



Coherence of human rights policymaking in EU institutions and other EU agencies and bodies

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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, entitled, 'Coherence Among EU Institutions and Member States'. There is one main objective related to the first report; namely, to analyse the coherence of EU internal and external policies regarding fundamental and human rights across different policy fields such as commercial policy, migration and asylum, the area of freedom, security and justice and counterterrorism.

The specific task for the report, as described in the project proposal, is to analyse the competences and responsibilities of EU institutions and bodies that initiate policies in fundamental and human rights in light of recent institutional developments brought on by the Lisbon Treaty. The focus of the task is on interactions between and the roles of the European Parliament, its subcommittee on human rights, the European Council, the Council, the Commission, the Court of Justice of the EU, the EU Fundamental Rights Agency, the High Representative of the Union for Foreign Affairs and Security Policy, the European External Action Service and EU Delegations.

In accordance with both the main objective and the specific task for this first report, this study begins with the premise that coherence is visible in three aspects of policy environments – organizational structures, policy regimes and interests - of the European Union (EU) to identify (in)coherence in current EU human rights policies among the EU Institutions. Beginning with the notion of competence, this report looks at how the EU institutions and agencies have viewed coherence in written and verbal discourse and then briefly sets forth how coherence is defined in other non-human rights contexts. Using those definitions and the views of coherence found in EU institutions as guidelines, a unique definition of coherence for EU human rights policy is created. This definition is the basis for the analysis of EU human rights policies and their (in)coherence in the final portion of the report. Regarding structures, this report examines the competence and responsibility of EU Institutions, agencies and bodies, as set forth in the treaties, regulations, rules of procedures and other key documents. The report continues by examining the policy regime in EU fundamental and human rights described in key instruments and documents. Finally, the policies and instruments, together with the competences of the institutions are analysed to identify (in)coherence in EU human rights policies as they have developed since the entry into effect of the Lisbon Treaty.

In the annexes to this report, three case studies present concrete examples of the (in)coherence in EU institutions and their human rights policies. One study examines how the FRA has fostered coherence in the structural aspects of EU policymaking by collaborating with a number of bodies and agencies to combat hate crimes in the EU, strengthen protection of LGBT rights and train workers in the respect for fundamental rights when dealing with border management. A second mini-study focuses on conflicting policy interests that lead to incoherence in the EU energy policy. A final study raises concerns about incoherence in policy drafting using the example of the approaches of the institutional actors in the drafting of the Recast Reception Directive.

This report makes the following (preliminary) suggested actions to enhance coherence in fundamental and human rights policies among and within the EU institutions:

- **Adopt a definition of coherence to be consistently used by EU institutions when developing policy.**
- **Develop mandates with clear references to legal bases and policy areas (AFSJ, CSDP, development, etc.)**
- **Create institutional awareness of both fundamental rights and human rights policymaking by establishing one directorate-general solely responsible for coordination and cooperation within the Stockholm Programme and its successor and the Strategic Framework environments.**
- **Give a broader mandate and more independence to FRA, enhancing its ability to monitor and report on violations of fundamental rights, including in the area of police and judicial cooperation and permit the agency to have a presence in human rights dialogues.**
- **Continue training and other awareness-raising activities in all Commission services and among other institutional staff so that fundamental and human rights impacts are assessed early and throughout (informally and formally) all policymaking processes.**
- **Use impact assessments consistently in both internal policy-making and external action to determine the effects of all proposals on fundamental and human rights.**

List of abbreviations

AWP - Annual Work programme
CEPOL –European Police College
COHOM – The Human Rights Working Group
CJEU – Court of Justice of the European Union
Charter - Charter of Fundamental Rights of the European Union
EASO - European Asylum Support Office
EB – Executive Board
EC – European Commission
ECDC – European Centre for Disease Prevention and Control
ECHR - European Convention on Human Rights ECHR
EIGE - European Institute for Gender Equality
EPSCO – Employment, Social Policy, Health and Consumer Affairs Council
EU – European Union
EUROFOUND – European Foundation for the Improvement of Living and Working Conditions
EUROJUST – European Union’s Judicial Cooperation Unit
EUROPOL – European Police Office
FRA - EU Agency for Fundamental Rights
FREMP – Working Party on Fundamental Rights, Citizens’ Rights and Free Movement of Persons
FRP – Fundamental Rights Platform
Frontex - European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
JURI – Committee on Legal Affairs
LGBT/LGBTQI – Lesbian, Gay, Bisexual and Transgender/ Lesbian, Gay, Bisexual, Transgender, Queer, Intersex
LIBE - Committee on Civil Liberties, Justice and Home Affairs
MAF - Multiannual Framework
MB - Management Board
PNR – Passenger Name Record
SC – Scientific Committee
TEU – Treaty on European Union[

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1. Introduction

This report examines policy coherence in the context of human and fundamental rights in the European Union. Assessing coherence is important from the perspective of institutional governance because it impacts the image, transparency and credibility of organisations. In the context of the governance structure of the European Union, policy coherence is a key ingredient for the way in which directives, regulations and other types of legislation are initiated and developed by the Union in Brussels and transposed and implemented in the 28 Member States. Coherence in those policies impacting human and fundamental rights is of utmost significance to ensure respect for and realization of those rights by the EU citizen. In addition, coherence and consistency are also called for in several of the provisions of the Lisbon Treaty.¹

1.1 Outline of the report

This report is structured as follows: an Executive Summary, a discussion of the concept of policy coherence, in the context of EU institutions and human rights policy, an analysis of the competence of EU institutions and their responsibilities in the area of human rights, the key strategy documents outlining EU human rights policy, analysis of and findings regarding the (in)coherence of human rights policies of EU institutions, together with suggested courses of action and conclusions. The report ends with a bibliography of references. The annexes to this report contain the mini-case studies of best practice and areas for improvement regarding the following issues: exemplary horizontal EU cooperation at the Fundamental Rights Agency (FRA), conflicting interests in the legislative process during the drafting of the Recast Reception Directive, the legislation that governs reception of asylum seekers, and reluctance evident in confronting Central Asian nations with their human rights records due to their importance for EU energy policy.

The case study regarding the FRA is included in the annex to demonstrate how fundamental rights are enhanced by cooperation and coordinated actions among EU institutions and agencies. The FRA mini-study focuses on combatting hate crimes in the EU, an issue that has gained visibility in recent years and was the subject of efforts by the Irish Presidency to prevent racism, xenophobia and homophobia in the Union (see discussion in section 2.1.1.3.1).

Given the current situation in the Ukraine and the rekindling of the debate regarding European energy (in)dependence, the authors include a study of how political and strategic interests introduce incoherence in human rights policies. The energy policy case study illustrates the softening of criticism toward human rights violations in Central European states - now seen as an alternative source of energy resources - since

¹ In the Treaty on European Union see Art. 11(3) (Commission responsible for coherent and transparent Union actions); Art. 13 (consistency of policies); Art. 16(6) (General Affairs Council and Foreign Affairs Council ensure consistency in work of Council configurations); Art. 18(4) (High Representative of the Union for Foreign Affairs and Security Policy responsible for consistency and effectiveness of Union actions).

the crisis in the Ukraine and the stepping up of quiet diplomacy as opposed to raising specific human rights issues with leaders of those repressive regimes.

Finally, the issue of migrant and asylum policy remains a contentious one; therefore, Dr. Liam Thornton of University College Dublin's School of Law reminds us, in his case study, that structural incoherence is evident in the way in which the Recast Reception Directive was rewritten to favour an approach that promotes security over protection of social and economic rights for asylum seekers.

1.2 Methodology

This report has been developed on the basis of literature reviews, desk studies of relevant EU human rights strategy documents, and stakeholder interviews. The literature reviews studied the relevant scholarly articles and texts regarding coherence in EU and non-EU contexts. The main literature review was undertaken to answer the question: What are the ways in which coherence has been defined in policy studies? The desk studies analysed the human rights strategy documents found on the databases of the relevant EU institutions, as well as the Treaties and regulations relating to human rights general principles. The case law of the European Court of Justice regarding general principles of law, fundamental and human rights was also reviewed. These documents and cases were analysed and reviewed to answer these questions:

- What are the competences and responsibilities of the EU institutions and agencies regarding fundamental and human rights? In what ways do they lend to greater (in)coherence in EU human rights policy?
- What are the relevant policy instruments for human rights found in the EU institutions? In what ways do they lend to greater (in)coherence in EU human rights policy?
- What horizontal incoherence is identified from the competence of EU institutions, their legal and policy instruments and interviews with EU officials and other stakeholders?

Finally, the authors conducted interviews in person and by telephone of EU officials in several EU institutions, including the EEAS, the Commission, the European Council and the FRA. (See Annex Four for a list of the interviewees). These interviews were designed to better understand the day-to-day workings in the institutions and how human rights policies are developed within and among institutions. Questions raised in the interviews included the cooperation in and among institutions, the implementation of key strategy documents and the impressions of individual officials regarding how the coherence of EU human rights policies in daily operations. The interviews have served to clarify the role and responsibilities of the EEAS, Commission and Council in the areas of fundamental and human rights. They were used to verify or test information and descriptions found in scholarly literature about the roles and responsibilities of institutions in fundamental and human rights, together with the critiques of EU fundamental and human rights policy coherence.

2 Policy coherence

Policy coherence is viewed as the backbone of sound organizational practice in companies, government agencies and international bodies alike.² Achieving coherence in policies has become an important part of policy-making in the European Union (EU), particularly following the entry into effect of the Lisbon Treaty.³ This concept of coherence in organizational policy-making has been studied by scholars of EU and non-EU political processes.⁴

To examine coherence in EU institutions, this study must begin by defining the concept of coherence to be used in this inquiry. Therefore, this first section of this report constructs a definition of coherence. To arrive at the definition, we conduct a brief examination of how the three European institutions involved in the legislative and programming (and therefore policy-making) processes view coherence and how the concept is debated by scholars of EU external relations. (The authors chose to study coherence in external relations because of the abundance of scholarship in the field.) Drawing upon those viewpoints, we refine the definition used for this report by adding dimensions that address the special nature of coherence in human rights policies. Finally, this definition is used to examine how incoherence arises in structures, policy domains and interests of the European Union's human rights policies.

2.1 Understanding the use of and defining the concept of coherence

2.1.1 Policy coherence in human rights as seen by the EU institutions

The notion of coherence in human rights has been raised by the EU in its policy-making. Terms such as 'mainstreaming' human rights or 'consistency,' as well as 'coherence' are prominently found in the discourse surrounding human rights issues. The discourse refers to different types of coherence – (i) vertical coherence between the policies devised in Union institutions, bodies and agencies and its transposition and implementation in Member States and their judicial and political institutions; and (ii) horizontal coherence in and among the policies developed in Union institutions, bodies and agencies. Because of their role in the legislative and agenda-setting process, the three main decision-making institutions – The EU Parliament, the Council and the Commission – as well as the main programming institution, the European Council, have been selected to begin this study of how the EU institutions view coherence. Each has evoked the notion of coherence in its discourse. This section provides a brief overview of their discourse on coherence in human rights policy. One thing is striking in the discussion: **there is no common definition of coherence used among the institutions.** Nevertheless, each institution does embrace some common understandings of the types of coherence visible in Union policy – vertical coherence between Union and Member State policies and horizontal coherence among institutions or among Member States, for example. (The types of coherence will be discussed later in this section.)

² P.J. May, J. Sapotichne and S. Workman, 'Policy Coherence and Policy Domains' 34 *The Policy Studies Journal* 381, 387 C. Portela and K. Raube, 'The EU Polity and Foreign Policy Coherence' 8 *Journal of Contemporary European Research* 3, 3 Mr. Lambrinidis emphasized that coherence in the realm of EU human rights policies faces three challenges, those related to internal/internal, internal/external and external/external coherence. 16 February 2014 Exchange of Views with FREMP and COHOM.

³ M. Nilsson and others, 'Understanding Policy Coherence: Analytical Framework and Examples of Sector-Environment Policy Interactions in the EU' 22 *Environmental Policy and Governance* 395, 395

⁴ For analysis of coherence in post-Lisbon contexts see L. den Hertog and S. StroB, 'Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term' 18 *European Foreign Affairs Review* 373; Portela and Kolja at 3

2.1.1.1 Basic documents dealing with coherence in the whole of EU human rights policy

In addition to references to 'consistency'⁵ and 'coherence'⁶ in the text of the Lisbon Treaty, there are some basic documents that reference coherence in global EU human rights. The contents of these documents are discussed elsewhere in this report, but it is important to note that they do not describe or define coherence; instead they make pronouncements and propose specific steps to ensure coherent policymaking in the field of fundamental and human rights. The documents and resolutions are as follows:

- Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy⁷
- EU Annual Report on Human Rights and Democracy in the World 2013⁸
- Council of the European Union, EU Annual Report on Human Rights and Democracy in the World in 2012⁹
- European Parliament Resolution of 13 December 2012 on the review of the EU's human rights strategy¹⁰

2.1.1.2 European Parliament

The Parliament has passed several resolutions regarding coherence in EU human rights policy. The resolutions are sometimes directly related to coherence in policymaking. Other resolutions use terminology closely-associated with coherence, such as 'consistency'. Some of those resolutions are briefly described below.

2.1.1.2.1 Resolutions on coherence

- European Parliament Resolution of 3 April 2014 on the EU comprehensive approach and its implications for the coherence of EU external action¹¹ urging the need for institutional and financial coherence and 'coherence in practice' – the coordination of political responses and a systematic elaboration of strategies to ensure coherence 'on the ground.'
- European Parliament Resolution of 13 March 2014 on the EU 2013 Report on Policy Coherence for Development (PCD)¹² calling for an arbitration system for disputes arising within the Commission regarding PCD and the development of indicators for measure donor and partner country programmes.

⁵ The Treaty on European Union articles use the term consistency in several provisions. Art. 9(1) Union's institutional framework shall ensure 'consistency, effectiveness and continuity of its policies and activities; Art. 16(6) General Affairs Council responsible for consistency; Art. 18(4) High Representative guards consistency of EU external action; Art. 21(3) Union must have consistency in external action and other policies; Art. 26(2) the Council and the High Representative ensure unity, consistency and effectiveness of action by the Union. The Treaty on the Functioning of the European Union also uses the terms consistency in Articles 71 and 334, regarding consistencies between policies and activities and the Council and Commission's enhance cooperation and consistency of activities with policies of the Union, respectively.

⁶ The Treaty on the European Union references the coherence of Unions actions in Article 11(3)

⁷ 11855/12, 25 June 2012

⁸ Council of the European Union, EU Annual Report on Human Rights and Democracy in the World in 2013, 7965/14, 6 June 2014

⁹ 9431/13, 13 May 2013

¹⁰ 2012/2062 (INI)

¹¹ 2013/2146(INI)

¹² 2013/2058(INI)

2.1.1.2.2 Resolutions referencing or using the term coherence

The Parliament has passed a number of resolutions that use the term coherence in relation to several important global human rights-related issues. A sampling of resolutions from 2012 to 2014 is enumerated here:

- The European Parliament Resolution of 13 March 2014 on EU priorities for the 25th session of the UN Human Rights Council¹³;
- European Parliament Resolution of 25 February 2014 with recommendations to the Commission on combating Violence Against Women¹⁴;
- European Parliament Resolution of 4 February 2014 on Undocumented Women Migrants in the European Union¹⁵;
- European Parliament Resolution of 12 March 2013 on the Situation of Women in North Africa¹⁶;
- European Parliament Resolution of 16 October 2012 on the Discrimination Against Girls in Pakistan, in particular the case of Malala Yousafzai¹⁷;
- European Parliament Resolution of 13 December 2012 on Caste Discrimination in India¹⁸;
- European Parliament Resolution on EU Foreign Policy in a World of Cultural and Religious Differences¹⁹;
- European Parliament Resolution of 11 March 2014 on the Eradication of Torture in the World²⁰.

2.1.1.2.3 Policies the EP identifies as problematic for human rights coherence

The Parliament also identified some areas where the Union is incoherent regarding its policies in the area of human rights, including in:

- The protection of human rights defenders, as a key priority within EU human rights policy;²¹ and
- Security, humanitarian aspects, trade, energy, environment, migration as area where there is a 'lack of progress in the consistency of the Union's external action'²²

2.1.1.2.4 Instances in which the EP refers to human rights coherence

The EP refers to coherence in a number of instances. More often than not, the Parliament refers to issues of coherence between the internal and the external levels while vertical and horizontal coherence is very seldom referred to in these terms. Usually, the documents that make reference to coherence are the ones adopted in the Plenary of the EP or discussed in DROI and FEMM, but, for reasons of space, we will resort to the most prominent documents referring to coherence, which are EP Resolutions and adopted texts.

¹³ 2014/2612(RSP)

¹⁴ 2013/2004(INL)

¹⁵ 2013/2115(INI)

¹⁶ 2012/2102 (INI)

¹⁷ 2012/2843 (RSP)

¹⁸ 2012/2909 (RSP)

¹⁹ (2014/2690(RSP)

²⁰ 2013/2169(INI)

²¹ European Parliament Resolution of 13 March 2014 on EU priorities for the 25th session of the UN Human Rights Council ([2014/2612\(RSP\)](#)) para 63. The EP recommends that more support should be given to the EIDHR

²² European Parliament Resolution of 3 April 2014 on the EU comprehensive approach and its implications for the coherence of EU external action (2013/2146(INI)), para 8

The EU Annual Report on Human Rights and Democracy in the World in 2012 declares that the European Parliament strives for a more 'efficient, visible and coherent action' regarding human rights policies and mentioning the EP's role in the appointment of the EU Special Representative for Human Rights. 'The EP called on the EU to move from words to action and to implement pledges made in a swift and transparent manner, and stressed that the Strategic Framework and Action Plan represent a floor, not a ceiling, for EU human rights policy. It also urged the Commission and the EEAS to live up to the pledge of a 'human rights-based approach' across the entire development cooperation process'.²³

2.1.1.2.5 Internal/external coherence

In the Resolution of 13 December 2012 on the review of the EU's human rights strategy, the EP critically identified, without specifically pinpointing, a lack of respect towards the consistency of different areas of EU external actions. Without due attention being paid to consistency and coherence,²⁴ the EP considered that these external instruments therefore became 'stand-alone elements' which need to be harmonized and linked.²⁵ Furthermore, the EP showed the risk of paying lip service to human rights especially in the context of the present economic and financial crisis and highlighted, once again, the necessity of implementing proclamations through 'agile and concrete measures (...) underpinned by an obligation to respect the coherence and consistency of the internal and external dimensions of all EU policies'.²⁶

The EP also used this opportunity to remind the Commission of commitments made in its 2010 Communication on an Action Plan Implementing the Stockholm Programme²⁷ to strive for greater internal and external coherence.²⁸ Most importantly, the EP reminds EU member states and 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'.²⁹

Additionally, reference to the internal-external levels of policy coherence is made in the EP Resolution on the Proposal for a Regulation of the EP and of the Council establishing a European Neighbourhood Instrument, where it is stated that: 'coherence with the external dimensions of Union's internal policies and instruments should also be ensured'.³⁰

Furthermore, the Annual Reports on Human Rights and Democracy in the World 2010 and 2011 make it clear that the EU is expected to take a firmer stance on issues dealing with discrimination. The EP urges

²³ Council of the European Union, 9431/13, EU Annual Report on Human Rights and Democracy in the World in 2012, [2013], 150.

²⁴ Later in this report, a definition of coherence is developed. While consistency is an element of coherence, in the sense that it shows a coordinated effort in policy-making, coherence is a broader term that encompasses both practical policymaking concerns as well as the structures and interests influencing and shaping policies.

²⁵ European Parliament Resolution of 13 December 2012 on the review of the EU's human rights strategy 2012/2062 (INI), D.

²⁶ Ibid

²⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens: Action Plan Implementing the Stockholm Programme, COM(2010)0171.

²⁸ The Stockholm Programme will be discussed in depth in Section 4.1 and again in portions of Section 5 of this report. The programme was adopted by the European Council and sets forth the priorities for the Area of Freedom, Security and Justice. It has specific provisions relating to the promotion of fundamental rights.

²⁹ European Parliament Resolution of 13 December 2012 on the review of the EU's human rights strategy 2012/2062, para 12

³⁰ European Parliament legislative Resolution of 11 December 2013 on the proposal for a regulation of the European Parliament and of the Council establishing a European Neighbourhood Instrument ([COM\(2011\)0839](#) – C7-0492/2011 – [2011/0405\(COD\)](#)), 13.

the EU - in its relation with third countries - to develop a more coherent and inclusive definition of non-discrimination, especially in those problematic areas, such as religion or belief, sex, sexual orientation, gender, ethnic origin.³¹ In the Annual Report on Human Rights and Democracy in the World 2012, the Parliament stresses that the EU Special Representative on Human Rights, the Commission and the EEAS should tackle 'discriminatory and inflammatory content' which is displayed in the media and the obstacles preventing a free enjoyment of the freedom of thought, conscience and belief in third countries.³²

We can easily observe that the EP uses an identical wording in instruments that are not directly and immediately concerned with human rights coherence. However, the issue of coherence comes up as a spillover because human rights are an objective of the Union and synergies must exist between different EU policies. The recurrent phrase goes as follows: 'The Union should seek the most efficient use of available resources in order to optimise the impact of its external action. This should be achieved through coherence and complementarity between Instruments for external action, as well as the creation of synergies between the present Instrument, other Instruments for external action and other policies of the Union. This should further entail mutual reinforcement of the programmes devised under these Instruments'.³³

Moreover, on various occasions, the EP underlines that the EU's action on the international scene and its objectives in its external action 'would be undermined if member states were not able or willing to live up to the standards to which they have agreed and bound themselves by signing the Treaties'.³⁴ The EP makes reference to this when dealing with the situation of fundamental rights in Hungary,³⁵ the eradication of torture in the world³⁶ or to EU's foreign policy in a culturally and religiously diverse world.³⁷

³¹ European Parliament Resolution of 12 March 2013 on the situation of Women in North Africa, 2012/2102 (INI); European Parliament Resolution of 16 October 2012 on the Discrimination Against Girls in Pakistan, in particular the case of Malala Yousafzai, 2012/2843 (RSP) ; European Parliament Resolution of 13 December 2012 on Caste Discrimination in India, 2012/2909 (RSP).

³² Annual Reports on Human Rights and Democracy in the World 2012, 163-164.

³³ European Parliament legislative Resolution of 11 December 2013 on the proposal for a regulation of the European Parliament and of the Council establishing a European Neighbourhood Instrument ([COM\(2011\)0839](#) – C7-0492/2011 – [2011/0405\(COD\)](#)), 13 a; Position of the European Parliament adopted at first reading on 11 December 2013 with a view to the adoption of Regulation (EU) No .../2014 of the European Parliament and of the Council establishing a Partnership Instrument for cooperation with third countries -- European Parliament legislative Resolution of 11 December 2013 on the proposal for a regulation of the European Parliament and of the Council establishing a Partnership Instrument for cooperation with third countries ([COM\(2011\)0843](#) – C7-0495/2011 – [2011/0411\(COD\)](#)), para 13 d; Position of the European Parliament adopted at first reading on 11 December 2013 with a view to the adoption of Regulation (EU) No .../2014 of the European Parliament and of the Council establishing a financing instrument for democracy and human rights worldwide – [European Parliament legislative Resolution of 11 December 2013 on the proposal for a regulation of the European Parliament and of the Council establishing a financing instrument for the promotion of democracy and human rights worldwide ([COM\(2011\)0844](#) – C7-0496/2011 – [2011/0412\(COD\)](#))], para 11a.

³⁴ Parliament Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary -- European Parliament Resolution 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) (2012/2130(INI)) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0315+0+DOC+XML+V0//EN&language=EN>> last accessed 10 June 2014.

