate from wider EU data protection rules.

Fifth, and most importantly for this contribution, EU law has identified data protection as a fundamental right – with overarching implications for the treatment of personal data in all the above contexts. Article 8 of the Charter of Fundamental Rights of the European Union, adopted in 2000, identified data protection as one of the fundamental rights enjoyed by everyone throughout Europe. In doing so, it ‘recognised’ it as a fundamental right although the consensus view in the literature is that it in fact created a new right with no direct antecedents in other international human rights instruments.<sup>395</sup> In confirming data protection as a fundamental right the Charter therefore goes significantly further than the European Convention on Human Rights – while the ECHR recognises an overlapping right to privacy, many aspects of data protection, such as the right to access personal data, remain beyond the scope of the case law under Article 8 ECHR.<sup>396</sup>

This elevation of data protection to a fundamental right took on particular significance after the Treaty of Lisbon entered into force in 2009. While the Charter of Fundamental Rights did not initially have any direct legal effect, the Lisbon Treaty put the Charter on the same status as the EU treaties, binding both the EU and the Member States when implementing EU law. Article 8 has since been relied on by the CJEU in two cases<sup>397</sup> to invalidate EU laws which unjustifiably interfered with the rights to privacy and data protection. In addition, it was used by the CJEU in *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*<sup>398</sup> to develop the so-called ‘right to be forgotten’ – more accurately, a right on the part of individuals to have certain links removed from the results of searches against their name. These decisions have led a number of observers to describe the CJEU as having had a ‘Privacy Spring’ moment – giving a new emphasis to privacy rights which relies, in part on this new status of data protection as a fundamental right.<sup>399</sup>

### 3. Development of the Data Retention Directive

This wider European data protection context has fundamentally shaped the development of data retention laws both domestically and at EU level. Data retention in this setting refers to laws which

<sup>395</sup> Gloria González-Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Law, Governance and Technology Series, volume 16, Springer 2014), 2.

<sup>396</sup> Lee A Bygrave, ‘Data Protection pursuant to the Right to Privacy in Human Rights Treaties’, (1998) 6 (3) *International Journal of Law and Information Technology*, 247–84.

<sup>397</sup> *Digital Rights Ireland* and Judgement of 9 November 2009 *Volker und Markus Schecke GbR and Hartmut Eifert vs. Land Hessen*, C-92/09 and C-93/09.

<sup>398</sup> Judgement of 13 May 2014 in *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12.

<sup>399</sup> See e.g. Gabriela Zafir, ‘How CJEU’s ‘Privacy Spring’ Construed the Human Rights Shield in the Digital Age’, in Elzbieta Kuzelewska and others (eds) *European Judicial Systems as a Challenge for Democracy* (Intersentia 2015).

require<sup>400</sup> telecommunications providers to store information about subscribers' use of their services for later law enforcement use: for example, by logging information about calls made, text messages and emails sent, the location of mobile phones, and so forth. The distinction is between the storage of the *content* of the communications and the storage of information *about* the communication (time, date, sender, recipient, location from which sent, etc.). Proponents of data retention argue that the storage of the latter information is less invasive, is valuable for policing purposes and is therefore permissible even against the whole population. Civil liberties advocates, on the other hand, challenge the strength of the distinction and point out that such storage results in the creation of a map of the private life of every citizen.<sup>401</sup>

Pressure for data retention laws can be dated to at least the late 1990s, when a number of governments sought to include a data retention mandate in the Council of Europe Convention on Cybercrime – though following widespread opposition from civil society there was ultimately no consensus in favour. Instead, when the Convention was finalised in 2001 it opted for a data preservation model which allows for targeted 'freezing' of data in specific circumstances rather than indiscriminate mass retention of data.<sup>402</sup> Nevertheless, data retention was immediately back on the agenda following the terrorist attacks on 11 September 2001 and has remained a goal of many national governments since then.<sup>403</sup>

At that time data retention in Europe was, however, largely precluded by existing data protection law. The Data Protection Directive established the general principle that data should not be retained for longer than necessary for the purpose for which it was collected.<sup>404</sup> The first ePrivacy Directive supplemented this with specific rules in relation to telecommunications, specifying that traffic data must be erased on termination of calls, with very narrow exceptions for billing and marketing purposes.<sup>405</sup> The combination of these two directives required telecommunications providers to delete data within a short period – in Ireland, for example, the Data Protection Commissioner directed telephone companies to retain data for no longer than six months – and the directives appeared to rule out any conflicting national legislation.<sup>406</sup>

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<sup>400</sup> Sometimes data retention laws merely permit the retention of data – as in the UK Voluntary Code of Practice on Retention of Communications Data, provided for by the Retention of Communications Data (Code of Practice) Order 2003. However, the term 'voluntary' comes with a question mark – telecommunications companies have generally been unwilling to reject demands from the executive that they should retain data even without any formal compulsion to do so.

<sup>401</sup> Caspar Bowden, 'Closed Circuit Television for inside Your Head: Blanket Traffic Data Retention and the Emergency Anti-Terrorism Legislation' (2002) 1 *Duke Law & Technology Review*, 1–7.

<sup>402</sup> See Arts 16 and 17 of the Convention and Amalie M. Weber, 'The Council of Europe's Convention on Cybercrime' (2008) 18 *Berkeley Technology Law Journal*, 439; Edgar A. Whitley and Ian Hosein, 'Policy Discourse and Data Retention: The Technology Politics of Surveillance in the United Kingdom' (2005) 29 *Telecommunications Policy*, 857–74.

<sup>403</sup> See e.g. Catherine Crump, 'Data Retention: Privacy, Anonymity, and Accountability Online' (2003) *Stanford Law Review*, 191–229.

<sup>404</sup> Art 6(1)(e).

<sup>405</sup> Art 6.

<sup>406</sup> For background see T.J. McIntyre, 'Data Retention in Ireland: Privacy, Policy and Proportionality' (2008) 24 *Computer Law & Security*, 328.

The initial response at EU level came in the form of the second ePrivacy Directive, adopted in July 2002, which provided a derogation from general data protection principles to permit (but not require) national data retention laws. It allowed Member States to legislate for data retention where this 'constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system'.<sup>407</sup> Following this, domestic data retention laws were introduced in a number of Member States.

The 2002 directive was soon followed by pressure to widen data retention further. In particular, France, Ireland, Sweden and the UK put forward a proposal for a framework decision to require Member States to introduce data retention both in relation to telephony and internet use. The legal basis chosen – as a third pillar measure – was however challenged by the European Parliament which described the proposal as having both first and third pillar dimensions.<sup>408</sup> As a result, the Commission put forward an alternative proposal for a directive in 2005, which was adopted after significant amendments as Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (the 'Data Retention Directive').

To summarise, the Data Retention Directive required Member States to introduce data retention for traffic and location data relating to telephony and internet use for a period between six months and two years.<sup>409</sup> It also allowed Member States to require a longer retention period if 'facing particular circumstances that warrant an extension'.<sup>410</sup> This retention period covered data necessary to identify the source, destination, date, time and duration of each communication, along with data necessary to identify the type of communication, users' communication equipment and the location from which communications were made.<sup>411</sup> Content data – data revealing the content of a communication – was excluded from its scope.<sup>412</sup> As regards the internet, the directive imposed an obligation to log information about the date and time of log-in and log-off, the IP address allocated and the user ID, as well as information about emails – though not information about web browsing, i.e. the particular web pages or URLs visited during an internet session.<sup>413</sup>

A stated aim of the directive was 'to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law'.<sup>414</sup> Significantly, however, the directive did not limit the use of retained data to this purpose – once the data

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<sup>407</sup> Art 15.

<sup>408</sup> For background see Eleni Kosta and Peggy Valcke, 'Retaining the Data Retention Directive', (2006) 22 Computer Law & Security Review, 370–80.

<sup>409</sup> Art 6.

<sup>410</sup> Art 12.

<sup>411</sup> Art 5(1).

<sup>412</sup> Art 5(2).

<sup>413</sup> Art 1(2) specifies that 'It shall not apply to the content of electronic communications, including information consulted using an electronic communications network.'

<sup>414</sup> Art 1.

had been captured it could be used for any other purpose permitted by national law such as prosecutions for minor crimes as well as civil actions for defamation or file sharing.<sup>415</sup> The directive was also silent as to the conditions for access to the retained data – for example, whether a judicial order should be required – instead, this was left solely to national law.

## 4. Challenges to the Data Retention Directive

### 4.1 Legal basis

The change in the legal instrument for data retention – from framework decision to directive – had been opposed by Ireland and Slovakia and in July 2006 Ireland commenced an Article 230 challenge before the CJEU alleging that the measure had been adopted on the wrong legal basis. The challenge was rejected by the CJEU which accepted that the directive was intended to harmonise the obligations placed on telecommunications providers and so ‘cover[ed] the activities of service providers in the internal market’ under the first pillar, and did not attempt to regulate matters within the third pillar such as access to and use of data by the competent national authorities.<sup>416</sup>

That challenge was, however, procedural only – it did not challenge the concept of data retention but rather the process by which the law had been passed – and the CJEU explicitly noted that it was not determining ‘any possible infringement of fundamental rights arising from interference with the exercise of the right to privacy’.<sup>417</sup>

### 4.2 Challenges to national implementations

Soon after, a number of fundamental rights challenges were brought against domestic laws implementing the directive. These resulted in a series of national decisions invalidating implementing measures on fundamental rights grounds – in Bulgaria, the Czech Republic, Cyprus, Germany and Romania – but these did not (and of course could not) give a definitive decision on the validity of the directive itself.<sup>418</sup> Notably, the German ruling took some pains to avoid making a preliminary reference to rule on the validity of the

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<sup>415</sup> See in particular Judgement of 19 April 2009 *Bonnier Audio AB and others v Perfect Communication Sweden AB*, C-461/10.

<sup>416</sup> Judgement of 10 February 2009 *Ireland v. Parliament and Council*, C-301/06.

<sup>417</sup> Para 57.

<sup>418</sup> Katja de Vries and others, 'The German Constitutional Court Judgment on Data Retention: Proportionality Overrides Unlimited Surveillance (Doesn't It?)', in Serge Gutwirth and others (eds) *Computers, Privacy and Data Protection: An Element of Choice* (Springer 2011); Niklas Vainio and Samuli Miettinen, 'Telecommunications Data Retention after Digital Rights Ireland: Legislative and Judicial Reactions in the Member States' (2015) 23 *International Journal of Law and Information Technology* 290–309.



directive – something which observers have attributed to the difficult relationship between the German Constitutional Court and the CJEU as regards the primacy of European law<sup>419</sup> – and as we shall see this may also reflect a wider unwillingness on the part of the German court to defer to EU privacy norms.

### 4.3 Digital Rights Ireland and Seitlinger and Others

A fundamental rights challenge did not reach the CJEU until 2013 when the court heard *Digital Rights Ireland and Seitlinger and Others*.<sup>420</sup> These two joined cases – one from Ireland, one from Austria – involved actions brought by civil liberties groups which challenged the national implementing measures and also the directive itself. Both the Austrian and Irish courts made preliminary references which in substance asked the CJEU to assess the validity of the directive in light of the general principles of EU law, the ECHR and the Charter of Fundamental Rights.

In its judgment of 8 April 2014, the CJEU invalidated the directive on the basis it interfered with the rights to privacy and data protection in a way which did not comply with the principle of proportionality having regard to Articles 7, 8 and 52(1) of the Charter.<sup>421</sup> The detail of the judgment is particularly important in understanding its effect for national data retention policies, so an extensive summary will be provided.

The court began by noting that data retained under the Directive is particularly revealing in nature:

Those data, taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.<sup>422</sup>

Consequently, even though the directive did not extend to the content of communications the court nevertheless accepted that it might have a chilling effect on freedom of expression, stating that ‘the retention of the data in question might have an effect on the use, by subscribers or registered users, of the means of communication covered by that directive and, consequently, on their exercise of the freedom of expression guaranteed by Article 11 of the Charter’.<sup>423</sup>

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<sup>419</sup> Katja de Vries and others, 'The German Constitutional Court Judgment on Data Retention: Proportionality Overrides Unlimited Surveillance (Doesn't It?)', in Serge Gutwirth and others (eds) *Computers, Privacy and Data Protection: An Element of Choice* (Springer 2011), 11-12.

<sup>420</sup> Judgement of 8 April 2014 *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, C-293/12 and C-594/12.

<sup>421</sup> Para 69.

<sup>422</sup> Para 27.

<sup>423</sup> Para 28.

In addition, the court held that the retention *in and of itself* constituted an interference with the fundamental right to privacy (under Article 7 of the Charter) and data protection (under Article 8 of the Charter), while access by competent national authorities constituted a further interference.<sup>424</sup> Significantly, the court noted that the interference was ‘wide-ranging, and it must be considered to be particularly serious’ as ‘the fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance’.<sup>425</sup>

The court then considered whether this interference with the rights to privacy and data protection could be justified under Article 52(1) of the Charter, which provides that:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The court began this assessment by finding that data retention, although ‘a particularly serious interference with’ the rights under Article 7 did not ‘adversely affect the essence of those rights’ on the basis that it did not extend to the contents of communications. Similarly the court held that data retention did not ‘adversely affect the essence of the fundamental right to the protection of personal data enshrined in Article 8 of the Charter’ on the basis that the directive required that data security measures must be put in place as regards the retained data.<sup>426</sup>

Turning to the question of proportionality, the CJEU accepted that data retention served a legitimate objective (to address serious crime)<sup>427</sup> but went on to find that it did not do so in a proportionate way, identifying a variety of deficiencies in the scheme of the directive. The court found that the interference caused was particularly serious as it:

applies to all means of electronic communication, the use of which is very widespread and of growing importance in people’s everyday lives. Furthermore... the directive covers all subscribers and registered users. It therefore entails an interference with the fundamental rights of practically the entire European population.<sup>428</sup>

The indiscriminate nature of the retention was a particular concern, the court noting that it applied to the entire public (including lawyers, journalists, doctors and others who are entitled to secrecy in their professional communications) and did so without any geographic or temporal limitation and without any element of individualised suspicion or justification:

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<sup>424</sup> Paras 33-36.