³⁵ Ibid

³⁶ European Parliament Resolution of 11 March 2014 on the eradication of torture in the world ([2013/2169\(INI\)](#))

³⁷ European Parliament Resolution of 17 April 2014 on EU foreign policy in a world of cultural and religious differences ([2014/2690\(RSP\)](#)), paras 26-30. See also European Parliament recommendation to the Council of 2 February 2012 on a consistent

In the Parliament's view, credibility, coherence and consistency of EU policy are deeply interlinked and, therefore, urges more coherent EU human rights policies 'based on common fundamental standards and a constructive, results-oriented approach'.³⁸ The simple placement of legislation is not sufficient; it is rather its implementation and supervision that is a problem. This is also the case with EU's initiative regarding the eradication of torture in the world. While the European Parliament welcomes the 2012 update of the EU Guidelines on torture and shares the holistic approach adopted by it, it nevertheless underlines that they must be followed by a 'credible, consistent and coherent action' and calls on the Council, the EEAS and the Commission 'to take more effective steps to ensure that Parliament and civil society are involved, at the very least, in the assessment exercise in respect of the EU Guidelines'.³⁹

2.1.1.2.6 Vertical/Horizontal coherence

Although the EP does not employ the language of vertical (EU-Member State) and horizontal (among and between EU institutions, bodies and agencies) coherence, it does refer to such issues, when mentioning that progress in the areas of human rights and democracy can be achieved only if there is a 'coordinated and coherent action' of the EU and its member states.⁴⁰ Furthermore, implicitly tackling horizontal coherence, the EP stresses the need for coherence and consistency 'across all policy areas', which is 'an essential condition for an effective and credible human rights strategy'.⁴¹

At other times, the EP speaks about horizontal coherence as 'institutional coherence', mentioning that it 'believes that, so far, institutional and procedural shortfalls have largely prevented such coherent EU external action in most crisis areas where the EU has acted damaging the EU's credibility as a global actor and security provider'.⁴²

The EP also uses the term comprehensive approach (CA) in recent documents, such as the Resolution of 3 April 2014 on the EU comprehensive approach and its implications for the coherence of EU external action, which responds 'not only to the joined-up deployment of EU instruments and resources, but also to the shared responsibility of EU-level actors and member states, whose policies, actions and support should contribute to more coherent and more effective EU external action'⁴³ which gives the EU the possibility to get involved in international matters but also, at the same time, pursue its own human rights policies. This goes along the same lines as the United Nations concept of 'integrated approach' to conflict

policy towards regimes against which the EU applies restrictive measures, when their leaders exercise their personal and commercial interests within EU borders ([2011/2187\(INI\)](#)).

³⁸ European Parliament resolution of 17 April 2014 on EU foreign policy in a world of cultural and religious differences ([2014/2690\(RSP\)](#)), para 29.

³⁹ European Parliament Resolution of 11 March 2014 on the eradication of torture in the world ([2013/2169\(INI\)](#)), paras 8-9.

⁴⁰ European Parliament Resolution of 13 December 2012 on the review of the EU's human rights strategy, 2012/2062 (INI), J.

⁴¹ Ibid, para. 12.

⁴² European Parliament Resolution of 3 April 2014 on the EU comprehensive approach and its implications for the coherence of EU external action (2013/2146(INI)), para 14.

⁴³ European Parliament Resolution of 3 April 2014 on the EU comprehensive approach and its implications for the coherence of EU external action (2013/2146(INI)), B.

and post-conflict situations⁴⁴ and to NATO's New Strategic Concept⁴⁵ urging for a comprehensive approach to crisis management, adopted at the 2010 Lisbon Summit.

The EP also defines CA as the 'coordinated work of all relevant institutions (the EEAS and the Commission's relevant services, including ECHO, DEVCO, TRADE and ELARG, but also Parliament and the Council) pursuing common objectives within an agreed framework designed at EU level, and mobilising its most relevant instruments, including the CSDP when the security situation so requires'.⁴⁶ In this sense, the EP highlights the necessity of the EU to 'preserve and promote its values, interests and stability on the global stage, as well as protect the security and prosperity of its citizens (...) in cooperation with strategic partners'⁴⁷ and the importance of effective coordination and coherence in the European Union's external action.

2.1.1.3 The Council's references to human rights coherence

The centrepiece for coherence in human rights policy can be found in the Council's Strategic Framework and Action Plan on Human Rights and Democracy⁴⁸ which contains the architecture of the current Union policy on human rights in external action and is discussed in section 4, below. The Council appears reserved when speaking of human rights coherence, mostly due to criticism for not fulfilling its duty to ensure consistency through all EU policies.⁴⁹ Recently, the Council seems to be more engaged in the matter. The Council conclusions in May 2014 deal with the 'Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union'. Herein the Council 'reiterates its commitment' to integrate fundamental rights' throughout its internal decision-making procedures and particularly in relation to legislative procedures in different policy areas. In the same document, the Council again 'emphasizes its own responsibility for the effective and systematic application of the Charter', seeing the Charter as a 'key element' to uphold the shared values of all EU member states and for the promotion of a consistent human rights' policy.⁵⁰

When addressing issues of the vertical and/or horizontal dimension, the Council describes the situation, either pointing out that 'coherence and coordination among all EU external policies and instruments

⁴⁴ United Nations Economic and Social Council, ECOSOC and Integration for Sustainable Development, available at <http://www.un.org/en/ecosoc/integration/>; United Nations Rule of Law, The Department of Peace Keeping Operations, available at <http://www.unrol.org/article.aspx?n=dpko>

⁴⁵ NATO, NATO's New Strategic Concept, available at <http://www.nato.int/strategic-concept/Index.html>

⁴⁶ Ibid at 14.

⁴⁷ European Parliament Resolution of 3 April 2014 on the EU comprehensive approach and its implications for the coherence of EU external action (2013/2146(INI)), para 2.

⁴⁸ *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12 (2012)

⁴⁹ The European Parliament especially criticizes the Council when adopting the annual budget, see European Parliament resolution of 23 October 2013 on the Council position on the draft general budget of the European Union for the financial year 2014 (13176/2013 – C7-0260/2013 – 2013/2145(BUD))

⁵⁰ 21 May 2014, Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union, 10116/14, page 5 and 8;

should be further pursued'⁵¹ (horizontal coherence) or indicating that 'closer coordination at all levels between EU and member states should be sought'⁵² (vertical coherence).

2.1.1.3.1 Internal/external coherence

In May 2013, the Council adopted the 'EU Annual Report on Human Rights and Democracy in the World in 2012' presenting its performance in meeting the objectives set out in the Strategic Framework for Human Rights, as provided in the Action Plan. Within this report, a whole chapter is devoted to the issue of 'coherent policy objectives, internally and internationally', indicating the special relevance the Council dedicates to this topic. Therein, the Council reiterates the EU's commitment to human rights in all spheres, specifically in its external action according to Article 21 of the Treaty on the European Union, and the EU and its member states' commitment to ensure the respect for Human Rights within the EU's borders. It also points out that several efforts have been made in 2012 to address issues of coherence and consistency between the EU's internal and external policies, in particular, welcoming the increased cooperation between FREMP and COHOM.⁵³ In that vein, FREMP has endeavoured to discuss coherence in its internal and external dimensions, exchanging views with the EU Special Representative for Human Rights and engaging in dialogue with the Fundamental Rights Agency while also notifying Member States that:

In external relations there appears to be a need to refer to internal standards of protection which can be further applied to the external sphere. This also relates to the need to better explain the cumulative effect of ECHR, the EU Charter and the EU Treaties, which ensure a comprehensive and far-reaching system of protection of human rights in the EU.⁵⁴

In March 2013, the Foreign Affairs Ministers of Denmark, Finland, Germany and the Netherlands sent a letter to the President of the Commission raising the need for a new 'more effective mechanism to safeguard fundamental values in Member States'.⁵⁵ The letter emphasizes that the credibility of the European project depends on 'living up to the standards' the Union has set itself, especially in times where confidence in Europe has been deeply shaken.⁵⁶ To this end, the four Foreign Ministers point out the issue of ensuring coherence as between the internal and external dimensions of the EU action on human and fundamental rights issues. This letter, as well as an initiative by the Irish Presidency in the informal Justice and Home Affairs Council (JHA) of January 2013 discussing the need to counter intolerance, racism, anti-Semitism, xenophobia and homophobia,⁵⁷ started a debate in the Council of the possibility to strengthen

⁵¹ 19 May 2014, Draft Council Conclusions on a rights-based approach to development cooperation, encompassing all human rights, 9987/14, page 3;

⁵² 19 May 2014, Draft Council Conclusions on a rights-based approach to development cooperation, encompassing all human rights, 9987/14, page 5;

⁵³ 13 May 2013, EU Annual Report on Human Rights and Democracy in the World in 2012 (Thematic Reports), Council of the European Union, 9431/13;

⁵⁴ The Council of the European Union, Note, FREMP 53 JAI 200 COHOM 50, 31 March 2014 (on file with the authors)

⁵⁵ See the letter of 6 March 2013 sent by four Foreign Affairs Ministers to the President of the Commission, page 2, <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme.pdf>;

⁵⁶ Letter of 6 March 2013 sent by four Foreign Ministers to the President of the Commission, page 1;

⁵⁷ 21 June 2013, European Parliament, Working Document I on the situation of fundamental rights in the European Union 2012, p 4, <http://www.europarl.europa.eu/document/activities/cont/201310/20131021ATT73205/20131021ATT73205EN.pdf>;

instruments to encounter violations of Union values. The EU Commission reacted by a Communication of March 2014 on a new EU framework to strengthen the rule of law.⁵⁸ The Fundamental Rights Agency also proposed a framework for fundamental rights that would include a peer monitoring and peer evaluation tool.⁵⁹

In the following, the Council reaffirmed on several occasions the EU's commitment to promote human rights 'in all areas of its external action without exception'⁶⁰ and recalled that the Union has 'in accordance with the Treaties [...] a duty to ensure consistency between the different areas of its external action and between these and its other policies'.⁶¹ Additionally, in the Council conclusions on the evaluation of the European Union Agency for Fundamental Rights, the Council determines that the coherence between the internal and external dimension of the European Union human rights policies constitutes a priority.⁶² In this regard, the Council recognizes that strengthening consistency between internal and external aspects of human rights' protection contributes to the credibility of the European Union in its external relations and its role as a human rights promoter.⁶³ Further, in the Council conclusions in May 2014, the Council pointed out that the 'comprehensive approach' is not only a general working method, but also 'a set of concrete measures and processes to improve how the EU collectively can develop, embed and deliver more coherent and more effective policies, working practices, actions and results'. This would also allow the EU to respond more rapidly and effectively in crisis and conflict situations.⁶⁴

2.1.1.3.2 vertical/horizontal coherence

The Council considers vertical coherence as a possible contribution to the Union's ability to play a positive and transformative role in its external relations and as a global player. In particular, it notes the possibility of the EU and its member states using policies and tools, 'ranging from diplomacy, security and defence to finance trade, development and human rights, as well as justice and migration', in a coherent and consistent manner.⁶⁵

The Council considers the multi-layered system of fundamental rights protection as assurance for internally high standards of protection of human rights, but emphasizes that these standards should be further applied to the external sphere, 'in accordance with the respective competences of the Union and Member States'.⁶⁶ The May 2014 Council conclusions reference horizontal coherence (between the

⁵⁸ Communication of the Commission, A new framework to strengthen the rule of law, COM(2014)158/final/2 of 19.03.2014.

⁵⁹ Fundamental Rights Agency, Fundamental Rights: Challenges and Achievements in 2013, available at http://fra.europa.eu/sites/default/files/annual-report-2013-focus_en.pdf

⁶⁰ 19 May 2014, Draft Council Conclusions on a rights-based approach to development cooperation, encompassing all human rights, 9987/14, page 2;

⁶¹ 21 May 2014, Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union, 10116/14, page 6;

⁶² 21 November 2013, Council conclusions on the evaluation of the European Union Agency for Fundamental Rights, 16622/13;

⁶³ 21 May 2014, Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union, 10116/14;

⁶⁴ 12 May 2014, Council Conclusions on the EU's comprehensive approach, 9644/14, page 2;

⁶⁵ 12 May 2014, Council Conclusions on the EU's comprehensive approach, 9644/14, page 2;

⁶⁶ 21 May 2014, Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union, 10116/14, page 4;

institutions *inter se*.) The Council recalls the duty of all institutions of the European Union of ‘scrutinising their action with regard to the provisions of the Charter’ and at the same emphasizes that ‘it would welcome a renewed determination of Union institutions to ensure consistent application of the Charter in legislative activity’.⁶⁷

In addition, the Council highlights the necessity for the European Union to use its instruments and policies in a coherent manner in order to fight the root causes of a conflict or crisis by calling for ‘better, earlier and more systematically’ connections among ‘its political engagement, its CSDP missions and operations, its development cooperation and assistance’ and others.⁶⁸

2.1.1.3.3 Possible EU actions to promote progress on coherence of EU human rights policies

The Council Conclusion of September 2011 ‘Towards a coherent EU human rights policy’ points out that in order to achieve a more coherent EU human rights policy, the remaining tasks are firstly, to determine common aims and secondly the establishment of a method to achieve these objectives. The paper further lists six possible objectives, in which FREMP and COHOM could be engaged:

- (1) The accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which would make the Union subject to the external control of the European Court on Human Rights. This mean was again favoured by the Council in May 2013 and 2014.⁶⁹
- (2) The promotion of ‘international human rights instruments guaranteeing human rights standards’ among the EU member states and thirds countries.⁷⁰
- (3) The reinforcement of the international and internal monitoring mechanisms and simultaneously ‘increasing the level of implementation of the recommendations issues by the monitoring bodies to the EU Member States’.⁷¹
- (4) The adoption of further EU thematic guidelines on human rights issues, indicating the EU priorities. This issue has been further pursued since 2009, as pointed out in Chapter V of the ‘EU Annual Report on Human Rights and Democracy in the World in 2012’⁷² and still constitutes a crucial element for the European Union in the years to come, as can be observed in the Action Plan.

⁶⁷ 21 May 2014, Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights’ protection and promotion in the European Union, 10116/14, page 5;

⁶⁸ 12 May 2014, Council conclusions on the EU’s Comprehensive Approach, 9644/14, page 4;

⁶⁹ 29 May 2013, Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, 10168/13; and 21 May 2013, Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights’ protection and promotion in the European Union, 10116/14;

⁷⁰ 27 September 2011, Towards a coherent EU human rights policy, 14806/11, page 4;

⁷¹ 27 September 2011, Towards a coherent EU human rights policy, 14806/11; page 5;

⁷² 13 May 2013, EU Annual Report on Human Rights and Democracy in the World in 2012 (Thematic Reports), Council of the European Union, page 51, 9431/13

- (5) The Council should exercise more political oversight over the agencies, for example by calling upon states to increase their level of fundamental rights protection.
- (6) The adoption of the Human Rights Action Plan as referred to in the Stockholm Programme. This point was fulfilled in June 2012.⁷³

2.1.2 The European Commission

The Commission has also been aware of a need for coherence in EU human and fundamental rights policy. This has been particularly clear in the internal dimension with the Commission's recognition that coherence is important for the application of Charter rights in Member States. The Commission declared in its report on the application of Charter rights in 2012 that:

After just three years in force as primary law, the take up of the Charter by national courts when EU law is involved can be seen as a positive sign. The increasing reference to the Charter gives a first indication of an effective, decentralized application of the Charter within the national constitutional orders. This is an important step on the road to a more coherent system for the protection of fundamental rights....⁷⁴

One year later in the 2013 report, the Commission acknowledged its own need to consider the impact of legislation on fundamental rights (the horizontal and intra-service dimensions), to ensure the consistent application of the Charter provisions:

EU institutions have made significant efforts to ensure the consistent application of the Charter's provisions since it gained legally binding force as primary EU law. Any impact on fundamental rights needs to be carefully considered during legislative procedures, especially at the stage of elaborating final compromise solutions. A strong inter-institutional commitment is required to achieve this goal.⁷⁵

The Commission has also recognized that coherence is necessary in individual directives or other legislation. For example, in its strategy for combatting human trafficking it has called for 'enhanced coordination and cooperation among key actors and policy coherence,' and emphasis on 'mainstreaming fundamental rights in the legislative and policy framework.'⁷⁶ In the strategy document, the Commission states that 'the EU Justice and Home Affairs Agencies signed a joint statement... [for] better prevention of trafficking, more efficient investigation and prosecution of perpetrators, and more effective protection of victims that complies with fundamental rights and takes the gender of victims into account.'⁷⁷

The Commission is involved in the day-to-day implementation of the EU Strategic Framework and Action Plan on Human Rights and Democracy, in which it endeavours to pursue coherent objectives in both the

⁷³ 27 September 2011, Towards a coherent EU human rights policy, 14806/11

⁷⁴ European Commission, 2012 Report on the Application of the EU Charter of Fundamental Rights, http://ec.europa.eu/justice/fundamental-rights/files/charter_report_2012_en.pdf

⁷⁵ European Commission, 2013 Report on the Application of the EU Charter of Fundamental Rights (14 April 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0224&from=EN>

⁷⁶ Ibid, at 29-30; EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, 19.6.2012, COM(2012) 286 final, available at http://ec.europa.eu/home-affairs/doc_centre/crime/docs/trafficking_in_human_beings_eradication-2012_2016_en.pdf

⁷⁷ EU Strategy towards the Eradication of Trafficking in Human beings 2012-2016 at 11.

internal and external spheres. More specifically, in Part III of the Action Plan (pursuing coherent policy objectives), the Commission, the EEAS or EU delegations undertake to

- Intensify cooperation between the Council working parties on fundamental rights (FREMP) and human rights (COHOM) to address issues of coherence and consistency between the EU's external and internal human rights policy;
- appropriately refer to UN, Council of Europe and Charter in relevant documents; and
- hold an exchange of views with Member States on implementation of Human Rights treaties.⁷⁸

2.1.3 The European Council

The European Council has made coherence a main priority in its programming regarding the area of freedom, security and justice. In the Stockholm Programme, the issue of coherence is prominently referenced. The programme, which culminates at the end of 2014, has declared that greater coherence is necessary in the area of freedom, security and justice.

The importance of the external dimension of the Union's policy in the area of freedom, security and justice underlines the need for increased integration of these policies into the general policies of the Union. This external dimension is essential to address the key challenges we face and to provide greater opportunities for citizens of the Union to work and do business with countries across the world. This external dimension is crucial to the successful implementation of the objectives of this programme and should in particular be taken into account in, and be fully coherent with all other aspects of the Union's foreign policy.⁷⁹

The European Council cited legislation as an area where coherence was lacking, stating that 'the quality of legislation including the language used in some of the legal acts could be improved,'⁸⁰ clarifying that coherence was needed in inter-institutional drafting:

A horizontal review of the adopted instruments should be considered, where appropriate, in order to improve consistency and consolidation of legislation. Legal coherence and ease of accessibility is particularly important. Better regulation and better law-making principles should be strengthened throughout the decision-making procedure. The inter institutional agreement on better law-making between the European Parliament, the Council and the Commission [...] should be fully applied. All Union institutions at all stages of the inter institutional procedure should make an effort to draft Union legislation in clear and comprehensible language.⁸¹

⁷⁸ The Council of the EU, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12 Section III

⁷⁹ The European Council, *The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens (2010/C 115/01)* (2010) Section 1.1

⁸⁰ The European Council, *The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens (2010/C 115/01)* Section 1.2.3

⁸¹ The European Council, *The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens (2010/C 115/01)* Section 1.2.3 (citation omitted)

The European Council did not ignore the need for coherence across policy areas linked to migration,⁸² nor did it forget to call for greater coherence between the area of freedom, security and justice and the common security and defence policy.⁸³ In the course of its call for coherence, the European Council evokes many areas that touch on human and fundamental rights, including data management,⁸⁴ law enforcement,⁸⁵ trafficking,⁸⁶ foreign and development policy and trade.⁸⁷ However, the Stockholm Programme also explicitly calls for coherence in human rights policy, including the establishment of Human Rights Action Plans and the recognition that the area of freedom, security and justice contains external implications, for example the principle of *non-refoulement* and the use of the death penalty by nations that are partners of the Union.⁸⁸

More recently, the European Council has acknowledged the need for greater coherence in AFSJ policy, stating in its conclusions of July 2014 that:

All the dimensions of a Europe that protects its citizens and offers effective rights to people inside and outside the Union are interlinked. Success or failure in one field depends on performance in other fields as well as on synergies with related policy areas. The answer to many of the challenges in the area of freedom, security and justice lies in relations with third countries, which calls for improving the link between the EU's internal and external policies. This has to be reflected in the cooperation between the EU's institutions and bodies.⁸⁹

2.1.4 Conclusion

This brief overview of the ways in which coherence in human and fundamental rights policy has been evoked by the EU institutions demonstrates that there is an awareness of some of the main aspects of coherence and how incoherence can manifest itself in EU policymaking. More importantly, it highlights the importance of coherence to policymaking in fundamental and human rights. This section will now turn to how scholars understand coherence. It will also recommend a definition to be adopted by EU institutions when examining their coherence on human rights policy.

⁸² The European Council, *The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens* (2010/C 115/01) Section 6

⁸³ The European Council, *The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens* (2010/C 115/01) Section 7.1

⁸⁴ The European Council, *The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens* (2010/C 115/01) Sections 1.1 and 2.5

⁸⁵ The European Council, *The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens* (2010/C 115/01) Section 4.3.1

⁸⁶ The European Council, *The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens* (2010/C 115/01) Sections 3.1.1 and 3.3.1

⁸⁷ The European Council, *The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens* (2010/C 115/01) Section 6

⁸⁸ The European Council, *The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens* (2010/C 115/01) Section 7.2

⁸⁹ European Council, 26/27 June 2014 Conclusions, EUCO 79/14

2.1.5 Policy coherence in EU external relations and its application to policy coherence in fundamental and human rights: the academic literature

Many definitions have emerged regarding the notion of coherence in specific policy areas such as development,⁹⁰ as well as in international policy making within international, supranational and regional organizations.⁹¹ Marangoni & Raube ably summarize coherence scholarship explaining that the concept is often presented in the negative as an 'absence of incoherence or of contradictions between policies, instruments, institutions or levels of decision.'⁹² These authors also emphasize that coherence presumes that the impact of an action is more than the sum of the impact of each dimension of its action so that it is not just an exercise that ensures that policies do not contradict, but seeks 'synergy and added value in the different components of ... policy.'⁹³ The final point made by Marangoni & Raube is that scholars agree that coherence is goal-oriented; that is to say that the absence of contradictions and the synergies must also be in pursuit of a single objective.⁹⁴

The concept of coherence has been studied and developed at length in the area of EU external relations. One significant contribution by scholars of EU external policy is the awareness that coherence in EU contexts has several dimensions. As described by Marangoni & Raube, these dimensions include (1) the vertical relationship between the European Union and individual Member States; (2) the horizontal interactions among EU institutions (e.g. Council and Commission), as well as the (3) inter-institutional dimension where more than one actor is responsible for a single policy, together with and an intra-institutional aspect dealing with the way in which policy goals are handled internally within a single organization or EU body; and the (4) external dimension of coherence relating to how the EU presents itself to and is perceived by its partners.

The four dimensions found in EU external policy are also relevant to the human rights policy arena. Firstly, the vertical dimension is evident because, as in the international arena, respect for and protection of fundamental and human rights in the European Union (under the principle of subsidiarity)⁹⁵ are first and foremost the responsibility of Member States. Member States have constitutions and national legislation promoting and protecting human and fundamental rights.⁹⁶ 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

⁹⁰ Ministère de l'Economie des Finances et de l'Industrie, *Coherence des politiques en faveur du développement: mécanismes mis en oeuvre dans L'Union européenne* (2006) 14

⁹¹ The OECD has developed this general definition for coherence: 'Policy coherence means different policy communities working together in ways that result in more powerful tools and products for all concerned. It means looking for synergies and complementarities and filling gaps among different policy areas so as to meet common and shared objectives.' See Organisation of Economic Cooperation and Development, 'Policy Framework for Policy Coherence for Development' Working Paper #1, 2012 1, 3

⁹² A.-C. Marangoni and K. Raube, 'Virtue or Vice? The Coherence of the EU's External Policies' *Journal of European Integration*, 3

⁹³ Marangoni and Raube

⁹⁴ Marangoni and Raube In the context of EU human rights, query whether it is possible to articulate a single objective for all human rights policy.