<sup>425</sup> Para 37.

<sup>426</sup> Paras 39-40.

<sup>427</sup> Paras 41-44.

<sup>428</sup> Para 56.

Directive 2006/24 affects, in a comprehensive manner, all persons using electronic communications services, but without the persons whose data are retained being, even indirectly, in a situation which is liable to give rise to criminal prosecutions. It therefore applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime. Furthermore, it does not provide for any exception, with the result that it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy.

Moreover, whilst seeking to contribute to the fight against serious crime, Directive 2006/24 does not require any relationship between the data whose retention is provided for and a threat to public security and, in particular, it is not restricted to a retention in relation (i) to data pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved, in one way or another, in a serious crime, or (ii) to persons who could, for other reasons, contribute, by the retention of their data, to the prevention, detection or prosecution of serious offences.<sup>429</sup>

The next concern identified by the CJEU was the failure to control the manner in which the retained data could be used – meaning that retained data could be used in a disproportionate way:

[N]ot only is there a general absence of limits in Directive 2006/24 but Directive 2006/24 also fails to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference. On the contrary, Directive 2006/24 simply refers, in Article 1(1), in a general manner to serious crime, as defined by each Member State in its national law.<sup>430</sup>

This was exacerbated by the fact that the Directive did not specify any procedural safeguards to be followed before data could be accessed and ‘above all’ did not specify that access to retained data should take place only on the basis of *ex ante* judicial or quasi-judicial approval:

Above all, the access by the competent national authorities to the data retained is not made dependent on a prior review carried out by a court or by an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued and which intervenes

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<sup>429</sup> Paras 58-59.

<sup>430</sup> Para 60.

following a reasoned request of those authorities submitted within the framework of procedures of prevention, detection or criminal prosecutions.<sup>431</sup>

The allowable retention period set by the Directive was also criticised by the CJEU, which noted that it had been set without ‘any distinction as between the categories of data’ and without any obligation on Member States to ensure that they chose the minimum period strictly necessary based on objective criteria.<sup>432</sup>

The CJEU found that these deficiencies were in themselves sufficient to hold that the directive ‘entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary’.<sup>433</sup> In addition, the court went on to identify two further flaws: the directive did not provide for sufficient safeguards to protect the data held by providers against abuse (for example, it did not require that data be irreversibly destroyed at the end of the retention period), and did not require that the data be retained within the EU, raising the possibility that the data could be exported to another jurisdiction in a way which would put it beyond control by an independent data protection authority.<sup>434</sup>

Finally, the CJEU declined to address the freedom of expression issue, noting that there was no need to do so when the Directive had already been invalidated on privacy and data protection grounds.<sup>435</sup>

## 5. Interpreting Digital Rights Ireland

There has been a great deal written as to how the judgment in *Digital Rights Ireland* should be understood, with no firm consensus.<sup>436</sup> This is, for the most part, due to the structure of the decision. Although it

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<sup>431</sup> Para 62.

<sup>432</sup> Paras 64-65.

<sup>433</sup> Para 65.

<sup>434</sup> Paras 66-68.

<sup>435</sup> Para 70.

<sup>436</sup> See e.g. Niklas Vainio and Samuli Miettinen, 'Telecommunications Data Retention after Digital Rights Ireland: Legislative and Judicial Reactions in the Member States' (2015) 23 *International Journal of Law and Information Technology*; Federico Fabbrini, 'Human Rights in the Digital Age: The European Court of Justice Ruling in the Data Retention Case and Its Lessons for Privacy and Surveillance in the United States' (2015) 28 *Harvard Human Rights Journal*, 65; David Anderson, 'A Question of Trust – Report of the Investigatory Powers Review' (*Independent Reviewer of Terrorism Legislation*, 11 June 2015) <<https://terrorismlegislationreviewer.independent.gov.uk/a-question-of-trust-report-of-the-investigatory-powers-review/>> last accessed on 8 September; Tuomas Ojanen, 'Privacy Is More Than Just a Seven-Letter Word: The Court of Justice of the European Union Sets Constitutional Limits on Mass Surveillance: Court of Justice of the European Union Decision of 8 April 2014 in Joined Cases C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others', (December 2014) 10 *European Constitutional Law Review* (EuConst); Franziska Boehm and Mark Cole, 'Data Retention after the Judgement of the Court of Justice of the European Union', (Münster/Luxembourg, 30 June 2014) The Greens | European Free Alliance in the European Parliament <[http://www.janalbrecht.eu/fileadmin/material/Dokumente/Boehm\\_Cole\\_-\\_Data\\_Retention\\_Study\\_-](http://www.janalbrecht.eu/fileadmin/material/Dokumente/Boehm_Cole_-_Data_Retention_Study_-)

identifies a long list of problems with the directive, it does not explicitly address the significance of each one. Is blanket data retention *per se* impermissible? Should each problem should be treated as invalidating the directive in and of itself? Or should some be regarded merely as factors to be taken into account in an overall assessment of the proportionality of the directive? If the latter, what weight should be given to each factor? Is it merely the aggregation of all the failings which rendered the directive invalid?

Broadly speaking, two interpretations of the decision have emerged, which Vainio and Miettinen have dubbed 'strict' and 'permissive'.<sup>437</sup> The strict interpretation is that the judgment precludes any form of untargeted data retention – the 'serious interference' of data retention 'with the fundamental rights of the entire population' cannot be proportionate irrespective of whatever safeguards might be in place regarding access to and use of the data.<sup>438</sup> This is, notably, also the view of the *juge rapporteur* in *Digital Rights Ireland*, Prof. Thomas von Danwitz, who has been quoted extra-judicially saying that the general retention of communications data without cause is the 'essence of the ruling'.<sup>439</sup>

The permissive interpretation – which is, unsurprisingly, promoted by those national governments seeking to read down the effect of the judgment – is that it was the cumulative effect of the many deficiencies in the directive which led to its invalidation. On this interpretation, blanket data retention for the entire population is still possible provided that the other problems identified by the CJEU are addressed with appropriate safeguards, particularly as regards access to the data.

This question of interpretation goes to the heart of the issue of vertical coherence, as it determines how much room to maneuver Member States have after the judgment. These conflicting interpretations have in turn been reflected in subsequent national decisions applying *Digital Rights Ireland* to assess the validity

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[\\_June\\_2014.pdf](#)> last accessed on 8 September 2015; Marie-Pierre Granger and Kristina Irion, 'The Court of Justice and the Data Retention Directive in Digital Rights Ireland-Telling Off the EU Legislator and Teaching a Lesson in Privacy and Data Protection' (2014) 39 *European Law Review*, 835; Maria Helen Murphy, 'Data Retention in the Aftermath of Digital Rights Ireland and Seitlinger' (2014) 4 *Irish Criminal Law Journal*, 105; Orla Lynskey, 'The Data Retention Directive Is Incompatible with the Rights to Privacy and Data Protection and Is Invalid in Its Entirety: Digital Rights Ireland', (December 2014) 51 *Common Market Law Review*.

<sup>437</sup> Niklas Vainio and Samuli Miettinen, 'Telecommunications Data Retention after Digital Rights Ireland: Legislative and Judicial Reactions in the Member States' (2015) 23 *International Journal of Law and Information Technology*, 299-300.

<sup>438</sup> See e.g. Franziska Boehm and Mark Cole, 'Data Retention after the Judgement of the Court of Justice of the European Union', (Münster/Luxembourg, 30 June 2014) The Greens | European Free Alliance in the European Parliament <[http://www.janalbrecht.eu/fileadmin/material/Dokumente/Boehm\\_Cole\\_-\\_Data\\_Retention\\_Study\\_-\\_June\\_2014.pdf](http://www.janalbrecht.eu/fileadmin/material/Dokumente/Boehm_Cole_-_Data_Retention_Study_-_June_2014.pdf)> last accessed on 8 September 2015; Federico Fabbrini, 'Human Rights in the Digital Age: The European Court of Justice Ruling in the Data Retention Case and Its Lessons for Privacy and Surveillance in the United States' (2015) 28 *Harvard Human Rights Journal*.

<sup>439</sup> David Anderson, 'A Question of Trust – Report of the Investigatory Powers Review' (*Independent Reviewer of Terrorism Legislation*, 11 June 2015), 88 <<https://terrorismlegislationreviewer.independent.gov.uk/a-question-of-trust-report-of-the-investigatory-powers-review/>> last accessed on 8 September

of domestic data retention laws. To date, all such decisions have struck down the relevant domestic law – but the reasoning used to do so has been inconsistent.<sup>440</sup>

A permissive interpretation has been adopted in the United Kingdom, where the High Court judgment in *Davis v. Home Secretary*<sup>441</sup> took the view that blanket data retention would be allowable provided that adequate controls on access to retained data were present:

the *ratio* of *Digital Rights Ireland* is that legislation establishing a general retention regime for communications data infringes rights under Articles 7 and 8 of the EU Charter unless it is accompanied by an access regime (laid down at national level) which provides adequate safeguards for those rights.<sup>442</sup>

Such an access regime, the court held, must include clear and precise rules imposing safeguards sufficient to give effective protection against the risk of abuse of retained data, must limit the use of retained data to serious crimes and most importantly, must include a system of prior review by a court or other independent body before retained data can be accessed.<sup>443</sup> The court suspended the effect of its decision to allow the UK government time to legislate for a replacement data retention system which would meet these criteria.

This permissive approach has also been adopted in the Netherlands, where in the *Privacy First*<sup>444</sup> case the District Court of the Hague invalidated the Telecommunications Data Retention Act ('TDRA') – in particular, because it did not provide for prior judicial control of access to data – but held that the decision in *Digital Rights Ireland* left open the possibility of requiring blanket data retention subject to sufficient safeguards on access.<sup>445</sup> In a remarkable passage, the court justified this by stating that to require some prior suspicion would mean that 'first offenders'<sup>446</sup> could not be dealt with – illustrating the fact that the effect of data retention is to treat every citizen as a potential suspect.

An intermediate position was adopted by the Austrian Constitutional Court. In its judgment finding national data retention law contrary to the Charter and the ECHR, the court reserved its position on whether data retention could be permissible and if so in what circumstances, stating that '[r]egulations like those on data retention may be admissible to fight serious crime. However, they need to conform

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<sup>440</sup> Many of these cases are summarised in Niklas Vainio and Samuli Miettinen, 'Telecommunications Data Retention after Digital Rights Ireland: Legislative and Judicial Reactions in the Member States' (2015) 23 International Journal of Law and Information Technology.

<sup>441</sup> *Davis, Watson, Brice and Lewis v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin).

<sup>442</sup> Para 89.

<sup>443</sup> Para 91.

<sup>444</sup> Case number C/09/480009 / KG ZA 14/1575, 11 March 2015, see Wendy Zeldin, 'Netherlands: Court Strikes Down Data Retention Law', [2015] Library of Congress Global Legal Monitor <[http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205404345\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404345_text)> last accessed on 8 September 2015.

<sup>445</sup> See in particular paras 3.6 and 3.7, available in English at Anna Berlee, 'Unofficial Translation of Dutch Data Retention Ruling' (*Interdisciplinary Internet Institute*, 11 March 2015) <<http://theiii.org/documents/DutchDataRetentionRulinginEnglish.pdf>> last accessed on 8 September 2015.

<sup>446</sup> Para 3.8.

with the requirements of data protection and with the Convention on Human Rights... How a regulation could be designed that is in conformity with the constitution is an issue that does not pose itself for the Constitutional Court at present'.<sup>447</sup>

By comparison, a more strict interpretation seems to have been taken by the Belgian Constitutional Court in its decision striking down the 2013 Belgian data retention law.<sup>448</sup> That law largely mirrored the directive, and the court therefore used largely the same structure as the CJEU decision in finding the law unconstitutional. Unlike the courts in the UK and the Netherlands, however, the Belgian court considered the proportionality of the retention obligation itself, and placed emphasis on the fact that data retention applied indiscriminately to persons with no links of any sort to serious crime and with no geographic or temporal limitation – suggesting that blanket retention would not be permissible.<sup>449</sup>

## 6. Coherence issues

The decision of the CJEU in *Digital Rights Ireland* raises both horizontal and vertical coherence issues. As regards horizontal coherence, it places a question mark over other EU data retention schemes beyond the telecommunications context, and Boehm and Cole have already provided an extensive analysis of the impact which it is likely to have on systems such as passenger name records, terrorist finance tracking programmes and Eurodac – all of which similarly involve mass collection of data on individuals with limited safeguards on access and use.<sup>450</sup> However, in this contribution we will focus on the issue of vertical coherence where some problematic issues arise as regards the enforcement of Charter rights as against Member States.