⁹⁵ Article 5 TEU

⁹⁶ S. Douglas-Scott, 'The European Union and Human Rights After the Treaty of Lisbon' 11 *Human Rights Law Review* 645, 647

Lisbon Treaty reforms, the EU is also bound by the terms of the EU Charter of Fundamental Rights and is in the process of accession to the European Convention on Human Rights and Fundamental Freedoms.⁹⁷ As a result, human rights policies developed in the EU have a vertical dimension that encompasses both the Union and Member States. Similarly, human rights policies are shaped and implemented among the various EU institutions and therefore have a horizontal dimension. For example, the drafting process for legislation can include the Commission, the Council and the Parliament. The Commission can be responsible for monitoring the progress of implementation of a measure. The inter-institutional aspect of human rights is equally demonstrable in the way in which the European External Action Service (EEAS) collaborates with the Commission's Directorate-General for Home Affairs to ensure that human rights underpin the external dimension of work in the Area of Freedom, Security and Justice, as set forth in the EU Action Plan on Human Rights and Democracy.⁹⁸ The intra-institutional dimension of human rights policies is evident in EU human rights policy when both the Directorate-General for Justice and the Directorate-General for Trade are responsible for incorporating fundamental rights into the Commission's impact assessments. Finally, human rights policies in the EU are also the subject of an external dimension because the EU regularly engages with third countries on human rights issues and conditions many of its agreements on human rights principles (free trade agreements and the Generalised System of Preferences Plus). There is also a dimension that looks at the coherence between direct sectors, for example, how human and fundamental rights are respected in trade relations as compared to other contexts such as asylum proceedings or energy policy.

2.1.6 The unique nature of human and fundamental rights policymaking

While the definitions in scholarly literature serve as a guide for the larger understanding of coherence and the European Parliament, the Council and the Commission have made pronouncements regarding their commitment to producing coherent human rights policy, more precision is necessary when identifying the essential elements for coherent human rights policies in EU contexts. Indeed, as in EU foreign relations, in the area of EU human rights, policies must be viewed from the same four dimensions as EU external policy. Nevertheless, there are other aspects of human rights policies not found in EU external action policy.⁹⁹ For that reason, the understanding of coherence and definition of policy coherence in human rights must be adapted to fit the unique nature of human rights in the EU context, including the internal aspects of EU fundamental rights and the normative principles underlying human rights concepts. Accordingly, human rights policymaking must not be restricted to considerations of substantive human rights but must also encompass elements that are essential for ensuring that human rights are fully realized by natural persons within the EU. Such elements can include, but are not limited to, the policies that affect the funding for organizations that advocate for human rights, the flow of information to EU actors regarding the realization or violations of human rights, the creation of monitoring mechanisms for gauging progress in implementation and realization of human rights and the effective use of resources to promote and protect human rights.

⁹⁷ Art. 6(2) TEU

⁹⁸ The Council of the European Union, *EU Action Plan on Human Rights and Democracy* (2012)

⁹⁹ The notions of indivisibility and universality (discussed below) are specific to human rights policies and not to foreign policy or EU external action.

EU human rights contain an internal dimension not evident in EU external policy. Stavros Lambrinidis, the EU's Human Rights Representative has also referenced the internal and external character to EU human rights policies.¹⁰⁰ The internal dimension refers to EU human rights policies within the borders of the EU, whether at the Member State or the Union level.

This distinction between external human rights and internal fundamental rights is not merely a discrepancy in terms, it also relates to the substance of the rights and the concepts surrounding the rights. This distinction can give rise to incoherence; namely a two-tier system of protection that would provide less rights to citizens where EU institutions have competence and more rights where competence is shared with Member States.¹⁰¹ The human rights recognized in the international arena and by the United Nations are enshrined in the core UN human rights treaties and in the Universal Declaration on Human Rights. In general, those rights are broader than the rights found in the founding treaties of the EU and the Charter;¹⁰² therefore, the EU institutions are subject to a narrower set of standards than are recognised in international human rights law and there is a potential discrepancy in the rights in which the EU can promote in third countries and the rights to which its institutions are bound. This leads to credibility dilemmas.¹⁰³ In addition, it violates the principles of indivisibility and universality discussed below.

Based on the above discussion of the dimensions of human rights, the following chart illustrates the policy dimensions of EU human rights.

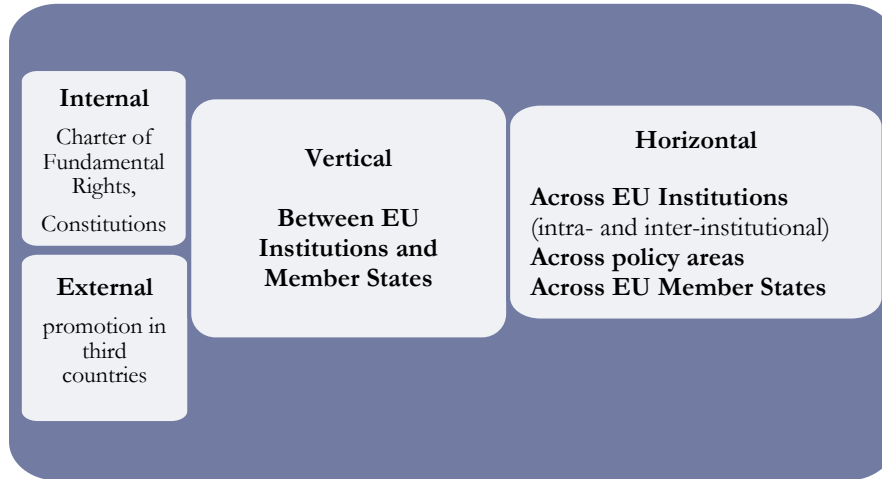
¹⁰⁰ Stavros Lambrinidis, the EU Special Representative for Human Rights explains that coherence of EU human rights policies has three dimensions: internal/internal, external/external and internal/external. Exchange of views with Mr. Lambrinidis, EU Special Representative for Human Rights, - 15964/13 FREMP 178 JAI 985 COHOM 247, 16 February 2014. The authors of this report note that human rights policies in the EU must also strive to focus on the coherence between Union institutions and within institutions. For example, within and among the different Directorates-General and the EEAS.

¹⁰¹ The notion of competence and the competence of EU institutions is explored later in Section 3. See also Regional Office for Europe of the UN High Commissioner for Human Rights, *The European Union and International Human Rights* at 50 ('there is a risk of a two-tier system of protection emerging in the EU. In policy areas falling within EU competence, individuals in Europe risk a lower level of protection than in policy areas falling under Member State competence. The lack of consistency between the EU's policy of promoting adherence to UN instruments in relations with third countries, while not according them prominence internally, also risks undermining its credibility on the world stage.')

¹⁰² Ibid, at 8. ('The EU as such has yet not ratified or acceded to a UN human rights treaty, with the notable exception of the [Convention on Rights of People with Disabilities] CRPD, to which it acceded in 2010. It has developed its own internal mechanisms aimed at protecting human rights, but these do not reflect the range of rights, nor do they mirror the depth of the obligations undertaken by the Member States under UN instruments. Consequently, those individuals within the jurisdiction of the Member States of the EU face a two-tier system of human rights protection. Where the Member States are still competent to act individually they will be guided by their obligations under the UN human rights treaties and the UN Charter. However, in those areas falling within EU competence the Member States give effect to EU rules that do not necessarily reflect the broader and deeper standards contained in the UN instruments.')

¹⁰³ This potential incoherence is discussed in detail in a report from the Regional Office for Europe of the UN High Commissioner for Human Rights available at http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf. One noteworthy conclusion of the report is that '... universality is itself a principle that the EU promotes. Therefore, it seems all the more important that the EU ensures that its own internal human rights regime conforms to UN standards, to which all its Member States have committed themselves, and which it promotes abroad. Any disparity between internal and external approaches to human rights would only serve to undermine the role of the EU in the eyes of its international partners and other third States.' Regional Office for Europe of the UN High Commissioner for Human Rights, *The European Union and International Human Rights* at 8.

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Due to the nature of human rights itself and the core principles of universality and indivisibility of human rights, defining coherence in EU human rights policies entails considerations beyond the internal, external, vertical and horizontal nature of policy environments. There are normative aspects to human rights policy. In other words, human rights policies must also respect the human rights principles of universality and indivisibility. Human rights are universal because they are applicable to all humans regardless of nationality or origin. In addition, the rights are indivisible and cannot be placed in a hierarchy with respect to one another. These two principles - universality and indivisibility - have important implications for the notion of coherence because human rights policies must also be designed to preserve these principles. Policies that violate these principles by failing to achieve universality and indivisibility are also incoherent because they fail to preserve the very principles that hold human rights policies together.¹⁰⁴

2.1.7 Defining coherence in human rights policies

In light of the previous discussion, in the context of human rights policies within the EU, coherence should be understood to mean:

polymaking 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 polymaking 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 polymaking ensures the respect for the universality and indivisibility of human rights in each policy dimension.

¹⁰⁴ The promotion of civil and political rights over and above economic, social and cultural rights can result in incoherence regarding the indivisibility of rights. On the other hand, guaranteeing certain rights to EU citizens while not permitting non-citizens resident in EU Member States to enjoy the same subset of rights can bring into question the universality of rights.

This initial portion of the report has devised a working definition for coherence in EU human rights policies, taking into account the special nature of human rights. The definition is built on a general understanding of policy coherence (as informed by the scholarly discussion and EU documents on coherence) that policy coherence is a collaboration among actors to implement commonly-agreed upon strategies and goals that are clearly identifiable and communicated by policy making institutions of the European Union. Next, the definition recognizes the specific realities of the EU environment and its varied dimensions of interaction. Finally, the definition at the conclusion of this section articulates the meaning of coherence in the light of two essential principles (universality and indivisibility) relevant to all human rights.

2.2 The contrasting notion of incoherence

A second important consideration relates to the notion of incoherence. While it is useful to have defined coherence of human rights policy in the EU context, for the purposes of this and future reports, the notion of incoherence and the circumstances in which it is likely to arise are also important.

Incoherence is introduced into policymaking when (1) structures are ill-designed leading to a lack of coordination in policy design or policy implementation;¹⁰⁵ (2) frameworks have competing visions or overlapping responsibilities;¹⁰⁶ and (3) interests diverge or conflict regarding policy goals.¹⁰⁷

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 poorly defined, structural incoherence will arise.

The EU 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. 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.

¹⁰⁵ May, Sapotichne and Workman 386 P.J. May and A.E. Joachim, 'Policy Regime Perspectives: Policies, Politics, and Governing' 41 Policy Studies Journal 426, 435 P. Gauttier, 'Horizontal Coherence and the External Competences of the European Union' 10 European Law Journal 23, 33

¹⁰⁶ A. Hommels, T.M. Egyedi and E. Cleophas, 'Policy Change and Policy Incoherence: The Case of Competition Versus Public Safety in Standardization Policies' 35 Journal of European Integration 443, 445

¹⁰⁷ May, Sapotichne and Workman 383 May and Joachim 436

Structures	Policy frameworks	Interests
<p>(Lack of) coordination policy-writing, drafting, implementation</p> <p>Competence and mandates conflicts (labour division)</p> <p>Agenda-setting roles</p>	<p>Competing visions (human rights v. fundamental rights)</p> <p>Overlapping policy regimes</p>	<p>Political/Socio-economic viewpoints</p> <p>Conflicting pressure/lobby interests</p>

2.3 Conclusions about the definition of coherence in EU human rights policy

While the notion of coherence has been the subject of academic and policy discourse, no definition of coherence in the human rights context has emerged, even within the EU institutions where coherence has been a policy goal for several years. The lack of a definition presents several problems, not the least of which is the ability to avoid policy regime incoherence. If institutions do not employ the same definition of coherence, their attempts to address coherence issues will not be uniform.

Suggested action:

Adopt a definition of coherence to be consistently used by EU institutions when developing fundamental and human rights policy.

This report formulated a working definition for this report and for the FP7 project as a whole. In relation to human rights policies in the EU, coherence is influenced by the internal and external aspects of EU human and fundamental rights. Considerations regarding the levels of policy actors whether at the height of union institutions or member states must also be borne in mind. Finally, policies should respect universality and indivisibility. With respect to the way in which coherence has been written and discussed by EU Institutions, it is clear that the notion is prevalent in the discourse, but it is not defined and is used in various senses and with varying degrees of consistency.

In other words, **coherence is 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.**

To adapt this definition to reflect the reality of the EU policymaking environment, coherence should be viewed as an environment where policies are elaborated with mindfulness of human and fundamental rights from the beginning of the process and continually assessed and monitored during and after conclusion of the implementation of the policy. This is achieved by coordinated planning within and among all institutions at all levels. It is also only possible when all officials are aware of human and fundamental rights standards and are able to recognize when and how these rights are relevant or potentially impacted by proposed measures and when teams and working groups share information and discuss human rights impacts throughout the process both informally and informal dialogues.

In view of the definition of coherence elaborated here and bearing in mind the three categories for the rise of incoherence, this report will examine the structures (the competence of EU Institutions and agencies), the policies (summaries of key instruments and strategy documents) and the interests (analysis of the policies and interviews of key stakeholders) with the goal of identifying (in)coherence in current EU human rights policies among the EU Institutions.

3 Competence and Responsibilities of European Union Institutions and Bodies in the Area of Human Rights

Competence and responsibility in the area of human rights has great potential to impact coherence of human rights policy. Indeed, the clarity of a mandate relating to human rights policymaking can directly affect the ability to definitively act in the field. In this section 3, we see that the nature of the EU (e.g. an international organisation comprised of sovereign member states) has influenced the way in which human rights have been integrated into Union policy over time. By definition, the Union is constrained to act only when it has the authority pursuant to EU treaties, as specified in Article 3(6) of the Treaty on European Union. Accordingly, the competence and responsibility of the EU Institutions in the area of human (and fundamental) rights is dependent upon the competence assigned to the EU institutions and bodies. Nevertheless, the notion of competence is fluid in the sense that there are also implied powers to make a regulation if those powers are reasonably necessary to exercise the competence.¹⁰⁸ As a result, institutions can expand the sphere in which they act, arguing that they are exercising an implied power. This expansion fuels the controversy over competence creep, the expansion of Union competence without specific and express authority. Historically, competence in the area of fundamental and human rights has grown in a piecemeal and erratic fashion. As will be demonstrated later in this report, no general competence has ever been assigned to the EU to act in the area of human rights. Accordingly, competence is added in an ad hoc manner. This uneven approach to policy can also have ramifications for coherence in fundamental and human rights policies.

This section will first trace the historic development regarding human rights policymaking in the EU. These historic beginnings are also important to explain the ad hoc acquisition of competence in areas that impact human rights. Then, the general and human rights competence of each EU Institution and body is set forth. Finally, in the conclusion, this report asks whether the competence and responsibilities are articulated in a way that enhances or detracts from coherent fundamental and human rights policymaking.

3.1 Historic developments regarding human rights policymaking in the EU

By outlining the evolution of human rights in the EU, this report places the coherence debate in its proper historical context while laying the groundwork for a later analysis of coherence and incoherence in EU policy. To the extent some of these (in)coherences arise from historical approaches to inclusion or exclusion of fundamental and human rights in the goals and general principles of the EU, this report will provide a general reference to the earlier institutional foundations.

In the years immediately following the Second World War, new international and regional institutions, such as the United Nations, were founded with the express purpose of preventing wars and promoting peace and stability in Europe.¹⁰⁹ The United Nations had declared human rights and fundamental freedoms as an end for international cooperation and had elaborated the International Bill of Rights, enumerating the vast array of human rights in the civil, political, economic, social and cultural arenas. In

¹⁰⁸ P. Craig and G. De Búrca, *EU Law: Text, Cases, and Materials* (Oxford 2011) 77

¹⁰⁹ M. Eilstrup-Sangiovanni and D. Verdier, 'European Integration as a Solution to War' 11 *European Journal of International Relations* 99, 99

Europe, two approaches to the promotion of peace emerged after the war. The first was the development of the institutions now known as the Council of Europe (CoE). The second was the creation of the bodies that would later form the European Union (EU). The CoE made human rights, democracy and the rule of law the three pillars of the organization. The EU, however, took a different path.

The European Union (known at its inception as the European Communities)¹¹⁰ was founded upon principles of economic cooperation in the aftermath of the Second World War, as agreed in the Treaties of Paris and Rome. Accordingly, human rights did not figure among the founding principles of the Communities.¹¹¹ Nevertheless, one of the founding treaties of the European Communities -- the Rome Treaty (1957) -- did include specific provisions regarding matters commonly recognized as human rights such as the prohibition against discrimination among European Community (EC) citizens, establishment of the freedom of movement for workers and admonishments to provide equal pay regardless of gender, but the treaty did not explicitly use the terms fundamental rights or human rights.¹¹²

The absence of a catalogue of human rights from the early days of the European Communities can be explained by the prevailing view, expressed in the preamble to the Treaty of Rome, that pooling of resources was the best way to 'preserve and strengthen peace and liberty' in Europe.¹¹³ In addition, in the original Article 2 of the Treaty Establishing the European Economic Community (1957) described the mission of the EC as an initiative to raise the standard of living of its Member States by providing harmonious development of economic activities, continuous expansion and increased stability.¹¹⁴ Therefore, in its exclusive focus on economic stability and expansion, the EC was not yet poised to actively engage in the promotion and protection of human rights within and outside of its borders.¹¹⁵ Instead, in the early days of the Communities, the singular aim to raise living standards in Europe meant that the protection of human rights remained primarily within the exclusive purview of Member States under the provisions of national law, including national constitutions. Many held the opinion that the EC's exclusive involvement in economic ventures made it unlikely that it would encroach on issues of human rights. In addition, during the post-war period, the Council of Europe had drafted its own European Convention on Human Rights and Fundamental Freedoms (ECHR) which was largely regarded as adequate for questions of human rights violations within Europe.¹¹⁶

¹¹⁰ European Coal and Steel Community (ECSC); European Economic Community (EEC), later named the European Community (EC); and European Atomic Energy Community (EAEC)

¹¹¹ B. Moriarty and E. Massa (eds), *Human Rights Law* (Oxford University Press 2012) at 157 N.A. Neuwahl and A. Rosas (eds), *The European Union and Human Rights*, vol 42 (Martinus Nijhoff 1995) at 299

¹¹² N.A. Neuwahl, 'The Treaty on European Union: A Step Forward in the Protection of Human Rights?' in Nanette A. Neuwahl and Allan Rosas (ed), *The European Union and Human Rights*, vol 42 (Martinus Nijhoff Publishers 1995) 1 See Treaty of Rome (1957) <http://www.eurotreaties.com/eurotexts.html#rometreaty>. Articles 7, 48 and 67 prohibited discrimination based on nationality, Article 119 prohibited discrimination based on sex regarding wages and salary.

¹¹³ Treaty Establishing the European Economic Communities

¹¹⁴ Lisbon Treaty, ('The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it.')

¹¹⁵ Moriarty and Massa at 157

¹¹⁶ C. Leconte and E. Muir, 'Introduction to Special Issue 'Understanding Resistance to the EU Fundamental Rights Policy'' 15 *Human Rights Review* 1, 4

Since its founding, the prominence of human and fundamental rights has dramatically increased in the European Union, a progression necessitated by the impact of economic integration on social issues and human rights. The first manifestations of human and fundamental rights incorporated into Union law and policy came from the CJEU's interpretations of Union law, the evolution of EU external relations within its Neighbourhood policy and its development and foreign aid agenda.

This transformation began to gain momentum when, shortly after the creation of the European Communities, the European Court of Justice was called to decide a number of cases where Community acts may have violated the (fundamental) rights of the citizens in the Member States.¹¹⁷ The Court was already operating on the principle of the supremacy of Community law, referred to in EU parlance as 'primacy.' Nonetheless, the CJEU began with a very restrictive view of its own competence to apply national law (review decisions from national courts based on the national rather than Community law) to Member States, rejecting the notion of any general principles of fundamental rights in Community law. The court's position was that it did not have the 'competence to review a decision of the High Authority for compatibility with German basic law' because it could only 'apply what was then European Community law' rather than Member State law.¹¹⁸

As Horspool and Humphreys note, "[s]ince recourse to purely national guarantees of fundamental human rights could jeopardise the existence and further development of Union law, the approach adopted by the Court of Justice was characterized by a recognition that the absence of written provisions relating to fundamental rights did not negate their existence. The position was rather that Union law needed to be supplemented by unwritten legal principles, including basic rights, which have equal status with primary Union law."¹¹⁹

The Court was initially occupied with negative rights – i.e. the need to refrain from the violation of rights. This position would gradually change when the Court began to recognize that the Community, as a supranational legal order was based upon concepts such as 'supremacy' (the priority of Community law over conflicting national law) and 'direct effect'¹²⁰ (the principle that EU decisions and regulations can be invoked directly by citizens in the Member States). Therefore, the Community must also ensure respect for human rights. The Court eventually abandoned its position and established a set of general principles of law (in the beginning the CJEU was more specific, calling them general principles of Community law, later they were just general principles) which encompassed human and/or fundamental rights or norms inspired by the constitutional traditions of EU Member States, including those rights enumerated in the international treaties to which the Member States are signatories.¹²¹ Important decisions issued included *Stauder v City of Ulm* (1969), *Internationale Handelsgesellschaft* (1970) and *Nold v Commission* (1973).¹²²

¹¹⁷ Case 40-64, *Marcello Sgarlata and other v Commission of the EEC*, 1 April 1965; Case 1/58 *Stork v ECSC High Authority*, 4 February 1959; *Costa v ENEL* [1964] ECR 419; *S.p.A v. Commission*, 1979 E.C.R. 777; Case 29/69 *Stauder v City of Ulm* [1969] ECR 419

¹¹⁸ Moriarty and Massa at 157; Two cases illustrate this point: Case 1/58 *Stork v. High Authority* (1959) and Cases 16, 17 and 18/59 *Ruhr v. High Authority* (1960).

¹¹⁹ M. Horspool and M. Humphreys, *European Union Law* (Oxford University Press 2012) at 142

¹²⁰ Moriarty and Massa at 157

¹²¹ J. Steiner and L. Woods, *EU Law* (Oxford University Press 2009); 134 Moriarty and Massa at 158

¹²² Moriarty and Massa at 158

The Court also held the position that it had the jurisdiction to ‘review acts of the institutions to ensure compatibility with’ human rights standards.¹²³ The Council, the Commission and the Parliament issued a joint declaration in 1977 recognizing that human rights principles of the Community were drawn from the constitutions of the Member States and from the ECHR. They also reiterated support for the principle of non-violation enunciated by the Court.

While a body of case law supporting human rights as general principles of Community Law was emerging over several decades, there was no manifestation of political agreement of such principles until the 1970s, the most notable being in 1977 when the three political institutions – the European Parliament, the Council and the Commission- issued a Joint Declaration on Fundamental Human Rights, stating the prime importance attached to the protection of fundamental human rights and the commitment of the European Communities to respect those rights.¹²⁴

The heightened status of human rights was also manifest in the new approach to the enlargement/accession process. The European Council issued a Declaration on Democracy in 1978, officially stating that respect for human rights was an essential element to membership in the Union.¹²⁵ More than a decade later, in 1993 at the Copenhagen European Council, the Union laid down specific criteria for accession, including ‘stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.’¹²⁶ In its relations, farther afield, the European Union was also introducing conditionality and political dialogues to its development cooperation agreements and trade deals, in accordance with its pronouncements in the Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries¹²⁷. The EU had brokered a series of agreements with African, Caribbean and Pacific (ACP) countries, known as Lomé I and II, but they had not been successful in stopping the abuses of long-time Uganda dictator Idi Amin and no human rights conditionality could be agreed upon until Lomé III, which fleetingly acknowledged human rights (including economic, social and cultural rights) in an annex.¹²⁸ Lomé IV, signed in 1989, made human rights an objective of the development cooperation.¹²⁹ In 2000, the EU signed the Cotonou Partnership Agreement which brought a new emphasis on conditionality, with the inclusion of a human rights clause in all agreements and the possibility of suspension for breaches.¹³⁰ There were also EU texts that changed the landscape for human rights: the Single European Act, the Treaty on the European Union (Maastricht Treaty) of 1991, the

¹²³ Moriarty and Massa at 157

¹²⁴ Moriarty and Massa at 160

¹²⁵ European Council, Declaration on Democracy, Conclusions of the Presidency (Copenhagen, 7-8 April 1978), Annex D, 20 April 1978, available at http://www.european-council.europa.eu/media/854616/copenhagen_april_1978__eng_.pdf (‘They solemnly declare that respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European Communities.’)

¹²⁶ European Council, conclusions of the Presidency, European Council in Copenhagen 21-22 June 1993, at 13, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf

¹²⁷ European Commission, Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries COM (95) 216 final, 23 May 1995

¹²⁸ A. Zimelis, ‘Conditionality and the EU-ACP Partnership: A Misguided Approach to Development?’ 46 Australian Journal of Political Science 389, 392

¹²⁹ Ibid

¹³⁰ Zimelis at 395; Conditionality is discussed in detail in Deliverable 9.1 of this FP7-FRAME project. Section 4.1.2 human rights in aid allocation and budget support.

Amsterdam Treaty of 1997 and the EU Charter of Fundamental Rights, adopted in 2000.¹³¹ These transformations are briefly set forth below.

In 1986, the then 12 Member States of the Community signed the Single European Act (SEA), an ambitious new treaty that sought to bring down the remaining barriers to the single internal market through harmonization policies.¹³² The SEA extended the Community's competence into new areas¹³³ and made an explicit referent to fundamental rights in two of its recitals, one related to fundamental rights recognized in the constitutions and laws of the Member States, the European Convention for Human Rights and the European Social Charter and the second regarding the promotion of human rights in external relations.¹³⁴

The Maastricht Treaty declared that the EU must respect fundamental rights and formally made ECHR principles and other sources of human rights general principles of Community law. More specifically, in the preamble, the Member States confirmed their 'attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.'¹³⁵

The Amsterdam Treaty committed Member States to liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law. It also required the Court of Justice to apply human rights standards to acts by Community institutions and expanded the Community's powers to combat discrimination.

The Lisbon Treaty further permitted suspension of member countries that breached human rights. The Charter confirmed that the Union was founded on indivisible, universal values of human dignity, freedom, equality and solidarity. The Charter not only encompasses the rights set forth in the ECHR, but introduces a range of rights not covered by the European Convention, including social rights of workers, the right of access to services of general economic interest and references to social security and social assistance. In its original version of 2000, the Charter was not legally binding on Member States, but that has changed with the entry into effect of the Lisbon Treaty in 2009.¹³⁶

3.2 The rise in prominence of human rights in EU governance after Lisbon

The changes brought into effect by the Lisbon Treaty have radically altered the visibility of human rights policies in the EU Institutions and Member States. As briefly explained above, the Lisbon Treaty raised the Charter of Fundamental Rights to the same level as the foundational EU Treaties, giving it binding character with regard to acts by EU Institutions but limiting its application to Member States to those cases in which a member state is implementing Union law.¹³⁷ The Treaty also permits the Union to monitor

¹³¹ A. Williams, *EU Human Rights Policies: A Study in Irony* (Oxford University Press 2004) 1

¹³² Steiner and Woods at 6

¹³³ Steiner and Woods at 51

¹³⁴ Neuwahl and Rosas at 300

¹³⁵ Art. F(2) Treaty on the European Union (Maastricht Treaty),

¹³⁶ Article 6(1) of the Treaty on European Union makes the Charter of Fundamental Rights of the European Union binding as against the Union.

¹³⁷ Charter of Fundamental Rights of the European Union, Article 51 ('The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law....')

Member State compliance with human rights principles after accession. These new roles represent a move from a largely 'passive' EU that was merely 'bound to respect fundamental rights while acting within the scope of EU law' to a 'pro-active' EU that has a mandate to 'enhance fundamental rights protection.'¹³⁸

The main provisions of the Treaty of the European Union (TEU) highlighting the prominence given to the respect and promotion of human rights are found in Articles 2, 3, 6 and 7. Each article is discussed in turn.

Article 2 specifies that the Union is founded upon the respect for human rights, a value common to all Member States:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 3 outlines the responsibilities of the Union in regard to the area of freedom, security and justice within the Union and with regard to Union relations in the wider world. Therefore, this article introduces a distinction between responsibilities within its territory and responsibilities abroad. Internally, Article 3(1) announces the aim of the Union to 'promote peace, its values and the well-being of its peoples.' Article 3(2) further mandates the Union to 'offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measure with respect to external border controls, asylum, immigration and the prevention and combating of crime.' According to Article 3(3), the Union is also committed to

- combat social exclusion and discrimination and
- promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

In addition, the Union is to 'promote economic, social and territorial cohesion, and solidarity among Member States. It must further 'respect its rich cultural and linguistic diversity' and 'ensure that Europe's cultural heritage is safeguarded and enhanced.'

Externally, Article 3(5) states that the Union must 'uphold and promote its values and interests and contribute to the protection of its citizens.' It is further advised to:

contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Article 3(6) enunciates an important constraint to the Union, stating that it should 'pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.' In other words, the Union can only carry out the stated objectives if it has been conferred the necessary

¹³⁸ E. Muir, 'Fundamental Rights: An Unsettling EU Competence' 15 Human Rights Review 25, 26

competence by the Member States. The competence of the Union and its individual institutions are studied below in Section 3.3 Competences and Responsibilities.

Article 6 introduces ground breaking reforms to Union human rights policies as pronounced by the Lisbon Treaty. Article 6(1) provides for the Charter of Fundamental Rights of the European Union (2000), the key catalogue of rights for EU citizens, to have the ‘same legal value as the Treaties.’¹³⁹ The Charter had been drawn up in 1999 and 2000 on an initiative of the European Council and was proclaimed by the Commission, Parliament and Council and approved by the Member States at a summit in Nice in December 2000; however, its legal status was in question due to the non-ratification of the Constitutional Treaty of 2005, the document to which the Charter had been annexed.¹⁴⁰ The Charter is also an annex to the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU), commonly referred to as the Lisbon Treaty, but has been given equal status with the treaties. This same Article 6 also announces that the ‘Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms,’ a process that is still under way at the writing of this report. Article 6(3) promotes fundamental rights of the ECHR and the constitutional traditions of Member States to ‘general principles of the Union’s law.’

While Article 7 goes beyond the scope of this report, the Lisbon Treaty does also provide for a suspension of rights for Member States found to be in serious breach of the values (including human rights) enumerated in Article 2. Voting rights on the Council is one right that can be suspended.

To summarize, the European Union is currently competent to promote human rights externally with third countries. In addition, within its borders, the Union is mandated to abide by the terms of the Charter and to promote and respect human rights. One notable weakness in the human rights provisions of the treaties is the lack of a general provision allowing the Union to formulate overall policymaking in the field of human rights. With respect to coherence, this discussion aids in understanding the challenge to create a coherent legal structure to support fundamental and human rights policymaking. Because the original founding treaties did not directly incorporate fundamental and human rights within the goals and objectives of the Union, the ability to show a coherent aim at promoting and protecting human rights has been a challenging journey that has been pushed along by court decisions, official strategy documents and treaty amendments. At times, this *ad hoc* approach leads to some incoherence in the overall pronouncement of the values of the Union as a whole and its commitment to protect and promote fundamental and human rights.

3.3 Competences and Responsibilities of EU Institutions

3.3.1 Conferring Competence upon the Union

Competences and responsibility of the EU derives from the conferral of power. While the EU is sometimes described as an intergovernmental organization, a supranational entity and a political and economic partnership, these denominations accurately describe only certain aspects of the EU (e.g. that it is a treaty-based entity comprised of states that commit to certain common interests and in certain policy areas its

¹³⁹ Art. 6 TEU

¹⁴⁰ Craig and De Búrca at 39

regulations and directives take supremacy over the national legislation of its Member States). Nevertheless, each of these categories ignores the key characteristic of the EU that distinguishes it from other partnerships and alliances of sovereign nations-- the handing over of decision-making power by the EU Member States to the Union.¹⁴¹ This act of transferring the power to legislate in certain areas is recognized as the principle of 'conferral.'¹⁴² 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.¹⁴³

Article 5(1) of the Treaty on European Union specifies that '[t]he limits of Union competence are governed by the principle of conferral.'¹⁴⁴ When power has been conferred upon the Union in a category or area, that power is generally recognized as a 'competence.' Competence is a term of art that refers to the ability of the Union to act within certain categories and areas. In legal parlance, competence refers to the jurisdiction or legal authority to act within a certain domain or policy area.¹⁴⁵ Union competence is also restricted in Article 5 TFEU by the principles of proportionality (ensuring that measures taken only to the extent they are necessary to achieve an objective) and subsidiarity (acting only where Union can better achieve an objective than Member States).

With the entry into effect of the Lisbon Treaty, the EU gained legal personality. Despite its existence as a legal entity, the Union does not enjoy full competence to act in all policy areas. Instead, as previously explained, the Union only receives those powers explicitly conferred, while the Member States retain all other authority and competence to act within policy domains. The Lisbon Treaty states, in Article 4, that 'competences not conferred upon the Union in the Treaties remain with the Member States.'¹⁴⁶ 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. Competences not conferred upon the Union in the Treaties remain with the member States.'¹⁴⁷ The resulting consequence of the principle of conferral is that there is no general legislative policy, instead the process known as 'European integration' is 'taking place incrementally,' with each treaty bringing new areas of competence to the Union level.¹⁴⁸

It is important for the next discussion, to explain the policy areas in which the Union has exclusive or shared competence or merely competence to support or provide arrangements. This is because any authority to enact fundamental and human rights policy will only arise in relation with competence to act

¹⁴¹ D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (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.') Ibid at 35.

¹⁴² Moriarty and Massa at 164

¹⁴³ For a discussion of competence in the EU see R.A. Wessel and L. den Hertog, 'EU Foreign, Security and Defense Policy: A Competence-Responsibility Gap?', 3 <<http://www.utwente.nl/mb/pa/research/wessel/wessel82.pdf>> Muir (2013) at 30 Moriarty and Massa at 164

¹⁴⁴ Art. 5(1) TEU

¹⁴⁵ P. Orebech, 'The EU Competency Confusion: Limits, 'Extension Mechanisms,' Split Power, Subsidiarity, and 'Institutional Clashes'' 13 *Journal of Transnational Law and Policy* 99, 107

¹⁴⁶ Art. 4 TEU

¹⁴⁷ Ibid

¹⁴⁸ Moriarty and Massa at 164

in another policy area due to the lack of a general competence for the Union in the area of fundamental and human rights. Competence conferral is never neatly applied to a policy area. In the area of fundamental and human rights, competence is interpreted and defined by the European Court of Justice (CJEU). The CJEU has played a key role by clarifying that there are express and implied powers in its opinions and case law, particularly regarding the conclusion of international agreements, including trade agreements.¹⁴⁹ Despite the efforts to base competence on Treaty provisions and CJEU pronouncements, the fear of competence creep (the tendency to increase the areas where the Union is authorized to act) still pervades the EU atmosphere.¹⁵⁰ For example, to what extent can the Union create an implied power to act in the area of fundamental and human rights because it is an objective of the treaty? And if such an implied power is created, how will the impact on fundamental or human rights be checked? Moreover, in accordance with the strict procedures of Article 352 (the flexibility clause), the Union can also act beyond the powers of the conferred by the treaties if necessary to achieve an objective. The implication for fundamental and human rights is significant because if institutions begin to use implied powers to regulate in this area, it would introduce a direct challenge to the CJEU's declaration that no general competence exists.

3.3.1.1 Categories of Union Competence

Competences exercised by the union 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:¹⁵¹

1. competence exercised solely by the Union, called 'exclusive competence';¹⁵²
2. 'shared competence,' held by both the Member States and the Union;¹⁵³
3. competence to support, coordinate or supplement actions of member states¹⁵⁴; and
4. competence to provide arrangements within which member states must coordinate policy.¹⁵⁵

3.3.1.1.1 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 only where granted power by the Union or where lacunae exist.¹⁵⁶ 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

¹⁴⁹ Craig and De Búrca at 308; Case 22/70 Commission v. Council (AETR) [1971] ECR 263, 275 (recognizing that the EU has implied competence to conclude an international agreement even where an express treaty provision specifying such a power did not exist).

¹⁵⁰ Mark A. Pollack, *Creeping Competence: The Expanding Agenda of the European Community*, 14(2), *Journal of Public Policy* 95 (1994); Stephen Weatherill, *Competence*

Creep and Competence Control, 23 *Yearbook of European Law* 1, 5-12 (2004).

¹⁵¹ 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 *The 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. available at <http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00047.en02.pdf> (last accessed 20 May 2014).

¹⁵² The Treaty on the Functioning of the European Union (TFEU), Arts. 2(1), 3

¹⁵³ Arts. 2(2), 4 TFEU

¹⁵⁴ Arts. 2(3), 5 TFEU

¹⁵⁵ Art. 6 TFEU

¹⁵⁶ The 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

resources under common fisheries policy, common commercial policy and the conclusion of international agreements under certain circumstances.¹⁵⁷

3.3.1.1.2 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.¹⁵⁸ 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.)¹⁵⁹ 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).¹⁶⁰ 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 of freedom, security and justice, common safety concerns in public health matters, research technological development and space, and development cooperation and humanitarian aid.¹⁶¹

3.3.1.1.3 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.¹⁶² In this area, any action by the Union will never exclude the Member States from acting in the same policy area.¹⁶³ This type of competence is also referred to as 'complementary competence.'¹⁶⁴

3.3.1.1.4 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.¹⁶⁵

3.3.1.1.5 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

¹⁵⁷ Art. 3 TFEU

¹⁵⁸ The 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

¹⁵⁹ The 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

¹⁶⁰ The 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

¹⁶¹ Art. 4 TFEU

¹⁶² Art. 5 TFEU

¹⁶³ The 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

¹⁶⁴ Moriarty and Massa at 165

¹⁶⁵ Art. 5 TFEU

foreign security policy; nevertheless, the EU cannot legislate in the field and the Court of Justice cannot issue a judgment in this area.¹⁶⁶

Chart of Competence of the EU Institutions by Policy Field

	Policy field	Legal basis
Exclusive	Customs union Competition rules for internal market Monetary policy for EU zone 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
Shared	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 judgment in this area.	Article 24 TEU
Support, coordinate, supplement Member State action	Improving human health Industry Culture Tourism Education, vocational training, youth and sport Civil protection Administrative cooperation	Article 6 TFEU
Provide arrangements	Economic policy Employment	Article 5 TFEU

3.3.2 Competence in Human and Fundamental Rights

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 conventions in this field.'¹⁶⁷ 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

¹⁶⁶ Arts. 2(4), 275

¹⁶⁷ ECJ Opinion 2/94 (1996)

provision providing that development cooperation shall contribute to respecting human rights and fundamental freedoms.¹⁶⁸ 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.]'¹⁶⁹

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.¹⁷⁰ Many, if not all, of the areas where the Union enjoys exclusive or shared competence cut across the gamut of human rights issues.¹⁷¹

Several provisions of the Lisbon Treaty underscore the mandate to promote and protect human rights in specific policy domains. For example, in Article 147(3) of the TFEU, the Union has the competence to ensure gender equality:

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 men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

Similarly, Article 19 of the TFEU provides for anti-discrimination measures:

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

¹⁶⁸ Case C-268/94 *Portugal v Council* [1996] ECR I-6177; *Moriarty and Massa* 166

¹⁶⁹ 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.

¹⁷⁰ *Craig and De Búrca* at 308

¹⁷¹ For example, the common commercial policy involves human rights considerations, as does the shared competence for social policy and consumer protection.

The Lisbon Treaty accorded legal personality to the EU and mandated that it accede to the European Convention on Human Rights.¹⁷² Legal personality permits the union to enter into international agreements and to act in the international arena. The Treaty also permits the Union to monitor Member State compliance with human rights principles after accession. Article 263(4) of the Treaty on the functioning of the EU also expanded the jurisdiction of the CJEU to individual annulment applications and included the areas formerly referred to as the 2nd and 3rd pillars (common foreign and security policy and police and judicial cooperation in criminal matters) into the core of EU law.

After the entry into force of the Lisbon Treaty, the external relations of the EU were also transformed, moving the formulation and implementation of the Common Foreign and Security Policy (CFSP) of the EU, including EU external human rights policy, away from the rotating presidency of the Council (with the support of the Council Secretariat and the European Commission) to the High Representative of the Union for Foreign Affairs and Security Policy, who simultaneously serves as the Vice-President of the Commission with the assistance of the European External Action Service (EEAS). The Lisbon Treaty placed human rights and democracy at the heart of the external relations of the EU by stating that ‘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 solidarity, and respect for the principles of the United Nations Charter and international law. The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations’.¹⁷³

Human rights must now cut across all layers of EU policy and all member states. Under the Lisbon treaty, EU Members play an important role in mainstreaming human rights, not just because ‘most matters of the Common Foreign and Security Policy (CFSP) are governed by unanimity, but also because an effective and credible human rights policy of the EU needs the full political support and buy-in of all member states.’¹⁷⁴ This can be seen in the fact that each institution of the EU is currently concerned with human rights: among other things, the Council of the EU and the European Parliament regularly issue annual reports on the situation of human rights in the EU and worldwide, whereas the European Commission is responsible for the funding of human rights projects through the European Instrument for Democracy and Human Rights (EIDHR). Since the entry into force of the Lisbon Treaty, the newly-installed EEAS Corporate Board includes an official responsible for human rights, while the CJEU has shown increased readiness to annul EU legislation in violation of fundamental rights by applying the Charter in an impressive number of cases.¹⁷⁵

¹⁷² Art. 47 TEU

¹⁷³ Art 21 (1) TEU

¹⁷⁴ *Theuermann Engelbert*, The Review of the EU Human Rights Policy: A Commitment to Strengthened EU Action on Human Rights, in 13 *European Yearbook on Human Rights* (2013).

¹⁷⁵ See Benedek Wolfgang, EU Action and Human and Fundamental Rights in 2010, in: Benedek/Benoît-Rohmer/Karl/Nowak (eds.), *European Yearbook on Human Rights* 2011, 96 et seq., 100 et seq.

3.3.3 Conclusions regarding competence

Competence is a term of art relating to the conferral of power on Union institutions by Member States. Given the role of the CJEU in interpreting provisions of the treaty and competence, there is always an element of uncertainty and insecurity about whether certain acts by the Institutions fall within Union competence. This uncertainty is often well founded, e.g. when the CJEU annuls a directive. However, insecurity also has implications for how quickly and resolutely institutions will enact legislation that can impact human rights (for better or worse). The hesitancy to act and the general resistance to overstepping competence (competence creep) can result in the EU institutions reluctance to intervene in matters that could affect human rights, leaving it vulnerable to criticism.¹⁷⁶

Competence has also been impacted by the historical origins of the EU institutions. Firstly, the EU was not founded with human rights as a main objective of the communities. At the same time, fundamental rights were found in the early treaties and were embraced by the CJEU as general principles. Eventually, fundamental rights were incorporated into Union law, but in a case-by-case and ad hoc fashion. As a result, no general competence in human rights was ever established, a fact noted by the court itself. Lack of general competence has consequences for structural coherence, as there is no legal basis for setting up structures that focus solely on human rights policy. It also sets the ground for interest incoherence as some actors or stakeholders may have an interest in keeping human rights at the outer fringe of Union coherence, while others may push for a greater importance or even a general competence in the field.

3.3.4 The Competences of the Union Institutions and Bodies

The key institutions of the Union act in fields that directly and indirectly impact fundamental and human rights. While there is no general competence to act in human rights, the competences in other key policy areas can result in actions and tasks that touch on human rights issues. In this section, a distinction is made between the general competence of the key actors and their specific activities in human rights.¹⁷⁷

¹⁷⁶ Interview with D-G Justice Official 1, 27 May 2014. The official noted that in cases such as discrimination against minorities in a Member State such as Hungary or Bulgaria or in case of police violence against peaceful demonstrators, the Union says it has no legal basis to interfere, the Treaty does not allow it and the rule of law must be respected.

¹⁷⁷ In this study, due to space limitations, we restricted the scope to EU institutions and individuals and bodies with direct responsibility in the areas of fundamental and human rights. While other EU agencies or bodies such as the Ombudsman, Frontex, the Data Protection Supervisor and the European Investment Bank have mandates that cover such rights, these institutions do not figure in our study.

The competences and human rights responsibilities of the following actors are examined:

- The European Parliament
- The European Council
- The Council of the European Union
- The European Commission
- The Court of Justice of the European Union
- The Fundamental Rights Agency
- The European External Action Service and the EU delegations
- The High Representative of the Union for Foreign Affairs and Security Policy and
- The Special Representative for Human Rights.

The competence of each of the European Union institutions, individuals and bodies is set forth below. The competence is first discussed in a general manner, based on those conferred by the treaties. Then, a separate section expresses competence, mandates and responsibilities specifically related to human rights. Here, it is important to distinguish between competence – that authority conferred by Member States -- and responsibilities – those practices and tasks that are carried out in fulfilment of a mandate to act. This section will describe both because in EU fundamental and human rights many duties and responsibilities have emerged over time, but are not yet enshrined in the treaties.

3.3.4.1 *European Parliament*

The European Parliament (EP) has gone from a ‘relatively powerless Assembly under the 1952 ECSC Treaty to the considerably strengthened institution that it is today.’¹⁷⁸ The EP, the only directly elected European institution, is currently a co-legislator with the Council, and has budgetary and supervisory powers.¹⁷⁹ However, the EP ‘is not a sovereign Parliament in the sense of its words being final. On the other hand, it is not a Parliament whose powers are in practice exercised to legitimize a government’s legislative wishes. It is an independent institution whose members are not bound to support a particular governing majority.’¹⁸⁰ Consequent to the Lisbon Treaty, the European Parliament wields a democratic check to the power of the High Representative of the Union for Foreign Affairs and Security Policy (HR) by way of consent at his/her appointment as a Commissioner. If the EP votes to censure the Commission, then the HR ‘shall resign from the duties that he or she carries out in the Commission’.¹⁸¹ Furthermore, the Parliament’s views must ‘be duly taken into consideration’ and Parliament must be informed regarding ‘the main aspects and the basic choices of the common foreign and security policy (CFSP) and the common security and defence policy (CSDP) and [...] how those policies evolve’.¹⁸² In addition, the EP gives input in the allocation of funds to the European Instrument for Democracy and Human Rights (EIDHR) and adopts the overall budget, allowing it to condition its agreement on the acceptance of EP priorities.¹⁸³

¹⁷⁸ Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 5th edition (OUP 2011), 51.

¹⁷⁹ For more information regarding the legal basis of the EP’s powers, objectives and human rights policies, see, generally, <http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuid=FTU_6.4.1.html> last accessed 3 July 2014.

¹⁸⁰ Richard Corbett, Francis Jacobs, Michael Shackleton, *The European Parliament*, 7th edition (Harper 2007), 245.

¹⁸¹ Article 17.8 TEU and 234 TFEU.

¹⁸² Article 36 TEU.

¹⁸³ Article 14 TEU and 310(1) TFEU.