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<sup>447</sup> Summary taken from the English language press release of the court: Verfassungsgerichtshof Österreich, 'Press Release on the Announcement of Decision G 47/2012 and Others' (June 27, 2014) <[https://www.vfgh.gv.at/cms/vfgh-site/attachments/1/5/8/CH0006/CMS1409900579500/press\\_releasedataretention.pdf](https://www.vfgh.gv.at/cms/vfgh-site/attachments/1/5/8/CH0006/CMS1409900579500/press_releasedataretention.pdf)> last accessed on 8 September 2015.

<sup>448</sup> Decision of 11 June 2015, 84/2015.

<sup>449</sup> Paras B.10.1, B.10.2.

<sup>450</sup> Franziska Boehm and Mark Cole, 'Data Retention after the Judgement of the Court of Justice of the European Union', (Münster/Luxembourg, 30 June 2014) The Greens | European Free Alliance in the European Parliament <[http://www.janalbrecht.eu/fileadmin/material/Dokumente/Boehm\\_Cole\\_-\\_Data\\_Retention\\_Study\\_-\\_June\\_2014.pdf](http://www.janalbrecht.eu/fileadmin/material/Dokumente/Boehm_Cole_-_Data_Retention_Study_-_June_2014.pdf)> last accessed on 8 September 2015.

## 6.1 National data retention laws after Digital Rights Ireland

There are currently no plans for a new European data retention law.<sup>451</sup> However the issue of data retention remains live at national level, as existing laws fall to be assessed in light of *Digital Rights Ireland* and new domestic laws are proposed. Consequently there is a need to look at vertical coherence in this context. Must domestic laws comply with the principles enunciated in *Digital Rights Ireland*? Do they actually do so? And if not – how will compliance be enforced?

As regards the first question, there is now no doubt that domestic data retention laws must comply with the Charter of Fundamental Rights.<sup>452</sup> While the Charter does not apply to all member state actions, it does when Member States are ‘implementing’ EU law.<sup>453</sup> As interpreted by the CJEU in *Fransson*<sup>454</sup> and *Pfleger*,<sup>455</sup> this includes ‘all situations governed by’ or ‘within the scope of’ EU law, including derogations from EU law.<sup>456</sup> National laws compelling service providers to retain data – which must rely on the derogation in Article 15 of the e-Privacy Directive as well as affecting wider data protection obligations and the freedom to provide services – are therefore necessarily within the scope of the Charter.<sup>457</sup> This has since been confirmed by a number of cases invalidating national laws – notably the *Privacy First*<sup>458</sup> case in the Netherlands and the decision of the English High Court in *Davis v. Home Secretary*.<sup>459</sup>

The second question is whether national data retention laws do in fact comply with the Charter of Fundamental Rights. In most cases the answer appears to be no – unsurprisingly, given that national laws implementing the directive generally shared its deficiencies. In addition to those laws which were struck

<sup>451</sup> Francesco Guarascio, 'EU Executive Plans No New Data Retention Law', (*Reuters*, 2015) <<http://www.reuters.com/article/2015/03/12/us-eu-data-telecommunications-idUSKBN0M82CO20150312>> last accessed on 8 September 2015.

<sup>452</sup> See e.g. Jürgen Kühling and Sonja Heitzer, 'Returning through the National Back Door? The Future of Data Retention after the ECJ Judgment on Directive 2006/24 in the UK and Elsewhere' (2015) 40 *European Law Review*, 263–78.

<sup>453</sup> Art 51. See generally Xavier Groussot, Laurent Pech, and Gunnar Thor Petursson, 'The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication,' (2011) *Eric Stein Working Papers* <<http://www.ericsteinpapers.cz/images/doc/eswp-2011-01-groussot.pdf>> last accessed on 8 September 2015.

<sup>454</sup> Judgement of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, C-617/10.

<sup>455</sup> Judgement of 30 April 2014, *Pfleger and others*, C-390/12

<sup>456</sup> Judgement of 30 April 2014, *Pfleger and others*, C-390/12, paras. 30-37.

<sup>457</sup> There is a detailed discussion in a leaked opinion from the European Parliament Legal Service - see 'Legal Opinion - Questions Relating to the Judgment of the Court of Justice of 8 April 2014 in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland* and *Seitlinger and Others* - Directive 2006/24/EC on Data Retention - Consequences of the Judgment' (European Parliament, 22 December 2014) <<http://www.statewatch.org/news/2015/apr/ep-ls-opinion-digital-rights-judgment.pdf>> last accessed on 8 September 2015.

<sup>458</sup> Judgement of 11 March 2015, C/09/480009 / KG ZA 14/1575; see Wendy Zeldin, 'Netherlands: Court Strikes Down Data Retention Law', [2015] *Library of Congress Global Legal Monitor* <[http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205404345\\_text.](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404345_text.)> last accessed on 8 September 2015. The court also held that the national law was within the scope of the Charter insofar as it imposed a restriction on the freedom to provide services.

<sup>459</sup> [2015] EWHC 2092 (Admin).



down prior to the decision in *Digital Rights Ireland*, subsequent decisions in Austria, Belgium, Bulgaria, the Netherlands, Poland<sup>460</sup>, Romania, Slovakia, Slovenia, and the United Kingdom have all invalidated national laws.<sup>461</sup> Even if one accepts the permissive interpretation of *Digital Rights Ireland* – that it allows some form of blanket retention – the remaining national laws generally still suffer from many of the defects identified by the CJEU: no requirement from judicial approval prior to accessing data, no restriction to serious crime, no specific controls on security of the retained data, and so on. Despite this, a number of Member States have claimed that these national laws are compliant with the Charter on the basis of a very narrow reading of the decision.<sup>462</sup> In light of this resistance, it will ultimately take a further ruling from the CJEU to clarify the effect of *Digital Rights Ireland*. A reference now underway from the Swedish courts is likely to be the vehicle – in the *Tele2 Sverige*<sup>463</sup> case the Stockholm Administrative Appeals Court has referred two questions to the CJEU which squarely ask whether a general data retention obligation is compatible with the ePrivacy Directive and the Charter.

Third, how will compliance with the Charter be enforced? To date, the majority of the actions against domestic laws have been brought by national campaigners and civil rights groups. Only two actions have been brought by state human rights bodies.<sup>464</sup> The Commission has been asked to investigate the legality of the remaining data retention laws, but has not done so.<sup>465</sup> To the contrary, the Commission has explicitly stated that it will not be taking any action against national data retention systems. In a press release in September 2015 it adopted a hands-off approach, stating that ‘the decision of whether or not to introduce national data retention laws is a national decision’ and that ‘data retention is often the subject of a very sensitive, ideological debate and that sometimes there can be a temptation to draw the European Commission into these debates. The European Commission is not ready to play this game.’<sup>466</sup> In a meeting with civil society in September 2015 it elaborated on this by stating that the standards set by the Charter of Fundamental Rights as interpreted by the CJEU ‘are subject to varying interpretations and

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<sup>460</sup> In relation to access only – the validity of data retention per se was not considered by the Polish Constitutional Tribunal.

<sup>461</sup> See AK Vorrat, 'Overview of National Data Retention Policies - Freiheit Statt Angst!' <<http://wiki.vorratsdatenspeicherung.de/Transposition>; Open Rights Group> accessed 31 August 2015, 'Data Retention in the EU Following the CJEU Ruling – Updated April 2015' <[https://www.openrightsgroup.org/assets/files/legal/Data\\_Retention\\_status\\_table\\_updated\\_April\\_2015\\_uploaded\\_finalwithadditions.pdf](https://www.openrightsgroup.org/assets/files/legal/Data_Retention_status_table_updated_April_2015_uploaded_finalwithadditions.pdf)> last accessed on 31 August 2015.

<sup>462</sup> Niklas Vainio and Samuli Miettinen, 'Telecommunications Data Retention after Digital Rights Ireland: Legislative and Judicial Reactions in the Member States' (2015) 23 International Journal of Law and Information Technology.

<sup>463</sup> Case C-203/15, *Tele2 Sverige*.

<sup>464</sup> In Slovenia the challenge was brought by the Information Commissioner; in Bulgaria by the Ombudsman; in Romania the issue of the validity of the second data retention law was raised by two judges from lower courts acting *ex officio*.

<sup>465</sup> Heini Järvinen, 'EDRI Asks EU Commission to Investigate Illegal Data Retention' (*EDRI*, July 2, 2015) <<https://edri.org/edri-asks-european-commission-investigate-illegal-data-retention-laws/>> last accessed on 31 August 2015.

<sup>466</sup> European Commission, 'Press Release - European Commission Statement on National Data Retention Laws,' 16 September 2015, <[http://europa.eu/rapid/press-release\\_STATEMENT-15-5654\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-15-5654_en.htm)> last accessed 22 October 2015.

do not provide adequate benchmarks' for an infringement action to be brought<sup>467</sup> – an argument which overlooks the fact that national courts have found the decision of the CJEU sufficiently clear to apply it as against their own national laws.

This raises an important issue for the credibility of the Commission – having brought several actions<sup>468</sup> to fine Member States which failed to transpose the Data Retention Directive, will it now show the same diligence in protecting Charter rights against national laws? While it is understandable that the Commission might prefer to avoid this politically sensitive area, the full protection of Charter rights will require action on its part. Restrictive standing rules, limited civil society resources and the cost of litigation mean that in several Member States there is no practical possibility of a domestic challenge being brought. It is unacceptable that legislation breaching the Charter should remain in force due to the difficulties national legal systems put in the way of a challenge – and the result is a lack of vertical coherence as different national legal systems interpret the *Digital Rights Ireland* decision in different ways.

## 6.2 Other national surveillance laws and practices following *Digital Rights Ireland*

Further coherence issues arise when we consider the broader implications of *Digital Rights Ireland* for other forms of state surveillance. In particular, it raises serious questions as to the compatibility of the practice of 'bulk collection' with the Charter. Unlike traditional interception of communications – which targets specific individuals, groups or devices – bulk collection involves the mass interception of communications which are then scanned for particular keywords or other characteristics.<sup>469</sup> This was highlighted by Edward Snowden, who revealed that the UK Government Communications Headquarters (GCHQ) operates a system, codenamed TEMPORA, which taps all fibre optic cables entering or leaving the UK and stores the full content of all internet communications for all users – including all emails, telephone calls, instant messages, video chats and web browsing – for at least three days.<sup>470</sup> The metadata associated with those communications is then stored for at least 30 days.<sup>471</sup>

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<sup>467</sup> Joe McNamee, "European Commission & Data Retention - a Faulty Basis for Decision-Making\*?," *EDRI*, September 21, 2015, [https://edri.org/data\\_retention\\_decision\\_making/](https://edri.org/data_retention_decision_making/).

<sup>468</sup> European Commission, 'Press Release - Data Retention: Commission Takes Germany to Court Requesting That Fines Be Imposed' (31 May 2012) <[http://europa.eu/rapid/press-release\\_IP-12-530\\_en.htm](http://europa.eu/rapid/press-release_IP-12-530_en.htm)> last accessed on 31 August 2015.

<sup>469</sup> See e.g. Nick Taylor, 'To Find the Needle Do You Need the Whole Haystack? Global Surveillance and Principled Regulation' (2014) 18 *The International Journal of Human Rights*.

<sup>470</sup> Ewen MacAskill and others, 'GCHQ Taps Fibre-Optic Cables for Secret Access to World's Communications' (*The Guardian*, 21 June 2013) <<http://www.theguardian.com/uk/2013/jun/21/gchq-cables-secret-world-communications-nsa>> last accessed on 31 August 2015.

<sup>471</sup> For further context see e.g. Susan Landau, 'Making Sense from Snowden: What's Significant in the NSA Surveillance Revelations', (2013) 11 *IEEE Security Privacy*, 54–63.

These revelations – though dramatic – were not entirely new. It has been known for some time that bulk collection and scanning have been carried out by a number of EU states; though never before at this scale and sophistication. In the leading case of *Weber and Saravia v. Germany*<sup>472</sup> the European Court of Human Rights (ECtHR) has held that such ‘strategic monitoring’ systems interfered with both the right to privacy under Article 8 ECHR and the right to freedom of expression under Article 10, but nevertheless could be justifiable where a system has an adequate legal basis, is proportionate in serving a legitimate aim, and has adequate and effective guarantees against abuse.<sup>473</sup>

*Weber and Saravia v. Germany* has since been relied upon by national governments to justify the use of bulk collection, though there is a question mark as to whether even this permissive ruling can be stretched to allow TEMPORA or comparable systems.<sup>474</sup> However, the logic behind *Digital Rights Ireland* goes significantly further than that in *Weber and Saravia* and suggests that bulk collection in its current forms is incompatible with the Charter, whatever its status under the ECHR.

Most importantly, in *Digital Rights Ireland* the CJEU stressed the fact that data retention did not capture the content of communications so that the ‘essence’ of the right to privacy was not adversely affected.<sup>475</sup> Bulk collection – which captures the full content of all communications between individuals – is considerably more intrusive again and must, therefore, go to the essence of the right.<sup>476</sup> The significance of this point is that, under Article 52(1) of the Charter ‘[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms’. If we accept that bulk collection goes to the essence of the right to privacy then it cannot be legitimated under the Charter, whatever safeguards are in place.