3.3.4.1.1 Human rights competences

Since human rights must now cut across all layers of EU policy and all European institutions and member states, the EP contributes to the development of coherent human rights policies in various ways: it draws up reports on human rights situations,¹⁸⁴ undertakes human rights missions to non-EU countries,¹⁸⁵ regularly sends a delegation to UN Human Rights Council sessions and its assent is required in treaty making processes with third countries (treaties that usually have a human rights dimension).¹⁸⁶ Human rights issues are addressed through resolutions, declarations and questions that are then submitted to the Council and to the Commission.¹⁸⁷

Within the European Parliament there are a number of Committees that tackle human rights issues.¹⁸⁸ The most prominent is the **Subcommittee on Human Rights** (DROI), which was reestablished in 2004 under the Committee on Foreign Affairs and since has become the main parliamentary actor for human rights.¹⁸⁹ The Subcommittee's attributions and responsibilities are outlined by Section I (8) of Annex VI of the Rules of Procedure of the European Parliament. Accordingly, it deals with issues concerning human rights, the protection of minorities and the promotion of democratic values in third countries and assists the Committee on Foreign Affairs. The Rules also make it clear that 'members from other Committees and bodies with responsibilities in this field shall be invited to attend the meetings of the Subcommittee'.¹⁹⁰

The EU Annual Report on Human Rights and Democracy in the World outlines a great number of instances in which DROI collaborates with EU institutions, the EU Special Representative for Human Rights (EUSR), the EEAS, other relevant committees or inter-parliamentary delegations and NGOs which are particularly concerned with human rights.¹⁹¹ In 2012 DROI formally exchanged views for the first time with the new EU Special Representative for Human Rights, a starting point for future regular consultations regarding EU human rights policies. Moreover, through *in camera* briefings and debriefings, DROI has followed human rights dialogues and consultations initiated between the EEAS and third countries.¹⁹² The 2012 EU Annual Report also highlights that, because of its increased procedural powers, DROI is more active in issuing parliamentary reports, EU Annual Reports, EU human rights policies reports, and official documents dealing with the manner in which human rights are affected by the current economic and financial crisis.

¹⁸⁴ Pursuant to the Rules of Procedure of the EP, 8th Parliamentary Term (July 2014), Chapter 2, Rules 49-52, there can be legislative reports, non-legislative reports and own-initiative reports.

¹⁸⁵ See EP, Guidelines for EP Interparliamentary Delegations on promoting human rights and democracy in their visits to non-EU countries, Approved by the Conference of Delegation Chairs on 5 April 2011.

¹⁸⁶ Articles 207 and 218 TEU. For example, in 2011 the EP refused, due to child labour issues, to give its consent regarding the textile protocol to the Partnership and Cooperation Agreement concluded between the EU and Uzbekistan.

¹⁸⁷ Rules of Procedure of the EP, 8th Parliamentary Term (July 2014), Rules 133-139.

¹⁸⁸ See powers and responsibilities of standing committees in Rules of Procedure of the EP, Annex VI, 8th Parliamentary Term (July 2014).

¹⁸⁹ Wolfgang Benedek, EU Action on Human and Fundamental Rights in 2012, in: Benedek/Benoit-Rohmer/Karl/Ketteman/Nowak (eds.), European Yearbook on Human Rights 2013, 63 and seq.

¹⁹⁰ Rules of Procedure of the EP, Annex VI, 1 (8), 8th Parliamentary Term (July 2014). See also the EP Subcommittee on Human Rights Summary of Activities, 6th Parliamentary Term, 2004-2009, <http://www.europarl.europa.eu/document/activities/cont/200906/20090612ATT57098/20090612ATT57098EN.pdf> accessed 3 July 2014.

¹⁹¹ EU Annual Report on Human Rights and Democracy in the World in 2013, 7965/14, 6 June 2014, 120.

¹⁹² Council of the European Union, EU Annual Report on Human Rights and Democracy in the World in 2012, 9431/13, 13 May 2013, 145.

DROI has also shown a trend in a more active collaboration with different UN Special Rapporteurs on human rights and well-known human rights defenders.¹⁹³

The **Committee on Foreign Affairs** (AFET) is instrumental in developing and monitoring foreign policies that ‘address the interest of the Union, the security expectations of its citizens and the stability of its neighbours, and ensures that it is coherent and effective’.¹⁹⁴ Human rights issues are discussed in AFET when it tackles parliamentary reports on EU foreign policy and international agreements with human rights clauses, with a desire that ‘Europe speaks with one voice’.¹⁹⁵

Other parliamentary committees play a role in human rights policies. For example, human rights issues related to commercial and trade agreements are discussed in the **Committee on International Trade** (INTA), human rights dealing with development in the **Committees on Development** (DEVE) and with women and gender are dealt in the **Committee on Women’s Rights and Gender Equality** (FEMM). In this ambit, the Parliament underlines that the rights of women should be promoted in all areas: civil, political, economic, social and cultural and should be duly transposed into national legislation. The EU’s internal policies are mostly dealt with by the **Committee on Civil Liberties, Justice and Home Affairs** (LIBE), which is particularly active in the fields of migration and asylum.¹⁹⁶ Furthermore, the **Committee on Constitutional Affairs** (AFCO) and the **Committee on Legal Affairs** (JURI) pay close attention to constitutional and legal aspects, including the EU accession to the European Convention on Human Rights.¹⁹⁷ Accordingly, there are committees, which deal with human rights in a transversal way, whereas others have a particular sector focus. In cases where several committees are competent, the lead committee does the report and the comments of others are included. In cases where a committee which is not foreseen wants to be included, the presidency of the EP has to resolve the issue. For example, more human rights coherence might be achieved if DROI would involve itself more in the work of other committees in order to introduce a human rights view.

Lastly, the European Parliament’s inter-parliamentary delegations frequently put up discussions on human rights issues and their impact on EU’s overall policies.¹⁹⁸

¹⁹³ Ibid.

¹⁹⁴ The European Parliament website, Committees, AFET, <http://www.europarl.europa.eu/committees/en/afet/home.html#menuzone>.

¹⁹⁵ Id.

¹⁹⁶ Israel Butler, A Fundamental Rights Strategy for the EU, <http://www.opensocietyfoundations.org/sites/default/files/fundamental-rights-EU-20140530_0.pdf>, p 6, accessed 3 July 2014. See also Rules of Procedure of the EP, Rule 38 (Respect for the Charter of Fundamental Rights of the EU), 8th Parliamentary Term (July 2014).

¹⁹⁷ Draft agendas, information and highlights about AFCO can be found at: <<http://www.europarl.europa.eu/committees/en/afco/home.html>>, about JURI at: <<http://www.europarl.europa.eu/committees/en/juri/home.html#menuzone>>, about INTA at: <<http://www.europarl.europa.eu/committees/en/inta/home.html#menuzone>>, about DEVE at: <<http://www.europarl.europa.eu/committees/en/deve/draft-agendas.html>>, about FEMM at: <<http://www.europarl.europa.eu/committees/en/femm/home.html#menuzone>>, about LIBE at: <<http://www.europarl.europa.eu/committees/en/libe/home.html#menuzone>>, last accessed 3 July 2014.

¹⁹⁸ Council of the European Union, EU Annual Report on Human Rights and Democracy in the World in 2012, 9431/13, 13 May 2013, 146. See also ‘Enhancing Cooperation Between the European Parliament and EU National Parliaments on EU Human Rights

3.3.4.2 The European Council

3.3.4.2.1 General Competences of the European Council¹⁹⁹

Charged with defining the general political direction and setting the priorities of the EU, the European Council is comprised of the Heads of State or Government of all EU Member States, together with the President and the President of the European Commission. Four times per year (twice every six months), the European Council is convened to provide the Union with the necessary impetus for its development. The European Council negotiates treaty changes and takes the lead in foreign policy. It is also responsible for ratifying important EU strategy documents. All decisions are made by consensus. The High Representative of the Union for Foreign Affairs and Security Policy joins the European Council in its work. The Commission president and the High Representative are both *ex officio* (non-members) of the European Council.

In the years before the Lisbon Treaty, the European Council's role evolved over time, having come into being in 1974 with regular summit meetings of heads of state or government and foreign ministers and subsequently developing into a formally-recognized EU entity with the entry into effect of the Maastricht Treaty in 1992 and finally, after Lisbon, becoming one of the seven EU Institutions, as set forth in Article 13 of the TEU.²⁰⁰ The Lisbon Treaty also introduced the office of the President, a permanent position for two-and-a-half years with the possibility to renew one time.²⁰¹ The President co-coordinates the Council and reports to the European Parliament after each meeting. In external relations, the President also represents the European Union. The President is supported by a General Secretariat of the Council of Ministers.²⁰²

The European Council nominates the President of the European Commission. It also, in a joint effort with the President of the European Commission, appoints the High Representative for Foreign Affairs and Security Policy, who is also the Vice President of the European Commission. Moreover, regarding the principles and values of the EU set out in Article 2 of the TEU (including those related to human rights and human dignity), the European Council, 'acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.'²⁰³ The European Council has no legislative functions.²⁰⁴

3.3.4.2.2 Human Rights Competences of the European Council

The European Council's role in human rights is mainly exercised through its agenda-setting role, in multi-annual programming and in high-level meetings with the leaders of third countries. A review of the

Policy', March 2014, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433789/EXPO-DROI_ET\(2014\)433789_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433789/EXPO-DROI_ET(2014)433789_EN.pdf)

¹⁹⁹ Unless otherwise noted, the information for this section is found in Arts. 14-16 TEU.

²⁰⁰ Horspool and Humphreys at 37

²⁰¹ Curtin at 78

²⁰² Curtin at 77

²⁰³ Art. 2 TEU

²⁰⁴ Horspool and Humphreys at 38

conclusions from regular and special meetings in 2014 and 2013, demonstrates that while the European Council has been preoccupied with economic matters, in its regular meetings, the European Council also periodically considers issues that touch on human and fundamental rights in internal matters and external relations. However, it does not have its own human rights policy guidance for those deliberations.

Nevertheless, the European Council has formulated conclusions on matters which impact human and fundamental rights. In the year 2013 and in the first quarter of 2014,²⁰⁵ the European Council has considered matters involving trade, promotion of economic growth, employment, the European Stability Mechanism, energy, tax evasion, the digital single market, coordination of economic policy, migration flows, intelligence and the fight against terrorism. While in most cases, the terms fundamental rights and human rights were not invoked in the conclusions, the European Council did invoke such language when referring to challenges in its external relations, notably the situations arising during the Arab Spring, in Syria and in Mali.²⁰⁶

In recent months, the Council has dealt with the tensions between the Russian Federation and Ukraine,²⁰⁷ Israel and Gaza,²⁰⁸ while also addressing EU economic challenges²⁰⁹ and the recent rise in accidents involving would-be migrants fleeing their homelands for the shores of Europe.²¹⁰ In such situations, when the President of the European Council meets the heads of states of other nations, those dialogues can also include formal admonitions regarding human rights situations, as was the case in the meeting with the Chinese premier in 2013.²¹¹

The European Council has identified five key areas for its multiannual programming, each having implications for human rights: job growth, quest to become a 'union that empowers and protects all citizens' by providing social safety nets, improve its energy security, create a union of freedom, security

²⁰⁵ European Council conclusions from 2003 to present are available at <http://www.european-council.europa.eu/council-meetings/conclusions>.

²⁰⁶ European Council 7/8 February 2013 Conclusions, at 4-5.

²⁰⁷ European Council, Special Meeting of the European Council (16 July 2014), Conclusions, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/143992.pdf; European Council, 20/21 March 2014, Conclusions, <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%207%202014%20INIT>

²⁰⁸ European Council, Special Meeting of the European Council (16 July 2014), Conclusions, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/143992.pdf

²⁰⁹ European Council, 26/27 June 2014, Conclusions, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/143478.pdf

²¹⁰ European Council, 24/25 October 2013, Conclusions, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/139197.pdf

²¹¹ European Council, The President, 26 November 2013, Speech by President of European Council Herman van Rompuy at Friends of Europe's Third Europe-China Forum, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/139729.pdf ('Allow me now a few words on our cooperation in the field of human rights. Our dialogue in this field is, as with other strategic partners, an integral part of our relationship. Throughout the years this dialogue has developed and I welcome the good exchanges during the recent visit to China of our Special Representative, Mr. Lambrinidis. The decisions adopted by third Plenum a few days ago, contain potential for positive movements in this field, including, the reduction in the number of crimes punished by the death penalty, the abolition of the 'Re-education Through Labour System', and reforms aimed at reinforcing the rule of law, including greater professionalisation of the judiciary. Some social reforms, such as the relaxation of the one - child policy, seem to go in the right direction. There is no doubt that lifting millions and millions of people from poverty in the last years is also a major contribution. Nevertheless, concerns regarding respect for fundamental freedoms (including human rights defenders and freedom of expression), and regarding the protection of minorities remain. And I raised these issues with the Chinese leadership, in the spirit of frankness, but also friendship and respect, that characterises our relations.')

and justice and be a strong global actor in multilateral settings and in its immediate neighbourhood.²¹² As regards the area of freedom, security and justice, the European Council recognizes the challenges presented by asylum policy and the assurance of data protection while addressing security concerns. It has called for a full transposition of the Common European Asylum System and a reinforced role for the European Asylum Support Office, EASO.²¹³

3.3.4.3 The Council of the European Union

3.3.4.3.1 Competences and responsibilities

The Council of the European Union (the Council) is the institution representing the governments of the member states of the European Union (EU). Presently, the Council has ten different configurations, each consisting of the responsible national minister from each member state. A list of the current Council configurations can be found in the Council's Rules of Procedure²¹⁴, while only two of them – the General Affairs Council and the Foreign Affairs Council – are mentioned within the European treaties.

The Council is, together with the European Parliament, responsible for legislation and budgetary affairs.²¹⁵ Before the Lisbon Treaty, the EU's external action was exercised by a variety of actors, including the Council, leading to problems in building a common and coordinated policymaking. The Lisbon Treaty reorganized the institutional framework, creating the post of High Representative of the Union for Foreign Affairs and Security Policy (HR) in an attempt to develop consistency within the EU policymaking. At the outset of her mandate, the HR set three priorities for the EU common foreign policy which had the purpose to 'guide EU action in 2013-14, with the aim of ensuring the consistency and coherence of EU foreign policy'.²¹⁶ These were the establishment of the European External Action Service (EEAS); the promotion of democracy, stability and prosperity with Europe's neighbours; and building strong strategic partnership with existing and emerging global players.²¹⁷

3.3.4.3.2 Human Rights competence and responsibilities

The Council started to have increasing impact in terms of human rights not only through its mandate of defining and implementing the EU's common foreign and security policy (CFSP),²¹⁸ but also through the conclusion of international agreements between EU and third parties.²¹⁹ The Council's responsibilities furthermore include the coordination of broad economic policies of member states²²⁰ and the adoption of measures concerning police and judicial cooperation within the EU.²²¹

²¹² European Council, 26/27 June 2014, Conclusions, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/143478.pdf

²¹³ European Council, 26/27 June 2014 Conclusion EUCO 79/14, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf

²¹⁴ 1 December 2009, Council's Rules of Procedure, 2009/937/EU, ANNEX I, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009D0937>

²¹⁵ Art 310 TFEU

²¹⁶ 7 December 2012, 18 month program of the Council, 17426/12, page 22

²¹⁷ 7 December 2012, 18 month program of the Council, 17426/12

²¹⁸ Art 24 TEU

²¹⁹ Art 218 TEU

²²⁰ Art 121 TFEU

²²¹ Title V TFEU

At its sessions on General Affairs, the Council prepares the Union's multi-annual budgetary perspective and negotiates on the enlargement of the EU. Furthermore, the **General Affairs Council (GAC)** ensures consistency in the work of the different Council configurations, by coordinating their work on different policy areas.²²² It prepares and ensures the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission.²²³

The **Foreign Affairs Council (FAC)** defines and implements the EU's foreign and security policy (CFSP), on the basis of strategic guidelines laid down by the European Council, as well as the common security and defence policy (CSDP). Additionally, FAC is responsible for development cooperation, humanitarian aid and trade. The High Representative of the Union for Foreign Affairs and Security Policy (HR), as the Chair of FAC, steers the formulation and implementation of the CFSP, including human rights policy.²²⁴ Together with FAC, she is responsible for the EU's external action, ensuring its unity, consistency and effectiveness.²²⁵ However, member states continue to play a key role in this area. Primarily, because most matters of the CFSP require unanimity, but also because having the political support of all member states is crucial for an effective and credible foreign and also human rights policy.²²⁶ Accordingly, FAC plays an important role in the promotion of human rights and protection of the common values of the EU Member States.

Furthermore, the Justice and Home Affairs Council which is composed of home affairs and justice ministers of all the EU member states, addresses many fundamental rights matters on a regular basis. It 'develops cooperation and common policies on various cross-border issues', which relate, inter alia, to the free movement of citizens, migration, asylum, the fight against terrorism, cybercrime, 'with the aim of building and EU-wide area of justice'.²²⁷

²²² Art 16 (6) TEU;

²²³ Official webpage of the EEAS, <http://www.consilium.europa.eu/council/council-configurations?lang=en#gac>;

²²⁴ Official webpage of the EEAS, <http://www.consilium.europa.eu/council/council-configurations?lang=en#gac>;

²²⁵ Art 16 (6) TEU;

²²⁶ *Theuermann Engelbert*, The Review of the EU Human Rights Policy: A Commitment to Strengthened EU Action on Human Rights, *European Yearbook on Human Rights* (2013);

²²⁷ Official webpage of the Council of the EU, <http://www.consilium.europa.eu/council/council-configurations?lang=en#jha>. For example, migration was considered to be the top priority on the March agenda of the JHA.

3.3.4.3.3 *The Council working parties and committees*

Before the Council assembles in one of its configurations, more than 150 working parties and committees of Member State officials gather and discuss information. Regarding human rights issues, two working groups of particular importance for human and fundamental rights: the Human Rights Working Group (COHOM) and the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP).

The **Human Rights Working Group (COHOM)** was created in 1987 and its mandate was extended in 2003.²²⁸ COHOM works under the Council of the European Union and its main responsibilities include human rights issues in the EU's external action. The members of COHOM consist in Human rights experts from member states and the European Commission.²²⁹

COHOM's mandate is broad and covers various aspects of the EU's human rights policy. The Working Group meets regularly and primarily ensures appropriate attention to human rights concerns at all levels of activity within the EU. Furthermore COHOM discusses and evaluates information on current violations of human rights and actions undertaken by the member states in the field of human rights and contributes to the coherence and consistency by leading the coordination of the positions of the member states on human rights issues likely to arise within all relevant international fora. The topics addressed (only the agendas are available on the website) range from consideration of EU human rights country strategies, human rights dialogues and consultations, UN matters to specific human rights such as freedom of expression, freedom of religion or belief or the rights of older persons. Additionally, COHOM specifically addressed the issue of internal and external coherence during a meeting in June 2013²³⁰ as well as in December 2011.²³¹ COHOM also plays an important role in designing and preparing human rights policies for the EEAS and the Council, in particular it prepared the EU Action Plan on Human Rights and Democracy, which was adopted by the Council in June 2012. In addition, COHOM is permanently chaired by a member of the EEAS, which ensures a degree of continuity in the work programmes.

In November 2012, a Brussels formation of COHOM was established, complementing the usual meetings in the capitals by regular meetings in Brussels. The aim was not to address COHOM's increased workload, but to ensure close interaction with the Political and Security Committee and others, especially the Council Working Parties dealing with geographic areas, to allow it to react more quickly to developments.²³²

The **Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP)**, ensures the compliance with the Charter of Fundamental Rights of the European Union, also in connection with preparatory work in the legislative procedures of the Council. Additionally, FREMP considers the question of the EU's accession to the European Convention on Human Rights.

²²⁸ Mandate of COHOM available at http://www.consilium.europa.eu/uedocs/cmsUpload/COHOM_mandates.pdf;

²²⁹ Official webpage of the EEAS, http://eeas.europa.eu/human_rights/workgroup/index_en.htm;

²³⁰ 17 June 2013, CM 3277/1/13, <http://register.consilium.europa.eu/doc/srv?l=EN&f=CM%203277%202013%20REV%201>;

²³¹ 5 December 2011, CM 5780/11, <http://register.consilium.europa.eu/doc/srv?l=EN&f=CM%205780%202011%20INIT>;

²³² 13 May 2013, EU Annual Report on Human Rights and Democracy in the World in 2012 (Thematic Reports), Council of the European Union, 9431/13, page 51, http://eeas.europa.eu/human_rights/docs/hr_report_thematic_2012_en.pdf;

FREMP is also concerned about the issue of coherence within the European Union. In April and March 2014 it discussed coherence between internal and external dimension of human rights policy based on two documents issued by the Council.²³³ In November 2013, FREMP invited representatives of the Council of Europe, of the EU Agency for Fundamental Rights, the alternate Chair of COHOM and the EU Special Representative for Human Rights to give their views on a discussion about coherence between the internal and external dimensions of the EU human rights policy.²³⁴ Additionally, the EU Action Plan on Human Rights and Democracy points out that the cooperation between FREMP and COHOM should be intensified, to address issues of coherence and consistency between the EU's external and internal human rights policy.²³⁵ The Council is of the view that in particular regular exchange of information and joint thematic meetings should strengthen the cooperation of the two working parties.²³⁶ Due to this objective, meetings were being held in January 2014 with the EU Special Representative for Human Rights and in March 2014 between FREMP and COHOM.²³⁷

A formation of the Friends of the Presidency Working Group was created in November 2012 to ensure horizontal coordination of cyber policy issues in the Council.²³⁸ The Group is responsible for examining any relevant horizontal issue, including human rights online. According to its agenda (available on the EU website), the Friends of Presidency Group discussed the issue of coherence and mainstreaming human rights several times during the last year.²³⁹

A myriad of other working groups and committees falling within the GAC or JHA Council configurations cover the gamut of fundamental and human rights, including the High Level Working Groups on Asylum and Migration, the Working Party on Information Exchange and Data Privacy, the Visa Working Park, the Asylum Working Party, the Working Party for Schengen matters, the Strategic Committee on Immigration, Frontiers and Asylum, the Working Party on Social Questions and others.²⁴⁰

²³³ 21 May 2014, Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union, 10116/14; and 31 March 2014, Presidency discussion paper 'Consistency between internal and external aspects of human rights protection on the EU', 8318/14;

²³⁴ CM 5209/13, <http://register.consilium.europa.eu/doc/srv?l=EN&f=CM%205209%202013%20INIT>;

²³⁵ 25 June 2012 The Council of the EU, EU Strategic Framework and Action Plan on Human Rights and Democracy, point 8, 11855/12;

²³⁶ 21 May 2013, Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union, 10116/14;

²³⁷ 31 March 2014, Council of the European Union – Presidency discussion paper, 8318/14;

²³⁸ 5 November 2013, Extension of the Friends of Presidency Group mandate, 15111/13;

²³⁹ In October 2013 (CM 4563/13), June 2013 (CM 3381/13) and April 2013 (CM 2284/13);

²⁴⁰ Council of the European Union, Meetings, <http://www.consilium.europa.eu/meetings?lang=en>; Irish EU Presidency, Council Working Parties, <http://eu2013.ie/ireland-and-the-presidency/abouttheeu/theeuexplained/councilworkingparties/>

3.3.4.3.4 EU Special Representative for Human Rights

Following the adoption in June 2012 of the EU's Strategic Framework and Action Plan on Human Rights and Democracy, Mr. Stavros Lambrinidis was appointed as EU Special Representative (EUSR) for Human Rights. He took office on 1 September 2012, with an initial mandate running for two years.²⁴¹ The EUSR's broad and flexible mandate is set out in Articles 3 and 10 of the Council Decision of July 2012.²⁴² It aims at enhancing the effectiveness and visibility of EU human rights policy in external relations, by improving the coherence and consistency of the Union's policies and actions in the area of human rights. Particularly, the EUSR shall contribute to the implementation of the Union's human rights policy and the Union's guidelines, toolkits and action plans on human rights and international humanitarian law and enhance dialogue with governments in third countries. He shall guarantee the integration of human rights in all areas of the Union's external action and at the same time contribute internally to the fulfilment of the Strategic Framework and Action Plan on Human Rights and Democracy.²⁴³ Further, the EUSR regularly reports to the High Representative, the Political and Security Committee and the competent Council working parties. The EUSR works in close cooperation with the EEAS, which provides the EUSR with full support, and under the direct authority of the High Representative.²⁴⁴

In July 2013, the Council adopted conclusions due to the first anniversary of the EU Strategic Framework and Action Plan and the appointment of the EUSR of Human Rights. It reaffirmed its determination to uphold its position as a human rights promoter in the world and highlighted once more the importance to place human rights at the centre of EU's policies and relations with third countries. The Council welcomed the progress made in the implementation of the Framework, including by the adoption of new EU Guidelines on the promotion and protection of freedom of religion and the work undertaken by the EUSR for Human Rights and expressed its 'full political support to his work.'²⁴⁵

3.3.4.4 The European Commission

3.3.4.4.1 General Competences of the European Commission²⁴⁶

The European Commission (the Commission) is the Union institution viewed as the executive body. The Commission promotes the 'general interest' of the Union and ensures the 'application of the Treaties.' It can take legal and administrative measures (including the imposition of fines) against violation of Union law in the Member States.²⁴⁷ The Commission exercises supervisory powers over other Union institutions. The Commission acts as an executive by taking responsibility for the daily operation of 'customs union,

²⁴¹ See generally, for a discussion of the EUSR's role, Peter Valant, The EU Special Representative for Human Rights: *Manager or Mastermind?*, in: Benedek/Benoit-Rohmer/Karl/Kettemann/Nowak (eds.), *European Yearbook on Human Rights* 2013 at 145-154.