Even if we do not accept that bulk collection goes to the essence of the right to privacy (though if it doesn’t, what does?) systems such as TEMPORA raise many of the other objections identified by the CJEU – with much greater force, given their greater invasiveness. In particular, by indiscriminately collecting all content these systems ‘do not require any relationship between the data whose retention is provided for and a threat to public security’<sup>477</sup> and by failing to provide for judicial controls on access they fail the requirement that ‘above all’ access should be dependent on a ‘prior review carried out by a court or by

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<sup>472</sup> Judgement of 29 June 2006, *Weber and Saravia v. Germany*, App No 54934/00 [94].

<sup>473</sup> See e.g. Stefan Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution* (1<sup>st</sup> edition, Hart Publications 2008), Chap 6.

<sup>474</sup> See e.g. Ben Emmerson, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism’ (2014) New York, United Nations General Assembly.

<sup>475</sup> Para 39.

<sup>476</sup> There is almost no caselaw as to what is meant by the ‘essence’ of a right. For discussion in the literature see Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (October 2012) 8 *European Constitutional Law Review*, 391.

<sup>477</sup> Para 59.

an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued'.<sup>478</sup>

### 6.3 The national security exemption and the application of Digital Rights Ireland

The discussion in the section above is predicated on the assumption that the Charter applies to bulk collection and similar forms of mass state surveillance. This will be the case where those systems are used for the purposes of criminal justice. However the Charter does not generally apply to the actions of Member States in the area of national security, where the EU has no competence.<sup>479</sup> This raises an important and difficult issue – to what extent might these mass surveillance systems fall within this national security exemption, insulating them from scrutiny under the Charter? There is little certainty in this area, even as regards the basic question of what we mean by national security, and the result of any litigation would depend heavily on the facts of the particular case as well as the political context.<sup>480</sup>

Where a Member State seeks to rely on a derogation from EU law – for example, under Article 15 of the ePrivacy Directive – then the mere invocation of national security is not enough: the CJEU has held in a number of cases that ‘although it is for Member States to take the appropriate measures to ensure their internal and external security, the mere fact that a decision concerns State security cannot result in European Union law being inapplicable’.<sup>481</sup> Instead, the Member State would have to ‘prove that it is necessary to have recourse to that derogation in order to protect its essential security interests’.<sup>482</sup>

On the other hand, if a Member State were to act in a way which did not rely on such a derogation and solely for the purpose of national security then it is possible that such a mass surveillance system would fall entirely outside the scope of EU law.<sup>483</sup> However, both the Article 29 Working Party and the European

<sup>478</sup> Para 62. See also David Anderson, 'A Question of Trust – Report of the Investigatory Powers Review' (*Independent Reviewer of Terrorism Legislation*, 11 June 2015), 91 <<https://terrorismlegislationreviewer.independent.gov.uk/a-question-of-trust-report-of-the-investigatory-powers-review/>> last accessed on 8 September.

<sup>479</sup> Art 4(2) of the Treaty on European Union confirms that ‘In particular, safeguarding national security remains the sole responsibility of each Member State’.

<sup>480</sup> See Art 29 Data Protection Working Party, European Commission 'Working Document on Surveillance of Electronic Communications for Intelligence and National Security Purposes' (5 December 2014, 22–27) <[http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp228\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp228_en.pdf)> last accessed on 31 August 2015.

<sup>481</sup> See in particular Judgement of 4 June 2011 *ZZ v. Secretary of State for the Home Department*, C-300/11; Judgement of 15 December 2009 *Commission v Italy*, C-387/05.

<sup>482</sup> *Commission v Italy*, C-387/05 [49].

<sup>483</sup> See e.g. Legal Service of the European Parliament, 'Legal Opinion - Questions Relating to the Judgment of the Court of Justice of 8 April 2014 in Joined Cases C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others - Directive 2006/24/EC on Data Retention - Consequences of the Judgment', 18.

Parliament have sought to limit the use of this argument. In a detailed Working Document on Surveillance of Electronic Communications the Working Party concluded that:

The only institution able to provide more legal certainty on what should and what should not be regarded as falling under the national security exemption is the CJEU. Only the Court can further define the scope of Union law and – subsequently – the applicability of the Charter. Until the moment the Court has given a further clarification of the scope of the national security exemption, the Working Party expects Member States to adhere to the standing case law requiring that recourse to the exemption needs to be justified in each case.<sup>484</sup>

The European Parliament has gone further, resolving in March 2014 that it:

Strongly rejects the notion that all issues related to mass surveillance programmes are purely a matter of national security and therefore the sole competence of Member States; reiterates that Member States must fully respect EU law and the ECHR while acting to ensure their national security; recalls a recent ruling of the Court of Justice according to which ‘although it is for Member States to take the appropriate measures to ensure their internal and external security, the mere fact that a decision concerns State security cannot result in European Union law being inapplicable’; recalls further that the protection of the privacy of all EU citizens is at stake, as are the security and reliability of all EU communication networks; believes, therefore, that discussion and action at EU level are not only legitimate, but also a matter of EU autonomy’.<sup>485</sup>

The views of the Article 29 Working Party and the Parliament are, however, certain to meet with strong resistance from a number of Member States which continue to push more intrusive forms of mass surveillance.<sup>486</sup> France, for example, has recently adopted a new surveillance law which requires the installation of ‘black boxes’ in ISPs to analyse all internet traffic to identify potential terrorist threats.<sup>487</sup> This has been described by many observers as violating the principles of the decision in *Digital Rights*

<sup>484</sup> Art 29 Data Protection Working Party, 'Working Document on Surveillance of Electronic Communications for Intelligence and National Security Purposes', 24.

<sup>485</sup> European Parliament 'Resolution 2013/2188 (INI) of 12 March 2014 on the US NSA Surveillance Programme, Surveillance Bodies in Various Member States and Their Impact on EU Citizens' Fundamental Rights and on Transatlantic Cooperation in Justice and Home Affairs [2014] <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0230+0+DOC+XML+V0//EN>> last accessed on 31 August 2015.

<sup>486</sup> See e.g. Juha Lavapuro, 'Finnish Government and the Desire to Constitutionalize Mass Surveillance: Toward Permanent State of Emergency?', (*Verfassungsblog*, 31 August 2015) <<http://www.verfassungsblog.de/en/finnish-government-and-the-desire-to-constitutionalize-mass-surveillance-toward-permanent-state-of-emergency/>> Last accessed 31 August 2015.

<sup>487</sup> See Winston Maxwell, 'French Surveillance Law Permits Data Mining, Drawing Criticism from Privacy Advocates' (*Hogan Lovells Chronicle of Data Protection*, 6 August 2015) <<http://www.hldataprotection.com/2015/08/articles/international-eu-privacy/french-surveillance-law-permits-data-mining-drawing-criticism-from-privacy-advocates/>> last accessed on 31 August 2015.

*Ireland* – though, remarkably, that decision was not even considered by the French Constitutional Court in its opinion<sup>488</sup> reviewing the law prior to its ratification.