²⁴² 25 July 2012, Council Decision appointing the European Union Special Representative for Human Rights, 2012/440/CFSP, available on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:200:0021:0023:EN:PDF>;

²⁴³ 13 May 2013, EU Annual Report on Human Rights and Democracy in the World in 2012 (Thematic Reports), Council of the European Union, 9431/13, available on http://eeas.europa.eu/human_rights/docs/hr_report_thematic_2012_en.pdf;

²⁴⁴ *Theuermann Engelbert*, The Review of the EU Human Rights Policy: A Commitment to Strengthened EU Action on Human Rights, *European Yearbook on Human Rights* (2013), page 39

²⁴⁵ 22 July 2013, Council Conclusions on the anniversary of the EU Strategic Framework and Action Plan on Human Rights and Democracy and the appointment of the EUSR for Human Rights, 12559/13, page 2

²⁴⁶ Unless otherwise noted, the information in this subsection is based on Art. 17 TEU.

²⁴⁷ Horspool and Humphreys at 52

the Common Agricultural Policy, competition policy and state aids and the common commercial policy.²⁴⁸ In addition, the Commission oversees the budget. It represents the Union externally (with the exception of common foreign and security policy). The Commission is also charged with making proposals for legislation. The Commission reports to the European Parliament and can be censured by that body. The main powers of the Commission involve decision-making and Union law-making. Under the ordinary legislative procedure provided for in Article 289 TFEU, the Commission proposes legislation. The Council also delegates some of its own powers to the Commission.²⁴⁹

Although they are completely independent and take no instructions from governments, commissioners are suggested by the Member States and appointed, in accord with the President-elect, by the European Council, for a term of office of five years. The Commission has a number of officers, including the President of the Commission who is responsible for laying down the guidelines for Commission work, determining the internal organization of the Commission and ensuring efficiency in its operations, as well as appointing the Vice Presidents (other than the High Representative of the Union for Foreign Affairs and Security Policy). The President of the Commission is proposed by the European Council and elected by vote of the European Parliament, in accordance with the rules set forth in Article 17(7) of the TEU. The High Representative of the Union for Foreign Affairs and Security Policy is appointed by a qualified majority of the European Council with the agreement of the President of the Commission. The High Representative coordinates the EU external policy and action, presides over the Foreign Affairs Council and conducts the common foreign and security policy as well as the common security and defence policy.²⁵⁰ The High Representative also serves as Vice President of the Commission to link the work of both institutions.

3.3.4.4.2 Human Rights Competences

As regards external action and human rights competence, the Commission (as well as all EU institutions) is bound by the terms of the treaties, particularly those found in Article 21(1) of the TEU, which provides that the principles of democracy, rule of law and the ‘universality and indivisibility of human rights and fundamental freedoms, respect for human dignity’ shall guide the EU’s actions on the international scene. This world view must be coupled with Article 3(5) TEU, which commands the Union to contribute to the protection of human rights in its external relations. Other specific competences are also granted to the Union, as a whole in Title V of the TEU and Part V of the TFEU, Articles 206 through 222 of the TFEU which give a broad context for human rights in external relations, including within the areas of development cooperation of the EU, humanitarian assistance, multilateral alliances, concluding international agreements, and in common commercial policy, trade and investment.

The Commission has several tools and instruments to promote fundamental and human rights. The Commission uses **impact assessments**²⁵¹ to determine how a proposed measure will affect fundamental rights. While impact assessment is conducted in multiple stages, it generally involves the creation of a roadmap to alert stakeholders of new proposed initiatives,²⁵² setting up a steering committee, consulting

²⁴⁸ Ibid

²⁴⁹ Ibid at 53

²⁵⁰ Art. 18 TEU

²⁵¹ European Commission, Impact Assessment, available at http://ec.europa.eu/smart-regulation/impact/index_en.htm

²⁵² European Commission, Roadmaps, available at http://ec.europa.eu/smart-regulation/impact/planned_ia/planned_ia_en.htm

interested stakeholders and interservice groups, collecting relevant data, and presenting a final report.²⁵³ The Commission has introduced guidelines for incorporating fundamental rights into its impact assessments.²⁵⁴ Historically, these assessments had taken economic social and environmental impacts into account. While social impacts are related to fundamental rights, a broader range of impacts became necessary (social impacts would exclude considerations such as privacy rights or right of expression.) The guidelines specify that the 'Impact Assessment should be used to identify fundamental rights liable to be affected, the degree of interference with the rights(s) in question and the necessity and proportionality of the interference in terms of policy options and objectives.'²⁵⁵ In addition, in its *Work Programme for 2014*, the Commission has listed key challenges related to human rights issues such as border management, consumer protection, citizen's rights, labour rights and data protection and privacy.²⁵⁶

The Commission has also developed, over time, certain strategies and practices to further promote human rights in external relations with third countries. The Commission incorporates **human rights clauses** in its trade deals, development policy and association or cooperation agreements.²⁵⁷ Occasionally, the Commission imposes sanctions on countries that have violated human rights, pursuant to the Common Foreign and Security Policy (CFSP).²⁵⁸ With respect to accession to the EU of candidate countries, the Commission has monitoring functions to ensure that the Copenhagen criteria are adopted; that criteria includes **human rights standards within the political conditions for accession eligibility**.²⁵⁹ Finally, it has established a human rights and democratization programme (EIDHR) that seeks to promote human rights in third countries by political dialogue, mainstreaming human rights, democracy strengthening measures and technical assistance.²⁶⁰

Because the Commission generally initiates the process of negotiating an agreement, in the field of human rights, it would also initiate an agreement to accede to a treaty such as the ECHR or the Convention on the Rights of Persons with Disabilities and for the accession of a new EU Member State. However, in both cases, a unanimous consent by all Member States must be sought, rather than a qualified majority vote.

Similarly, the Commission (and the EU as a whole) has obligations to promote human rights internally in the area of freedom, justice and security, as set forth in Title V of the Treaty on the Functioning of the European Union. The Charter of Fundamental Rights is also binding on the Union and therefore must be a priority for the Commission. The Charter itself, though applicable to acts of the Union institutions is only applicable to the states when implementing Union law or when acting in the scope of Union law. These

²⁵³ European Commission, Commission Impact Assessment Guidelines, available at http://ec.europa.eu/smart-regulation/impact/commission_guidelines/commission_guidelines_en.htm

²⁵⁴ *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC(2011) 567 final*

²⁵⁵ European Commission, *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC(2011) 567 final* 10

²⁵⁶ 'Commission Work Programme 2014, COM(2013) 739 final', 2

²⁵⁷ European Union, Human Rights, http://europa.eu/pol/rights/index_en.htm

²⁵⁸ European Commission, Sanctions or Restrictive Measures, http://eeas.europa.eu/cfsp/sanctions/index_en.htm

²⁵⁹ R.K.M. Smith, 'Monitoring and Enforcing Fundamental Rights' in Jan Erik Wetzel (ed), *The EU as a 'Global Player' in Human Rights?* (Routledge 2011) 37 European Commission, Enlargement, Conditions for Membership, http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm

²⁶⁰ The European Instrument for Democracy and Human Rights sets forth the policy for strengthening democracy, human rights and rule of law in third countries. European Commission, Democracy and Human Rights, http://ec.europa.eu/smart-regulation/impact/commission_guidelines/commission_guidelines_en.htm

parameters are spelled out in Article 51(1) of the Charter, itself inspired by CJEU decisions.²⁶¹ Generally, the Charter really does not seek to impose an obligation to act; such power to actively promote fundamental rights internally requires specific competence. Such competence has been granted in the areas of non-discrimination (Article 19 TFEU) and in data protection (Directive 95/46). Additionally, as pointed out by Craig and de Búrca, Article 35 TFEU is also the grounds for some human rights-related measures and has been invoked (in its earlier form) in the establishment of the Vienna Monitoring Centre on Racism and Xenophobia, now the Fundamental Rights Agency and in the human rights and democratization programme of the EU.²⁶²

The Commission's directorates-general and commissioners possess mandates that include issues that directly impact human rights. Technically all of the directorates have some dealings with human rights, the ones highlighted here are chosen for their thematic importance.

The Directorate-General for Justice promotes respect for fundamental rights by the EU and its Member States. Among the themes for which the Directorate-General is responsible are: equal treatment, consumer law, data protection, drug control, free movement/citizenship, contract law, gender equality, civil and criminal justice, discrimination and effective justice.²⁶³ The Directorate-General for Home Affairs coordinate policies related to immigration, Common European Asylum System matters, visas, borders, organized crime and human trafficking, police coordination, internal security and terrorism.²⁶⁴ The Directorate-General for Trade conducts consultations and dialogues with civil society and other stakeholders regarding its trade policies and agreements.²⁶⁵ (See the chart of current instruments used in

CURRENT INSTRUMENTS USED BY D-G TRADE TO PROMOTE HUMAN RIGHTS

GSP (Generalized System of Preferences):

- The general arrangement
- The special arrangement for sustainable development and good governance (GSP+)
- Everything But Arms (EBA)

FTAs (Free Trade Agreements) and related Framework/Association Agreements

Human Rights Clause - allows one party to take 'appropriate measures' if the other party is in violation of an 'essential elements' clause referring to human rights. Used by EU to suspend financial aid to regimes that went through political disturbances or coups d'état.

Specific measures

Regulation 1236/2005 - prohibits any export or import of goods that have no practical use other than for the purpose of capital punishment, torture and other cruel, inhuman or degrading treatment or punishment.

The Dual Use Goods (Regulation 428/2009) - prohibits goods, software and technology regularly used for civilian purposes but which might also have military applications, or might contribute to the proliferation of Weapons of Mass Destruction

Code of Conduct on Arms Export - conditions (including human rights) to be met prior to the issuing of a license.

Kimberley process - control the imports and exports of rough diamonds and to design in order to reduce the number of conflict diamonds (rough diamonds used to finance wars directed against legitimate governments) that enter the legal diamond trade.

Country-specific measures

The 2004 Basic Principles on the Use of Restrictive Measures - Council can impose autonomous EU sanctions to fight terrorism and the proliferation of weapons of mass destruction and as a restrictive measure to uphold respect for human rights, democracy, the rule of law and good governance. To date, sanctions have been imposed on Syria, Iran, Myanmar and

²⁶¹ See Cases C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany [2010] ECR I-13849; Case C-411/10 NS v Secretary of State for the Home Department (judgement of 21/12/11 (NYR))

²⁶² Craig and De Búrca 392

²⁶³ European Commission, 'Directorate-General for Justice' <http://ec.europa.eu/justice/mission/index_en.htm> accessed 14/04/2014

²⁶⁴ European Commission, 'Directorate-General for Home Affairs' <http://ec.europa.eu/dgs/home-affairs/index_en.htm> accessed 14/04/2014

²⁶⁵ European Commission, 'Trade Policy and You' <<http://ec.europa.eu/trade/trade-policy-and-you/>> accessed 14/04/2014

D-G Trade to promote human rights.) Labour, employment, pension social security issues are handled by the Directorate-General for Employment, Social Affairs & Inclusion.²⁶⁶

3.3.4.5 The European Court of Justice

3.3.4.5.1 General Competence of the Court of Justice of the European Union

The Court of Justice of the European Union (CJEU) is comprised of the Court of Justice, the General Court and specialized courts. Article 19 TEU and Articles 251 to 281 TFEU govern the CJEU. The CJEU is comprised of one judge from each Member States and is assisted by the Advocates-General.

The main mandate of the CJEU is to interpret and apply the Treaties. Generally, the court hears three types of cases. The CJEU can

- review measures taken by the Union;
- hear enforcement actions brought by the Commission against Member States; and
- give preliminary rulings on the validity of a measure at the request of courts or tribunals of the Member States or rule in other cases provided for in the Treaties.²⁶⁷

When the court reviews Union measures, pursuant to Article 263 TFEU, it may hear challenges regarding legislative acts (regulations, directives and decision adopted by The Council, Parliament and the Commission), acts of the Council, the Commission, the European Council and the European parliament where the latter two produce legal effects for third parties, and the acts of the bodies, offices or agencies of the Union intended to produce legal effects for third parties.

When the Commission wishes to enforce a previous court judgment, such enforcement proceeding can be brought to the CJEU for a pecuniary sanction against the offending Member State.²⁶⁸

Article 267 TFEU grants the CJEU the authority to rule on the ‘validity and interpretation of acts of the institutions,’ i.e. the ‘bodies, offices and agencies of the Union.’²⁶⁹ National courts must use this reference and, under Lisbon, the CJEU is required in Article 267 to act with minimum of delay.²⁷⁰

The jurisdiction of the CJEU differs according to three policy areas: the area of freedom, security and justice (AFSJ),²⁷¹ including police and judicial cooperation in criminal matters (PJCC), and common foreign and security policy (CFSP).²⁷²

Francis Jacobs explains that the areas of freedom, security and justice is extended in Lisbon and now comprises:

²⁶⁶ European Commission, ‘Employment, Social Affairs & Inclusion’ <<http://ec.europa.eu/social/main.jsp?langId=en&catId=1>> accessed 14/04/2014

²⁶⁷ Art. 19 TEU

²⁶⁸ F.G. Jacobs, ‘The Lisbon Treaty and the Court of Justice’ in *EU Law after Lisbon* (Oxford University Press 2012) 200 <<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199644322.001.0001/acprof-9780199644322-chapter-9>>

²⁶⁹ Jacobs at 201

²⁷⁰ Jacobs at 202

²⁷¹ Moriarty and Massa at 173

Policies on border checks, asylum and immigration;
Judicial cooperation in civil matters;
Judicial cooperation in criminal matters;
Police cooperation.²⁷³

In the police and judicial cooperation in criminal matters (PJCC), the CJEU is excluded by Article 276 TFEU from the review of the validity or proportionality of operations carried out by the police of Member States.²⁷⁴ However, it does retain jurisdiction in the majority of PJCC matters, though it has some transitional provisions in this area.²⁷⁵

Following the entry into effect of the Lisbon Treaty, and subject to the exceptions in Article 275 TFEU, the CJEU only exercises jurisdiction in the CFSP to monitor the delimitation of the Union's competences and to decision actions for annulment brought against decision providing for restrictive measure against natural or legal persons adopted by the Council.²⁷⁶ This provision has made it possible for relief to be granted by the Court to persons who have been denied their fundamental right to effective judicial remedies to bring actions and have the measure reviewed by the CJEU.²⁷⁷ The accession of the EU to the ECHR will further delineate the work of the CJEU in the areas of fundamental and human rights. While it is not possible to know how the new articulation of the CJEU will affect structural coherence of human rights, this is a development to watch in the future because of the Court's traditional role in the evolution of EU policy in this area. Of particular interest will be whether the Court will accept judgments from Strasbourg as binding or whether there will be a 'margin of appreciation in that respect.'²⁷⁸

3.3.4.5.2 Human Rights Competence of the European Court of Justice

No provisions in the treaties grant the CJEU a general human rights competence. However, the CJEU has played a significant role in development of human and fundamental rights by (1) exercising its jurisdiction in designating the general principles of law of the Union, (2) interpreting the treaty and the application of Union law to Member States and (3) declaring regulations and other Union acts null when they violate fundamental rights or the Charter of Fundamental Rights (Charter). In the area of external relations, the CJEU has also developed jurisprudence surrounding the conclusion of international agreements by the Commission.

Section 3.1 of this report briefly mentions the absence of human rights protections in the early years of the European Communities as a result of the largely economic focus of the organization. Indeed, as pointed out by Richard Burchill, early efforts to acknowledge the integration project's impact on human

²⁷³ Jacobs at 203

²⁷⁴ Ibid

²⁷⁵ Ibid

²⁷⁶ Ibid

²⁷⁷ Jacobs at 204

²⁷⁸ Craig and De Búrca at 405

rights were rejected by the CJEU.²⁷⁹ Essentially, the progressive inclusion of fundamental and human rights evolved as follows:

- a complete reluctance to opine as to fundamental rights,
- an acknowledgement that fundamental rights were aspirations that inspired EU law,
- the declaration that the institutions were bound by the legal traditions of the Member State constitutions or the treaties that those Member States had ratified,
- the recognition of certain fundamental and human rights as general principles of EU law,
- the acceptance of the binding character of those fundamental rights enumerated in the Charter on the Union institutions and the Member States when acting within the scope of EU law.

The full progression of rights came about because the CJEU had already given direct effect and primacy to Union law, stating that Union law confers rights or imposes obligations on individual that must be recognized and enforced in the national courts. Those Union laws were viewed to be supreme over national legislation.²⁸⁰ The discussion that follows traces the main changes in the court's rationale.

CJEU initially developed an approach that forbade the integration project to 'prejudice fundamental human rights' by relying upon the common constitutional foundations of the Member States and the European Convention on Human Rights.²⁸¹ *Stauder* marked the beginning of the Court's recognition that **fundamental human rights were enshrined in general principles of Community law**.²⁸² The Court's pronouncement in *Internationale Handelsgesellschaft* that 'respect for fundamental rights forms an integral part of the general principles of Community law protected by the Court of Justice'²⁸³ highlighted the CJEU's further willingness to acknowledge that Community law must protect fundamental rights. In *Nold*, the Court explained that **general principles of EU law were inspired by international human rights agreements and the common constitutional traditions of the Member States**.²⁸⁴ Article 6(3) partially enshrines the ruling in *Nold*, indicating that the sources of inspiration are national constitutional traditions and the European Convention on Human Rights (no reference is made to international human rights conventions.)

The Court also developed its doctrine on the applicability of EU legislation protecting fundamental rights to the Member States. The first case declaring general principles to be binding on Member States was in

²⁷⁹ R. Burchill, 'Assessing the EU's Position on Human Rights' in Jan Erik Wetzel (ed), *The EU as a 'Global Player' in Human Rights?* (Routledge 2011) at 20 (citing CJEU, case 5/88, *Wauchauf v Germany* [1989] ECR 2609, para. 17)

²⁸⁰ Case 26/62, *Van Gend en Loos v. Nederlandse Tariefcommissie*, 1963 E.C.R. 3; Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585. 594; Case 92/78, *Simmenthal S.p.A v. Commission*, 1979 E.C.R. 777.

²⁸¹ Burchill at 20

²⁸² Case 29/69 *Stauder v City of Ulm* [1969] ECR 419

²⁸³ Case 11/70 *Internationale Handelsgesellschaft v Enifuhr und Verratstelle fur Getreide un Futtermittel* [1970] ECR 1125 at para. 4

²⁸⁴ Case 4/73 *Nold v Commission* [1974] ECR 491, para 13 ('As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.')

the *Rutili* case²⁸⁵ and has been followed by countless others, particularly in the area of women's rights in the workplace, but also covering rights as diverse as family life and free movement regulations,²⁸⁶ right to an effective remedy,²⁸⁷ and asylum protections.²⁸⁸ The Court has also applied the general principles of EU law when Member States are acting as agents of the EU.²⁸⁹

Finally, the CJEU has a line of cases where it has required Member States derogating from or restricting EU law to respect fundamental rights.²⁹⁰ These cases involve Member State acts and are not the subject of this report.

In recent years, the court has delivered opinions declaring certain institutional measures null due to their incompatibility with fundamental rights. In connection with these cases, the **principle of proportionality** has been fine tuned for use in balancing the Union's interest in regulating certain areas of law and the citizens' rights to specific fundamental freedoms. For example, prior to the Lisbon Treaty, proportionality was examined when the CJEU upheld the right of protesters to assemble to block an Austrian highway in the *Schmidberger* case, despite the adverse effects on the free movement of goods over the roads.²⁹¹ While *Schmidberger* did not involve a Union regulation, the proportionality test has also been used to scrutinize Union acts.

In the *Test-Achats* case, the provision of a directive permitting insurers to derogate from the requirement of gender equality in insurance premiums was challenged. The court nullified that provision stating that 'a provision, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter.'²⁹² A second ruling, *Volker & Schecke*, found that provisions of two agricultural funds which published the names of beneficiaries violated the Charter's guarantees for privacy, found in Articles 7 and 8.²⁹³ The *European Parliament v. Council of EU*, Case C-355/10²⁹⁴ 'annulled a Council implementing decision on surveillance of the external sea borders of the EU,' because it conferred enforcement powers on border guards that were political choices falling to the EU legislature and likely to affect personal freedoms and fundamental rights.²⁹⁵ The Court has also given several rulings about the rights of persons whose names appear on terrorist lists or lists of persons and entities associated with nuclear proliferation, concluding that such individuals and entities have the right to good administration, and that reasons should be given and evidence disclosed regarding why their

²⁸⁵ Case 36/75 Roland Rutili v Minister for the Interior 28 October 1975

²⁸⁶ Case 249/86 Commission v Germany [1989] ECR 1263 and Chakroun v Minister van Buitenlandse Zaken, 4 Mar 2010

²⁸⁷ Case 222/87 Johnston v Chief Constable of the RUC [1986] ECR 1651

²⁸⁸ Case C-465/07 Elgafaji v Staatssecretaris van Justitie [2009] ECR I-921

²⁸⁹ Case 5/88 Wachauf v Germany [1989] ECR 2609; Case C-305/05 Ordre des barreaux francophones et germanophones et al v Council [2007] ECR I-5305;

²⁹⁰ Case C-260/89 Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas [1991] ECR I-2925; Case 12/86 Demirel v Stadt Schwabish Gmund [1987] ECR 3719

²⁹¹ Case C-112/00, Schmidberger v. Austria, [2003] ECR I-5659

²⁹² Case C-236/09 Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des Ministres [2011] 2 C.M.L.R. 38 at para. 32.

²⁹³ Cases C-92-93/09 Volker und Markus Schecke GbR v. Land Hessen, Judgment of 9 November 2010

²⁹⁴ Case C-355/10, European Parliament v. Council of EU, 5-9-2012.

²⁹⁵ E. Commission, 2012 Report on the Application of the EU Charter of Fundamental Rights 10

names are on the list.²⁹⁶ A final ruling involved joined cases from Ireland and Austria challenging the EU data retention directive, legislation designed to harmonize how data providers retain data that is used to detect and prosecute organized crime. The Court found the regulation in violation of Charter rights for private life and the protection of personal data.²⁹⁷

One additional aspect of the CJEU's influence and role in human rights policy merits highlighting. In April 2013, the draft agreement on accession of the EU to the ECHR was finalized, a milestone in the accession process. As a next step, the European Commission has asked the Court to give its opinion on the draft agreement.²⁹⁸ That agreement is more fully described in Section 4 of this report.

While the court has been credited with giving fundamental rights heightened visibility within the Union, there is some disagreement over the true emphasis of the court's position on the importance assigned to fundamental rights. Burchill maintains that the CJEU never abandoned its original emphasis on integration, leaving appeals to principles or values 'after the primary legal obligations of the treaties were dealt with,'²⁹⁹ and thereby acknowledging that the economic integration project could 'impose restrictions upon the exercise of rights.'³⁰⁰ Burchill concludes that despite the development in the protection of certain human rights by the CJEU, 'human rights within the EU project remain secondary to the treaty obligations setting out the economic integration project, and where the promotion and protection of human rights in the context of EU activities has been furthered their point of reference has been the impact rights protection has upon the integration project and not the importance of the human right itself.'³⁰¹

In contrast, Rhona Smith highlights that despite the lack of an actual treaty function defined in terms of human rights, all of the Union institutions have a potential or actual impact on rights and protection of those rights has dramatically increased in the last 50 years thanks to the Advocates General and Judges at the CJEU.³⁰² Smith points to the proclamation of the direct effect of Union law and the doctrine of supremacy as examples of how rights are impacted by EU law.³⁰³ Marton Varju stresses the flexibility in EU human rights law that arises in the preliminary ruling procedure afforded in Article 267 TFEU. That procedure recognizes the subsidiarity of international human rights protection by referring cases back to

²⁹⁶ CJEU, C-584/10 P Commission and Others v Kadi (Kadi II), Appeal Case against T-85/09 Kadi v Commission (Kadi I), 18.7.2013; General Court, joined cases T-35/10 and T-7/11 Bank Melli Iran; Case T-493/10 Persia International Bank plc; joined cases T-4/11 and T-5/11 Export Development Bank of Iran; T-12/11 Iran Insurance Company; T-13/11 Post Bank Iran; T-24/11 Bank Refah Kargar; T-434/11 Europäisch-Iranische Handelsbank AG; joined cases T-42/12 and T-181/12 Naser Bateni; T-57/12 Good Luck Shipping, and case T-110/12 Iranian Offshore Engineering & Construction Co. v Council, 6.9.2013.

²⁹⁷ Joined Cases C-293/12 and C-594/12, 8 April 2014, available at http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=req&docid=150642&occ=first&dir=&cid=313776

²⁹⁸ European Commission, 2013 Report on the Application of the EU Charter of Fundamental Rights, Commission Staff Working Document, Brussels, 14.4.2014 SWD(2014) 141 final PART 1/2, http://ec.europa.eu/justice/fundamental-rights/files/swd_2014_141_part1_en.pdf

²⁹⁹ Burchill at 20

³⁰⁰ Ibid; See also ECJ, Case 5/88, Wauchaf v Germany [1989] ECR 2609, paras. 17-18 (declaring that fundamental rights recognized by the Court are not absolute and that restrictions can be applied if they are not a disproportionate or intolerable interference).

³⁰¹ Burchill at 21

³⁰² Smith at 36

³⁰³ Ibid

national courts for a fundamental rights solution after weighing in on a question and giving guidance to the referring court.³⁰⁴

3.3.4.6 The High Representative of the Union for Foreign Affairs and Security Policy

The High Representative of the Union for Foreign Affairs and Security Policy is the agenda-setter who develops (as chair of the Foreign Affairs Council) the common foreign and security policy (CFSP) of the Union and ensures the implementation of the decisions adopted by the European Council and the Council. The High Representative has two sets of duties, one related to her representation of the Council and the other as one of the Vice Presidents of the Commission.³⁰⁵ Created by the Lisbon Treaty, the High Representative is assisted by the European External Action Service (EEAS) and also serves as one of the Vice Presidents of the European Commission and President of the Foreign Affairs Council.³⁰⁶ The term of office is five years.³⁰⁷

The main responsibilities of the High Representative are set forth in Articles 18 and 27 of the TEU. Those duties include the following:

- Conduct the Union's common foreign and security policy;
- Make proposals to develop the CFSP, which is carried out as mandated by the Council;
- Ensure implementation of decisions adopted in CFSP;
- Preside over the Foreign Affairs Council;
- Act as a Vice President of the Commission to ensure the consistency of the Union's external action;
- Coordinate the Union's external action;
- Represent the Union for matters relating to CFSP;
- Conduct political dialogue with third parties on the Union's behalf;
- Express the Union's position in international organisations and at international conferences;
- Exercise authority of the EEAS.³⁰⁸

3.3.4.6.1 Vice president of the Commission

Regarding the High Representative's role as a Vice President, the Council Decision of 26 July 2010 highlights the importance of 'consistency between the different areas of its external action and between those areas and its other policies,' stating that the Council and the Commission assisted by the High Representative must 'ensure that consistency' and 'cooperate to that effect.'³⁰⁹

³⁰⁴ M. Varju, 'Preserving Diversity and Promoting Human Rights' in Jan Erik Wetzel (ed), *The EU as a 'Global Player' in Human Rights?* (Routledge 2011) at 62

³⁰⁵ Horspool and Humphreys at 41

³⁰⁶ Curtin at 71

³⁰⁷ Horspool and Humphreys at 42

³⁰⁸ General Secretariat of the Council of the EU, *The High Representative for Foreign Affairs and Security Policy/The European External Action Service* (2009)

³⁰⁹ Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service, 2010/427/EU

3.3.4.6.2 Head of EEAS

The High Representative serves as the head of the European External Action Service. The Council Decision of 26 July 2010 stipulates that the 'EEAS shall be placed under the authority of the High Representative.'³¹⁰

3.3.4.6.3 President of Foreign Affairs Council

The High Representative leads the Foreign Affairs Council (FAC). The FAC is charged with coordinating the EU external action (including the foreign and security policy) regarding foreign policy, defence, trade, development cooperation and humanitarian aid.³¹¹ The FAC brings together the foreign ministers of Member States once a month, but can also convenes the defence ministers for Common Security and Defence Policy (CSDP) matters, the development ministers for development cooperation issues and the trade minister for common commercial policy decisions. All meetings are chaired by the High Representative with the assistance of the EEAS and the General Secretariat of the Council.

3.3.4.6.4 The European External Action Service and the EU Delegations

The High Representative is assisted by a European External Action Service, in cooperation with the diplomatic services of the Member States. The main tasks of the EEAS are set forth in the Council Decision of 26 July 2010 (Decision).³¹² The Decision mandates the EEAS to 'support the High Representative' and to 'ensure the consistency of the Union's external action.'³¹³ It further states that EEAS staff should 'carry out their duties and conduct themselves solely with the interest of the Union in mind.'³¹⁴ Article 2 outlines the tasks of the EEAS to support the High Representative in:

- Conducting the CFSP of the EU, including the CSDP;
- Fulfilling the mandate to preside over the FAC; and
- Carrying out the responsibility for external relations and coordinating other aspects of EU external action.³¹⁵

The EEAS is also tasked with assisting the President of the European Council, the President of the Commission and the Commission in carrying out functions in external relations.³¹⁶

The EEAS uses the same structure as the Commission – Directorates-General. The Directorates have geographic or thematic dossiers.

The High Representative, in agreement with the Council and the Commission also opens and closes delegations.³¹⁷

³¹⁰ Council Decision 26 July 2010 Article 1(3)

³¹¹ Council of the European Union, 'Foreign Affairs' <<http://www.consilium.europa.eu/policies/council-configurations/foreign-affairs.aspx?lang=en>> accessed 9/4/2014

³¹² Council Decision 26 July 2010

³¹³ Council Decision 26 July 2010 Whereas Clause (3)

³¹⁴ Council Decision 26 July 2010 Whereas clause (8)

³¹⁵ Council Decision 26 July 2010 Article 2(1)

³¹⁶ Council Decision 26 July 2010 Article 2(2)

³¹⁷ Council Decision 26 July 2010 Article 5

3.3.4.6.5 *The Human Rights Competence of the EEAS, the High Representative*

The High Representative has several tasks that are related to human rights and specified in the mandate of the EEAS, particularly in Article 9.³¹⁸ The EEAS and the Higher Representative have programming duties related to the EU external assistance instruments, which include the Development Cooperation Instrument,³¹⁹ the European Development Fund,³²⁰ the European Instrument for Democracy and Human Rights,³²¹ the European Neighbourhood and Partnership Instrument,³²² together with other instruments not specifically designed to promote human rights, development or democracy. In relation to these programming duties, the EEAS must prepare (1) the country allocations, in accordance with the Commission's multiannual financial framework; (2) country and regional strategic papers; (3) national and regional indicative programmes.³²³ Both the EEAS and the High Representative are directed to 'work with the relevant members and services of the Commission without prejudice to Article 1(3)' [the article placing the EEAS under the authority of the High Representative.]³²⁴ With the recent appointment of the new High Representative, it will be important to see if she will forge close ties with the Commission and whether her dossier will give her competence covering all aspects of external relations when the new Commission is formed. This will be an area to carefully watch in coming months. If she does get competence over all the external relations matters - and early indications from the new Commission structure suggest she will -³²⁵ it could lead to greater coherence in the way policy is coordinated and in the cooperation among the services and between the EEAS and the Commission.

³¹⁸ Council Decision 26 July 2010 Article 9

³¹⁹ An instrument in existence since 2007 and designed to assist 47 nations in Latin America, Asia and the Gulf regions to develop rural areas, eradicate poverty, strengthen the education and health sectors and improve human rights. European Commission, Development and Cooperation - Europeaid, http://ec.europa.eu/europeaid/how/finance/dci_en.htm

³²⁰ Financial aid package for the African, Caribbean and Pacific countries for economic, social and human growth as well as regional integration. See Decision No 1/2006 of the ACP-EC Council of Ministers, 2 June 2006, available at http://ec.europa.eu/europeaid/how/finance/edf_en.htm

³²¹ The European Instrument for Democracy and Human Rights sets forth the policy for strengthening democracy, human rights and rule of law in third countries. European Commission, Democracy and Human Rights, http://ec.europa.eu/smart-regulation/impact/commission_guidelines/commission_guidelines_en.htm

³²² An instrument to support the growth of democracy and human rights, as well as regional integration. European Commission, European Neighbourhood and Partnership Instrument, http://ec.europa.eu/europeaid/how/finance/enpi_en.htm

³²³ Council Decision 26 July 2010 Article 9(3)

³²⁴ Council Decision 26 July 2010

³²⁵ Under the new Commission structure she will be a Vice-President overseeing all Commissioners with external relations competence. See http://ec.europa.eu/about/juncker-commission/structure/index_en.htm

3.3.4.7 The European Union Agency for Fundamental Rights

3.3.4.7.1 Background

The EU Agency for Fundamental Rights (FRA) was established through Council Regulation (EC) No 168/2007 of 15 February 2007 (Regulation) as the only EU institution tasked solely to protect fundamental and human rights.³²⁶ The agency succeeds the European Monitoring Centre on Racism and Xenophobia, opening its doors on 1 March 2007 in Vienna. FRA's establishment was considered a crucial step towards greater coherence of EU policy with regards to human and fundamental rights.³²⁷ Along with the European Convention on Human Rights (ECHR) and the Regulation, the Charter of Fundamental Rights forms the legal and conceptual basis of the mandate of the FRA.

3.3.4.7.2 The Council Regulation (EC) No 168/2007 (Regulation) and FRA's Mandate

FRA's role is primarily that of a **research and advisory body** that shall 'provide the relevant institutions, bodies, offices and agencies of the Union as well as its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.'³²⁸ Thus, the FRA is not a political body, nor does it pass legally binding decisions or consider individual or inter-state complaints,³²⁹ but is the **information agency of the EU**, which 'shall fulfil its tasks in complete independence'³³⁰. More about FRA's lack of monitoring authority is discussed in Section 5 of this report.

3.3.4.7.3 Tasks of the FRA

The Regulation determines the tasks of the FRA; these can be subsumed into three areas: the **collection, analysis and dissemination of data**, the **provision of expert opinion** and the **promotion of fundamental rights**, i.e. the development of an appropriate and comprehensive communication strategy.³³¹ Concrete thematic areas are defined in the **Multiannual Framework (MAF)**. The latter is proposed by the European Commission, and adopted by the Council, in consultation with the European Parliament.³³²

³²⁶Gabriel Toggenburg, The EU Fundamental Rights Agency and the Fundamental Rights Charter: how fundamental is the link between them? in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (Eds.), The EU Charter of Fundamental Rights. A Commentary, Oxford(et.al.): Hart Publishing, 2014, at 1614

³²⁷ Hannes Tretter and Anna Müller-Funk, The European Agency for Fundamental Rights in 2009: Opportunities, Responsibilities and Prospects, in: Wolfgang Benedek, Florence Benoît-Rohmer, Wolfram Karl, Manfred Nowak (Eds.), European Yearbook on Human Rights, Wien: Neuer Wissenschaftlicher Verlag 2010, p.109. In 1998 in the Human Rights Agenda for the European Union for the Year 2000, the authors demanded an EU agency for fundamental rights to strengthen the human rights coherence within the EU and among its member states. Antonio Cassese, Catherine Lalumière, Peter Leuprecht, Mary Robinson, Leading by Example – A Human Rights Agenda for the European Union for the Year 2000, Florence: European University Institute, 1998. The authors argued that the agency would foster a more proactive and thus preventive human rights policy, rather than a reactive one, that predominantly acts after violations have occurred. Philipp Alston, Monitoring fundamental rights in the EU : the contribution of the Fundamental Rights Agency Oxford (et.al.) : Hart Publishing, 2005., p. 2

³²⁸ Art 2, Regulation (EC) n° 168/2007 establishing a European Union Agency for Fundamental Rights (2007)

³²⁹ Gabriel Toggenburg, The EU Fundamental Rights Agency and the Fundamental Rights Charter: how fundamental is the link between them? in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (Eds.), The EU Charter of Fundamental Rights. A Commentary, Oxford(et.al.): Hart Publishing, 2014, p.1614

³³⁰ Art 16, para 1, Regulation (EC) n° 168/2007

³³¹ Art 4, Regulation (EC) n° 168/2007

³³² Art 5, Regulation (EC) n° 168/2007

Since the establishment of the FRA two MAFs have been adopted. The first determined FRA working priorities from 2007 to 2012. The second one, adopted on 11 March 2013 by Council Decision No 252/2013/EU, defines FRA activities for the period 2013-2017.³³³ The current MAF priorities are: (a) access to justice; (b) victims of crimes, including their compensation; (c) information society, particularly the protection of the private life and personal data; (d) the integration of Roma; (e) judicial cooperation, with the exclusion of criminal matters; (f) the rights of the child; (g) discrimination on the grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or another opinion, membership of a national minority, property, birth, disability, age or sexual orientation; (h) immigration and integration of migrants, visa and border control as well as asylum; (i) racism, xenophobia and related intolerance.³³⁴ The FRA can only deal with any topics outside of the MAF, when requested to do so by the European Parliament, the Council or the Commission.

On the basis of the MAF the FRA formulates an Annual Work Programme (AWP), which lays out the work priorities and planned projects for the forthcoming year³³⁵. The draft of the AWP is submitted by the agency's director, after the Commission and the Council had the opportunity to deliver an opinion on it. After its adoption by the Management Board of the FRA, the AWP is conveyed to the European Parliament, the Commission as well as the Council.³³⁶

3.3.4.7.3.1 Collection, analysis and dissemination of data:

The FRA collects and analyses data in cooperation from a network of different national focal points; the FRA also has the mandate to contract other institutions to work on its behalf.³³⁷ FRA improves the methodological comparability of data by developing indicators, standards and methods, which result in more coherent information on fundamental rights issues of the EU.³³⁸ This has led to a common 'fundamental and human rights language'³³⁹ as well as a mutual understanding of fundamental and human rights issues and challenges, in the EU and among its institutions, which is a prerequisite for the formulation and implementation of effective human rights policy. A particularly suitable example for this is the work of the agency on hate crimes in the EU³⁴⁰. Until the FRA demonstrated, in reports and studies, the extent and gravity of hate crimes against Roma, LGBTQI-people, migrants across the EU, this topic was rarely on the radar of EU policy makers and the majority of the member states lacked suitable legal frameworks. The work of the FRA on hate crimes has led to a general awareness of the issue³⁴¹ and

³³³ Council Decision No 252/2013/EU http://fra.europa.eu/sites/default/files/council-decision-no-252-2013-eu-establishing-multiannual-framework-2013-2017_en.pdf

³³⁴ Council Decision No 252/2013/EU http://fra.europa.eu/sites/default/files/council-decision-no-252-2013-eu-establishing-multiannual-framework-2013-2017_en.pdf

³³⁵ Art 5, para 4, Regulation (EC) n° 168/2007

³³⁶ Art 12, para 6 (a), Regulation (EC) n° 168/2007

³³⁷ Art 6, para 3, Regulation (EC) n° 168/2007

³³⁸ Art 4, para 1, Regulation (EC) n° 168/2007

³³⁹ Armin von Bogdandy and Jochen von Bernstorff, Die Europäische Agentur für Grundrechte in der europäischen Menschenrechtsarchitektur und ihre Fortentwicklung durch den Vertrag von Lissabon, Zeitschrift Europarecht (EuR) - Nomos, 2010/2, p 114-164

³⁴⁰ See Example: Putting horizontal EU cooperation in practise: Combatting hate crimes in the EU in the annex of this report

³⁴¹ See for example Parliamentary question - Subject: Strengthening the fight against hate crimes in the EU - O-000019/2013, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT%2BQQ%2BO-2013-000019%2BO%2BDOC%2BXML%2BV0//EN&language=EN>

ultimately to a fairly powerful Council Decision in December 2013.³⁴² Furthermore a Member State working group is pushing the issue forward.³⁴³ Finally, the issue has significantly risen on the agenda of the Commission, the Council as well as the European Parliament.³⁴⁴

FRA focused their research mostly on right holders (individuals), rather than right bearers (states)³⁴⁵. The research showed that the majority of LGBT crimes are never reported.³⁴⁶ Thus only an approach that actively and directly interacts with (possible) victims can draw an accurate picture, since government officials and official data cannot de-mask the problem of hate crime to the extent that the FRA studies. The agency makes its reports and studies readily available to the public; this includes the publication of its Annual Report³⁴⁷.

3.3.4.7.3.2 Provision of expert opinion

Upon request the agency provides EU institutions and Member States with evidence-based advice, as trainings, reports, expert opinions and presentations.³⁴⁸ An example of such a request was that of the French Presidency of the Council in 2008 for an expert opinion on the proposal for a Council decision on the use of Passenger Name Record (PNR) for law enforcement purposes³⁴⁹.

³⁴² Council conclusions on combating hate crime in the European Union, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/139949.pdf

³⁴³ Interview with Morten Kjærum

³⁴⁴ Interview with Morten Kjærum

³⁴⁵ Gabriel Toggenburg, The EU Fundamental Rights Agency and the Fundamental Rights Charter: how fundamental is the link between them? in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (Eds.), The EU Charter of Fundamental Rights. A Commentary, Oxford(et.al.): Hart Publishing, 2014,, p 1616

³⁴⁶ FRA Website: <http://fra.europa.eu/en/news/2013/fra-director-holds-speech-combating-hate-crime-europe-and-beyond>

³⁴⁷ Art 4, para 1, Regulation (EC) n° 168/2007

³⁴⁸ Gabriel Toggenburg, The EU Fundamental Rights Agency and the Fundamental Rights Charter: how fundamental is the link between them? in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (Eds.), The EU Charter of Fundamental Rights. A Commentary, Oxford(et.al.): Hart Publishing, 2014, p 1614

³⁴⁹ Opinion of the European Union Agency for Fundamental Rights on the Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes. Available at http://fra.europa.eu/sites/default/files/fra_uploads/1491-FRA-opinion-PassengerNR_EN.pdf

3.3.4.7.3.3 Promotion of fundamental rights

FRA must 'develop a communication strategy and promote dialogue with civil society, in order to raise awareness of fundamental rights and actively disseminate information about its work'³⁵⁰. The FRA Communications Unit develops communications strategies with stakeholders. The **Fundamental Rights Platform (FRP)** invites all qualified and interested representatives of civil society to cooperate with the FRA.

3.3.4.7.4 Structure of the FRA

FRA comprises a Management Board, the Executive Board, the agency's Director and his team as well as the Scientific Committee.³⁵¹ The interaction of the different bodies of the agency is illustrated in the chart. Each Member State³⁵² appoints two independent human rights experts (this includes one deputy member)³⁵³ as members for the MB. Additionally, the MB consists of two Commission representatives and one independent person appointed by the Council of Europe.³⁵⁴ The latter also helps to avoid a possible duplication of the FRA's activities with the work of the Council of Europe, since this allows for a continuous, formal and informal exchange about each other's activities. Additionally, the collaboration with the Council of Europe on the EB, as noted below, places FRA in a unique position to influence coherence across Europe and among the different international organisations.



Organizational Structure of the FRA

Source: fra.europa.eu/en/about-

The key responsibilities of the MB are: defining the FRA's work priorities, the adoption of the annual work programme as well as the relevant budgets, the appointment - and if necessary - the dismissal of the agency's director, the adoption of the annual reports of the FRA as well as the election of its representatives, who are representing the MB at the Executive Board (EB) of the agency³⁵⁵. Together with the Council of Europe and Commission representatives, they form the EB, which provides assistance and advice to the director of the FRA and the MB³⁵⁶. The director's responsibility is to represent and manage the agency; he/she is appointed for a period of five years. The Scientific Committee acts as the quality assurance body of the FRA, it comprises eleven highly-qualified, independent experts from the field of human and fundamental rights. Their appointment is the responsibility of the MB of the agency, in close consultation with the LIBE Committee of the European Parliament; their term too, is limited to five

³⁵⁰ Art 4, para 1, Regulation (EC) n° 168/2007

³⁵¹ Chapter 3, Regulation (EC) n° 168/2007

³⁵² Also candidate countries may, dependent on the decision of the Council, appoint observers to the MB, who can attend MB meetings, but have no voting rights. (Regulation Art 28 para 3)

³⁵³ Regulation Art 12 para 1 (a)

³⁵⁴ Art 12, para 1 (b) and (c), Regulation (EC) n° 168/2007

³⁵⁵ Art 12, para 6, Regulation (EC) n° 168/2007

³⁵⁶ Art 13, Regulation (EC) n° 168/2007

years³⁵⁷. Finally, and strictly speaking not part of the organisational structure, the Fundamental Rights Platform (FRP) is used as a platform to interact with EU civil society.

3.3.4.8 Interaction and cooperation of the FRA with other EU institutions

	European Parliament	European Commission	Council of the EU
Request reports/opinions within the former first pillar	Yes	Yes	Yes
Request reports/opinions beyond the former first pillar	Yes	Yes	Yes
Request reports/opinions on legislative procedures	Yes	Yes	Yes
Involvement in the selection process of the FRA's director	Yes	Yes	Yes
Oversight of the work of the FRA's director	No	Yes	No
Involvement in the definition of the work priorities of the FRA	No	Yes	Yes
Information about the work of the agency	Yes	Yes	Yes
Participation in MB and EB of the FRA	No	Yes	No
Involved in the allocation of funds to the FRA	No	Yes	Yes
Oversight of the financial and budgetary matters of the FRA	No	Yes	Yes
Information about the financial and budgetary matters of the FRA	Yes	Yes	Yes
Involvement in the evaluation process of the FRA	No	Yes	Yes

The FRA engages in close cooperation with EU institutions and Member States to 'ensure appropriate coordination with relevant Community bodies, offices and agencies.'³⁵⁸

According to the Director of the agency, as well as the Head of Sector Cooperation with EU Institutions and EU Member States, EU institutions have availed themselves of the invitation by the Council in the Stockholm Programme to make full use of the FRA by readily seeking that expertise with an increasing tendency as the director of the FRA states: '...if you look at the references to FRA in the Parliament, in resolutions, in Commission work, in Council meetings you can see a significant increase of requests for FRA expertise and opinions as well as the usage of the work of the agency.'³⁵⁹

The **Council of the European Union** allocates the funding to the FRA, determines the scope of the thematic mandate of the agency and to some extent oversees the work of the FRA. It can request information that lies within and beyond the thematic scope of the FRA mandate, namely the

Overview of the relationship of the FRA with the EP, the EC and the Council.

³⁵⁷ Art 14, para 1, Regulation (EC) n° 168/2007

³⁵⁸ Art 7, Regulation (EC) n° 168/2007

³⁵⁹ Interview with Morten Kjærum

MAF³⁶⁰ and request expert opinions of the FRA that deal with legislative procedures³⁶¹ of the EU and sanction proceedings in accordance with Art 7 TEU. The Council is, together with the Parliament, involved in the selection of the FRA's director, its list of candidates have to be taken into account by the MB that appoints the FRA's director.³⁶² In addition the Council has budgetary authority over the FRA.³⁶³

In addition to cooperation and exchanges at expert level, the FRA Director partakes in informal ministerial meetings of the Justice and Home Affairs Council (JHA) as well as the Employment, Social Policy, Health and Consumer Affairs Council (EPSCO).³⁶⁴ The work of the FRA is used by the different preparatory bodies of the Council, particularly the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP), to which the Agency presents its annual report every year. Over the years the Council has also requested a number of expert opinions and reports: such as the aforementioned request of the French Presidency of the Council in 2008 for an Opinion on the proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) from the agency. In June 2013 the FRA was asked to provide an expert opinion within the context of the review of the Framework Decision on Racism and Xenophobia (2008/913/JHA). Also the survey on gender-based violence that was published in 2014 was requested by the Spanish Presidency of the Council in 2010.