This failure on the part of the French Constitutional Court to acknowledge the role of the Charter also highlights a possible risk for vertical coherence – that national courts may push back and ultimately refuse to apply EU law in this particularly sensitive area. In this, the French decision has echoes of the judgment of the German Constitutional Court in the Anti-Terror Database case.<sup>489</sup> There, the German Court refused to make a reference to the CJEU regarding the validity of a domestic statute regulating the exchange of information between the police and intelligence services, holding that it was clear the Charter could not apply to the domestic law as it had not been adopted to implement EU law – an approach which has been described by Fontanelli as ‘far-fetched’ and ‘purposely formulated to rebuke... what the German Court perceives to be risk of an abusive thrust encroaching on Member States’ sovereignty’.<sup>490</sup> It may well be that this risk will deter the CJEU from asserting the application of the Charter to domestic mass surveillance schemes if the issue eventually comes before it – in which case, the legality of those systems will ultimately fall to be considered in Strasbourg rather than Luxembourg, under the less stringent standards articulated by the ECtHR in *Weber and Saravia v. Germany*.

## 7. Conclusion

Following the decision in *Digital Rights Ireland* there is a significant disconnect between EU and national norms on mass surveillance. In that case, the CJEU set out strong privacy norms which apply at the very least to national data retention laws and may also apply to other systems such as the UK’s TEMPORA bulk collection schemes and the new French ‘black boxes’. Despite this, compliance at the level of national governments has been almost non-existent – in almost all cases, national governments have left clearly non-compliant data retention laws in place, forcing activists to bring litigation to have these laws annulled. In addition, the period since the judgment has seen Member States introducing new laws – such as the UK’s Data Retention and Investigatory Powers Act 2014 and the 2015 French Surveillance Law – which themselves are at least questionable, if not certainly contrary to the Charter of Fundamental Rights.

Thus far, enforcement of these Charter norms has largely been left to civil society, with the Commission expressly refusing to take action against national data retention laws. However, in its 2010 Strategy for the Effective Implementation of the Charter of Fundamental Rights, the Commission stated that it is:

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<sup>488</sup> Decision of 24 July 2015, No 2015-478 QPC <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-478-qpc/decision-n-2015-478-qpc-du-24-juillet-2015.144165.html>> last accessed on 31 August 2015.

<sup>489</sup> Decision of 24 April 2013, 1 BvR 1215/07.

<sup>490</sup> Filippo Fontanelli, 'Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog', (2013) 9 European Constitutional Law Review.

determined to use all the means at its disposal to ensure that the Charter is adhered to by the Member States when they implement Union law. Whenever necessary it will start infringement procedures against Member States for non-compliance with the Charter in implementing Union law. Those infringement proceedings which raise issues of principle or which have particularly far-reaching negative impact for citizens will be given priority.<sup>491</sup>

It is difficult to see data retention and mass surveillance generally as anything other than a significant issue of principle with particularly far-reaching negative impact for the entire population – and the action which the Commission takes on these issues will test the reality of the commitment it made in the 2010 Strategy.

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<sup>491</sup> European Commission, Commission Communication: Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' [2010] COM (2015) 573 final) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:en:PDF>> last accessed on 31 August 2015.

## VII. Conclusion

The principles, structures and discourse surrounding the actions of the EU, its institutions and the Member States are complex, under-developed and contain tensions that lead to incoherence in concept and practice in the promotion and protection of human and fundamental rights. These problems of coordinating action and implementing programmes for human rights are exacerbated by an international situation in which the interests of the EU institutions and those of individual Member States conflict. Faced with these challenges, the prospects for more coherent action for human rights may seem bleak. We have seen that this political and interest incoherence appears even in the interactions between areas where the EU exercises exclusive competence, like trade, with areas of shared competence, like development. Even when the competence for protecting a fundamental right is clear, like the ECJ's role in guaranteeing data protection, enforcing the ECJ's decision regarding the regimes of particular Member States runs into the problem of the national security exemption and a lack of political will on the part of the European Commission to do so. Further, as our case study surrounding economic, social and cultural rights shows, the EU has not, in practice, engaged in human rights proofing, provided accountability mechanisms or carried out social impact assessments of the effects of its policies when imposing the fiscal measures on Member States that are commonly termed 'austerity'.

Nevertheless, there are reasons for some optimism about the ability, at least, of the EU and its Member States to act coherently for human rights. The decision of the CJEU in the case of *Digital Rights Ireland* shows that more robust protection of human rights is possible within the EU structures, in particular if the courts of the Member States and the CJEU uphold the 'strict' rather than the 'permissive' interpretation of that decision. As the EU constitutionalises, structural coherence should improve. The boundaries between competences should become clearer—not least through the development of a more precise 'balancing test' by refining the principle of proportionality *and* the principle of sincere cooperation—and the EU institutions and the Member States will be able to act in a more coordinated manner in all areas, including human rights. With its explicit and now constitutional commitment to fundamental and human rights, the EU institutions are well placed to exercise their competences in ways that live up to the demands of discursive or conceptual coherence, based on the idea of human rights themselves as universal, indivisible and interdependent. Although there are obvious political obstacles to these developments in terms of the incoherence produced by the diverging interests of the EU institutions and of individual Member States, these debates should be carried out within the discourse of human rights as fundamental values that unite the Member States of EU. Most important, coordinated action should use the tools of human rights implementation, including human rights proofing, accountability mechanisms and impact assessments to make these discursive commitments effective.

This report makes the following suggested actions to enhance vertical coherence in the promotion of fundamental and human rights by the EU institutions and Member States:

- **The CJEU should develop a clear understanding of the principles of proportionality and sincere cooperation and their relation to each other and their application in cases involving fundamental and human rights.**



- The discursive commitments of the EU institutions should reflect the wider discourse of human rights, developed by other courts and regional systems and in international fora.
- This human rights discourse should be the language in which political conflicts between the EU institutions and the Member States and between Member States regarding EU internal and external policies involving fundamental and human rights are resolved.
- A detailed analysis which measured the human rights implications of budgetary decisions and policy making would be a useful step in devising tools for EU institutions and EU Member States to identify weaknesses in protection and methods to respect, protect and fulfil rights obligations.
- Member states and EU institutions should affirm in rhetoric and structure the positive duties that States have 'to fulfil economic and social rights, as well as obligations to respect them (by refraining from deliberate infringement of those rights) and to protect rights against abuses by corporate and other private actors' - regardless of EU-led economic and financial policies - and the duty to fulfil which requires 'actively putting in place the conditions and systems necessary for all members of the population to be able to fully exercise and progressively realize their rights.
- All of the EU institutions should live up to their commitments to protect and promote fundamental and human rights, even in the face of resistance from the Member States based on divergent political interests. In particular, the European Commission should act to implement the decision of the ECJ in Digital Rights Ireland regarding data protection.

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