The **European Commission** oversees the work and activities of the FRA. It may request information that lies within and beyond the thematic scope of the mandate of the FRA³⁶⁵ and request expert opinions of the FRA that deal with legislative procedures³⁶⁶ of the EU. The Commission may also request amendments to working agreements that the agency enters into with other EU institutions.³⁶⁷ The Commission is also represented by two persons in the MB meetings,³⁶⁸ one also an EB member. In addition, the Commission oversees, together with the Council, the financial and budgetary matters of the FRA: It therefore receives the estimate of revenue and expenditure for the Agency for the following year by 31 March by the MB.³⁶⁹ Furthermore the Commission can propose to invite a candidate country that has completed its Association Agreement with the EU to participate in the FRA³⁷⁰. Moreover the Commission is involved, together with the MB, in the determination of the timing and scope of the external evaluation of the FRA.³⁷¹ Finally the Commission has to be informed of the work through an annual report, which has to be delivered due by 15 June each year.³⁷²

A big part of this cooperation takes place on an informal level, which is appreciated by representatives of the Commission, as considered more efficient and speedier as the formal one. In an interview that was

³⁶⁰ Art 5, para 3, Regulation (EC) n° 168/2007

³⁶¹ Art 4, para 2, Regulation (EC) n° 168/2007

³⁶² Art 15, para 1, Regulation (EC) n° 168/2007

³⁶³ Art 20, para 6, Regulation (EC) n° 168/2007; Art 20, para 8, Regulation (EC) n° 168/2007

³⁶⁴ FRA Website: <http://fra.europa.eu/en/cooperation/eu-partners/council-of-the-european-union>

³⁶⁵ Art 5, para 3, Regulation (EC) n° 168/2007

³⁶⁶ Art 4, para 2, Regulation (EC) n° 168/2007

³⁶⁷ Art 8, para 3, Regulation (EC) n° 168/2007

³⁶⁸ Art 12, para 1, Regulation (EC) n° 168/2007

³⁶⁹ Art 20, para 5, Regulation (EC) n° 168/2007

³⁷⁰ Art 28, para 3, Regulation (EC) n° 168/2007

³⁷¹ Art 30, para 4, Regulation (EC) n° 168/2007

³⁷² Art 12, para 6, Regulation (EC) n° 168/2007

conducted during the external evaluation of the FRA, a Commission representative states: 'In the informal coordination process Commission employees take direct contact to relevant FRA desk officers [...] The informal processes work very well, and they are sufficient for my needs.'³⁷³

The agency has been involved in the implementation of the Action Plan on Unaccompanied Minors (2010–2014), internal consultations and a meeting of an EU expert group on unaccompanied minors that brought together all key actors of the implementation of the action plan. In 2011 the Commission requested best practices with regards to victim support services which is reflected in the Commission's Roadmap for strengthening the rights and protection of victims. The FRA serves on the 'Roma Task Force' and the EU Framework for National Roma Integration Strategies to 2020, tasked to provide relevant data and expertise as well providing assistance to Member States in developing appropriate monitoring tools.³⁷⁴

The **European Parliament** oversees the procedures of the FRA and can request information that lies within and beyond the thematic scope of the mandate of the FRA, namely the MAF³⁷⁵. The Parliament can also request expert opinions of the FRA that deals with legislative procedures³⁷⁶ of the EU. The Parliament can, at any time, call upon the director to attend hearings or any matter linked to the activities of the FRA³⁷⁷. Finally the Regulation establishes that the Parliament has to be informed about the work, the activities and the performance of the FRA, in a pre-determined timeline, this includes: being provided with the FRA's annual report³⁷⁸, to receive the estimate of revenue and expenditure for the agency for the following year as well as preliminary draft budget by the Commission,³⁷⁹ to be transmitted the report on the FRA's budgetary and financial management for the previous financial year by the Commission,³⁸⁰ to be provided with the final accounts of the FRA,³⁸¹ and finally to receive the recommendations of the MB that result from the findings of the external evaluation to the Commission.³⁸²

Particularly strong ties have been established with the Committee on Legal Affairs (JURI) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee). The former Chair of the latter Committee, Juan Fernando López Aguilar, describes the interaction with the FRA in the following way: 'We need the EU Fundamental Rights Agency to [...] inspire and sustain the legislative work of the European Parliament regarding fundamental rights'.³⁸³ The references made to the output of the FRA in the work of the Parliament,³⁸⁴ the participation of FRA staff at Parliament meetings, the jointly organised events demonstrate that close ties between the Parliament and the FRA have been established over the

³⁷³ External Evaluation of the FRA: Evaluation of the European Agency for Fundamental Rights, Final Report, November 2012, p 24 available at: http://fra.europa.eu/sites/default/files/fra-external_evaluation-final-report.pdf

³⁷⁴ FRA Website: <http://fra.europa.eu/de/about-fra/how-we-do-it/how-our-work-is-used>

³⁷⁵ Art 5, para 3, Regulation (EC) n° 168/2007

³⁷⁶ Art 4 para 2, Regulation (EC) n° 168/2007

³⁷⁷ Art 15 para 6, Regulation (EC) n° 168/2007

³⁷⁸ Art 12 para 6, Regulation (EC) n° 168/2007

³⁷⁹ Art 20 para 6, Regulation (EC) n° 168/2007

³⁸⁰ Art 21 para 3, Regulation (EC) n° 168/2007

³⁸¹ Art 21 para 6, Regulation (EC) n° 168/2007

³⁸² Art 31 para 1, Regulation (EC) n° 168/2007

³⁸³ Interview with Juan Fernando López Aguilar available at https://www.youtube.com/watch?feature=player_embedded&v=e5Z0PnUbvXc

³⁸⁴ FRA Website: <http://fra.europa.eu/de/about-fra/how-we-do-it/how-our-work-is-used>

past years. The Annual Report of the FRA is presented annually to the Members of the European Parliament in the LIBE Committee.

3.4 Conclusions about the competences and responsibilities of EU Institutions

The EU institutions have general competence related to agenda setting, legislative initiative and co-legislation-making powers. However, no general competence for legislating in the area of human rights is found in the Lisbon Treaty. Because some powers have been conferred to the Union by Member States in policy areas that directly or indirectly invoke human and fundamental rights, the EU is able to promote human and fundamental rights both within and outside of the EU. In addition, because the EU will accede to the European Convention on Human Rights and due to the binding nature of the Charter of Fundamental Rights on Union acts, the protection of human rights is also a priority for EU policy. The policies have been developed and elaborated in key policy instruments and strategies described in Section 4 below.

Suggested action:

Develop mandates with clear references to legal bases and policy area (AFSJ, CSDP, development, etc.)

In section 5, more will be asserted about the competence and responsibilities of EU institutions in human rights, particularly regarding the need for clear mandates. The absence of a general competence complicates efforts to achieve coherent policy making in the field. This is evident in the need to continually develop tools and mechanisms to address discreet aspects of fundamental and human rights (e.g. the fundamental rights checklist in Impact Assessments or the Rule of Law initiative), but to never have one comprehensive mechanism for fundamental and human rights in all Union activities. However, devising clear mandates for each institution, body, service or agency that develops policy can contribute to greater clarity in the division of labour and the overall vision for institutions in human rights policy making. Any attempts to clarify mandates should also take into consideration the general aversion to competence creep.³⁸⁵

4 The EU Human Rights Policy: Key Strategy Instruments

In the previous section, this report examined where the EU Institutions derive their authority to act in the area of human rights. Once EU Institutions are competent to form human rights policy, actions taken to coordinate policymaking is often communicated to the institutions in the form of strategy documents and action plans. In fact, the EU has historically developed its policies in all areas pursuant to broad guidelines issued by the European Council and carried out and monitored by the European Commission. This section analyses the principal strategy documents that encompass the EU approach to fundamental rights in internal policy and human rights in EU external action. The Council of Europe document governing accession to the ECHR by the EU is also briefly analysed in this section.

³⁸⁵ Muir at 33 (Muir highlights the difficulty of using Articles 19 and 16 TFEU, to support the intervention by EU political institutions into fundamental rights. Muir argues that 'These legal bases illustrate the difficulty for the treaty-makers to allocate institutional powers to define the content and scope of EU fundamental rights protection.')

Analysis of strategy documents is a key factor in determining the coherence of policies. Firstly, strategy documents articulate the goals of and philosophy behind EU policies. In addition, they set forth the plan for implementation and/or monitoring progress. Finally, these documents also shed light on the way in which policy implementation relates to the structures and institutions of the EU. A comparison of the goals to the actual outcomes yields important insight into policy coherence.

As has already been noted in this report, EU human rights policy is marked by a division between external and internal human rights. The key human rights strategy instruments and action plans also reflect that division. Regarding the internal fundamental rights policy, the European Council announced the **Stockholm Programme** in 2009,³⁸⁶ a programme that was followed by the Commission's implementation (or action) plan.³⁸⁷ The programme will conclude at the end of 2014 and preparations, consultations and seminars were under way for several months to formulate the Stockholm Programme's successor policy document. The new program articulates new priorities and references coherence, as will be briefly explained below.³⁸⁸ Within the internal sphere, fundamental rights have largely been the responsibility of the Directorate-General for Justice and the Directorate-General for Home Affairs, now two separate entities. However, many other Directorates-General, including the Directorate-General for Employment, as well as Directorate General Development Cooperation – Europe Aid also have responsibilities for issues directly implicating human rights.

The external human rights strategy currently being implemented is jointly declared by the Commission and the High Representative for EU Foreign Affairs and Security Policy in *Human Rights and Democracy at the Heart of EU External Action: Towards a More Effective Approach* and further outlined in the *EU Strategic Framework on Human Rights and Democracy* issued in 2012 and a complementary *Action Plan*.³⁸⁹ The latter two strategy instruments included ambitious goals to ensure human rights are reflected throughout EU policy, promote universality of human rights, pursue coherent policy objectives, weave human rights into all EU external action, implement EU priorities in human rights, work through multilateral institutions and work with bilateral partners.³⁹⁰ However, this sphere is also subject to the measures outlined in the *European Instrument for Democracy and Human Rights* (EIDHR). The external affairs have fallen under the responsibility of the High Representative and the European External Action Service (EEAS).

The accession of the EU to the ECHR is a very important step in the EU's respect and promotion of human rights. Because the document that governs the accession is a Council of Europe document, it will not be closely scrutinized here. However two remarks are pertinent to the accession preparations: first, the Union accedes but does not undertake to do any more than it is competent to do under the treaties of the EU, as explicitly stated in Article 2(1) of the draft accession agreement. Second, the accession is viewed

³⁸⁶ *The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens* (2010/C 115/01)

³⁸⁷ European Commission, *Action Plan Implementing the Stockholm Programme*, COM(2010) 171 final

³⁸⁸ European Commission, *The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union*, COM(2014) 144 final

³⁸⁹ The Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12

³⁹⁰ The Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12

to be necessary to enhance the coherence of EU human rights policy, as stated in the draft agreement as well as in the explanation of the draft agreement, which follows:

The accession of the European Union [...] to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 [...] hereinafter referred to as ‘the Convention’) constitutes a major step in the development of the protection of human rights in Europe. The objective of the accession is to enhance coherence in human rights protection in Europe by strengthening participation, accountability and enforceability in the Convention system.³⁹¹

This provision brings into question how the EU institutions will exercise their competence to act in fundamental and human rights knowing that their acts are subject to judicial review under the provisions of the ECHR (in addition to the treaties and the Charter).

4.1 Internal matters and the Stockholm Programme (multi-annual planning for protection of fundamental rights)

The European Council has planned the EU’s Area of Freedom, Security and Justice (AFSJ) in multi-annual (five-year) programs starting with the Tampere Programme in 1999,³⁹² followed by the Hague Programme of 2004³⁹³ and ending with the most recent Stockholm Programme scheduled to expire at the end of 2014..³⁹⁴ The Stockholm Programme accompanied the many modifications to the AFSJ envisaged in the Treaty of Lisbon, including the application of the

so-called ‘Community method of cooperation’ or co-decision procedure (now denominated the ‘ordinary legislative procedure’) to a vast majority of these areas – and hence the formal recognition of the EP as co-legislator, along with the expansion of the jurisdiction of the CJEU to review and interpret AFSJ law and actions. The Treaty of Lisbon has also guaranteed the constitutionalisation of fundamental rights in the EU’s legal system and placed the individual’s liberty and security at the core of European cooperation in these domains, with the recognition of the legally binding force of the EU Charter of Fundamental Rights.³⁹⁵

While EU human rights policies have been, in practice, carried out in two different spheres – external and internal, the Stockholm Programme actually calls for integration of the external dimension of the Union’s policy in the AFSJ, stating that ‘This external dimension is essential to address the key challenges we face

³⁹¹ Council of Europe, Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, Final Report of the CDDH, 47+1(2013)008rev2, available at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1\(2013\)008rev2_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf)

³⁹² Tampere European Council 15 and 16 October, 1999, available at http://www.europarl.europa.eu/summits/tam_en.htm.

³⁹³ The Hague Programme: 10 Priorities for the Next 5 Years, available at http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/l16002_en.htm

³⁹⁴ The European Council, *The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens (2010/C 115/01)*

³⁹⁵ S. Carrera and E. Guild, *Does the Stockholm Programme matter? The struggles over ownership of AFSJ Multiannual Programming* (2012) 2 (citing Elspeth Guild)

and to provide greater opportunities for citizens of the Union to work and do business with countries across the world.³⁹⁶

The main highlights of the Stockholm Programme are:

- the promotion of citizenship and fundamental rights by enlarging the Schengen area and respecting the rights set forth in the EU Charter of fundamental rights;
- achievement of a European area of justice that recognizes the legal decisions of other Member States;
- an internal security strategy to protect the lives of citizens by tackling organised crime and terrorism through cooperation in law enforcement, border management and disaster response;
- affording access to Europe to businesspeople, tourists, students, workers and scientists;
- developing a comprehensive migration and asylum policy; and
- integrating the external dimension of human rights into the AFSJ policy.³⁹⁷

The Action Plan to implement the Stockholm Programme was broad and ambitious in that it authorized negotiations of agreements, proposed legislation and directives, called for reports and communications, requested implementation reports and recommended accession to treaty regimes in diverse areas ranging from individuals rights (anti-racism, rights of child, citizen's rights) to cyber law, child pornography and external borders.³⁹⁸ The vast majority of the measures in the Action Plan were the responsibility of the Commission alone; however, some measures were the joint responsibility of the Commission and the Council, the Commission and the Member States or the Commission, Council and Parliament. In other cases, agencies like EASO, Europol or FRONTEX took responsibility for implementation. Many measures had specific time deadlines, while others were identified as 'ongoing'.³⁹⁹

In a recent communication, the Commission announced that since the Stockholm Programme began, a Common European Asylum System was agreed and a framework for the EU's external migration and asylum policies is in place.⁴⁰⁰ The Commission emphasized that though the Schengen area had been strengthened and visa requirements for several countries abolished, there were still challenges confronted by Member States in their quests to foster 'economic growth and attract people with the right skills, as well as legitimate travellers to Europe'.⁴⁰¹ These challenges will need to be addressed in the next multi-annual strategy currently being developed.⁴⁰²

A number of pronouncements from the Stockholm Programme have resulted in further strategy development by the Commission. In section 2.1 of the Stockholm Programme, the Council encouraged:

³⁹⁶ The European Council, *The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens (2010/C 115/01)* Section 1.1

³⁹⁷ The European Council, *The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens (2010/C 115/01)*

³⁹⁸ European Commission, *Action Plan Implementing the Stockholm Programme, COM(2010) 171 final* Annex

³⁹⁹ European Commission, *Action Plan Implementing the Stockholm Programme, COM(2010) 171 final* Annex

⁴⁰⁰ European Commission, *An Open and Security Europe: Making it Happen COM(2014) 154 final* 2

⁴⁰¹ European Commission, *An Open and Security Europe: Making it Happen COM(2014) 154 final*

⁴⁰² To assist in developing the next strategy, the Commission has conducted a public consultation and held an event for stakeholder input in January 2014. They have also discussed future policies with the Parliament, Council, Committee of the Regions and the Management Boards of EU Agencies. Ibid, at 3.

the Union institutions and the Member States to ensure that legal initiatives are and remain consistent with fundamental rights and freedoms throughout the legislative process by way of strengthening the application of the methodology for a systematic and rigorous monitoring of compliance with the European Convention and the rights and freedoms set out in the Charter of Fundamental Rights.⁴⁰³

Thereafter, the Commission adopted the **Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union**.⁴⁰⁴ Within this document, the Commission calls for three main steps towards implementation of the Charter: (1) being an exemplary Union by adhering to a fundamental rights checklist when developing policy,⁴⁰⁵ engaging in a process to verify the impact of policies on fundamental rights,⁴⁰⁶ and ensuring that Member States comply with the Charter, including bringing infringement proceedings for breaches;⁴⁰⁷ (2) providing better information to the public about the Charter;⁴⁰⁸ and (3) an annual report on the implementation of the Charter in which the Parliament and the Commission have an exchange of views and take stock of progress in fundamental rights.⁴⁰⁹ The strategy also reinforces the importance of accession to the ECHR⁴¹⁰ and promises to develop individual policies in line with fundamental rights in areas such as protection of personal data, children's rights, gender equality, non-discrimination, intellectual property and freedom of movement.⁴¹¹ The strategy recognizes that the legislative amendment procedure has no accompanying impact assessment and recommends a fundamental rights check at that stage.⁴¹² Finally, the strategy also acknowledges that there must also be more efforts to ensure that amendments conform to the Charter of Fundamental Rights and that the Member States implement the Union law by properly transposing legislations, respects fundamental rights when implementing Union law or face infringement procedures for non-compliance.⁴¹³

⁴⁰³ European Council, *The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens (2010/C 115/01)* Section 2.1

⁴⁰⁴ The European Commission, *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final

⁴⁰⁵ European Commission, *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final 4

⁴⁰⁶ European Commission, *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final at 6

⁴⁰⁷ European Commission, *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final at 8

⁴⁰⁸ European Commission, *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final at 10

⁴⁰⁹ European Commission, *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final at 12

⁴¹⁰ European Commission, *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final at 3

⁴¹¹ European Commission, *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final at 4

⁴¹² European Commission, *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final 8 The strategy acknowledges the Commission's earlier efforts to include fundamental rights checks in the proposal process, as set forth in Commission communication – 'Compliance with the Charter of Fundamental Rights in Commission legislative proposals - Methodology for systematic and rigorous monitoring', COM(2005) 172 final of 27.4.2005.

⁴¹³ European Commission, *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final at 9

The Commission further elaborated its process for assessment of impact on fundamental rights in a second strategy document: **Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments**, a document that is currently being updated and revised.⁴¹⁴ The document purports to be ‘for Commission staff preparing impact assessments and for impact assessment support units.’⁴¹⁵ Part one of the guidelines explains why impact assessments are necessary, describing when the Charter is applicable and further summarizing the Commission’s Charter strategy. It contrasts the Charter with the European Convention on Human Rights and explains the role of core UN human rights conventions. Finally, it distinguishes between absolute rights and those subject to limitations and discusses the difference between an impact assessment and verification of compliance with fundamental rights.⁴¹⁶ Part two of the operational guidance gives the step-by-step procedures after initial screening of whether absolute rights are likely to be affected. These procedures include: consultation with interested parties, including non-governmental organization and social partners.

The successor to the Stockholm Programme aims to consolidate, codify and complement actions already taken in the AFSJ. The new programme calls for Member States to uphold fundamental rights, ensure effective remedies, provide judicial training, strengthen information and technology in areas such as e-justice (the electronic portal for cross-border cooperation) and improve operational cooperation.⁴¹⁷ Codification of civil and commercial measures, consumer rights legislation and criminal law matters are also targeted in the new five-year programme.⁴¹⁸ Finally, the new plan is for enhanced mutual trust, including in protection of procedure rights, increased promotion of economic growth, facilitation of citizens’ lives by better access to civil status records and active participation in international fora to promote interests such as the protection of personal data.⁴¹⁹

4.2 External relations and the strategic framework on Human Rights

In the area of external EU actions, the strategies have been bolder. The Commission has launched a key initiative known as the European Instrument for Democracy and Human Rights (EIDHR) to replace the 2000 to 2006 European Initiative. EIDHR is the flagship program promoting human rights and democracy in third countries. In December 2011, the European Commission adopted a joint Communication entitled **Human rights and democracy at the heart of EU external action – towards a more effective approach**, declaring that the EU would put human rights and democracy at the centre of its external action as a ‘silver thread’ running through all that it does.⁴²⁰ The approach promised to incorporate human rights into all areas, including democracy and elections, development cooperation, the use of human rights clauses of

⁴¹⁴ European Commission, *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments*, SEC(2011) 567 final

⁴¹⁵ European Commission, *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments*, SEC(2011) 567 final at 3

⁴¹⁶ European Commission, *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments*, SEC(2011) 567 final at 9

⁴¹⁷ European Commission, *The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union*, COM(2014) 144 final, point 4.1

⁴¹⁸ Ibid, point 4.2

⁴¹⁹ Ibid, point 4.3

⁴²⁰ Joint Communication ‘Human rights and Democracy at the Heart of EU external action—Towards a more Effective Approach’, COM (2011) 886, at 10, 12 December 2011; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0886:FIN:EN:PDF>

political framework agreements, trade policy, information and communications technology, business, conflict prevention, crisis management, counter terrorism strategies and the area of freedom, security and justice.⁴²¹ In June 2012, the **Strategic Framework on Human Rights and Democracy** with its related Action Plan described, for the first time, the priorities and goals of the EU concerning human rights and is the emblematic strategy for fostering human rights in external relations.⁴²²

The framework involves actions carried out by Commission Directorates-General, including Trade, Justice and DevCo, the EEAS and the Member States and also envisions a partnership with civil society.⁴²³ The main points of the framework involve incorporation of human rights throughout EU policy, promotion of the principle of universality, coherent objectives, human rights in all EU external policies, implementation of EU priorities on human rights, bilateral partnership, and cooperation with multilateral institutions.⁴²⁴ The Action Plan will end in December 2014.⁴²⁵ Progress on meeting objectives is laid out in the annual report on human rights and democracy in the world.⁴²⁶

Specifically, regarding human rights and democracy throughout all EU policy, the plan calls for:⁴²⁷ (1) incorporation of human rights in all impact assessment whether for legislative or non-legislative proposals, for stand-alone investment agreements and free trade agreement; (2) close cooperation between Heads of Delegations and civil society to draft country strategies, debrief human rights dialogues, implement human rights defenders guidelines; (3) pressure to ratify key human rights treaties by raising in all human rights dialogues with third countries; (4) training of EEAS, Commission, EU delegations, common security and defence policy (CSDP) mission and operations in human rights; (5) pilot projects to give democratic support to third countries, including election observation; (6) regular meetings between Council working parties on fundamental rights (FREMP) and the working party on human rights (COHOM); (7) develop a way to make trade cooperate with human rights, including advancement of economic, social and cultural rights; (8) ensure that human rights are taken into consideration in counter-terrorism activities; (9) in CSDP mission and operations, a task force created in 2012 will ensure systematic inclusion of human rights, child protection, gender equality and international humanitarian law in all missions; (10) in the external aspects of the area of freedom, security and justice develop partnerships to fight trafficking and train diplomats and Embassy staff on counteractions to trafficking; (11) fight against the death penalty and torture with the help of the COHOM Torture Task Force and continued implementation of the EU guidelines on torture; (12) support, including small grant scheme, for human rights defenders at risk; (13) promotion of very specific protections in the areas of children's rights, opposition to gender-based violence; LGBT issues and freedom of religion, expression; (14) support of the implementation of UN

⁴²¹ Ibid, at 10-15.

⁴²² The Council of the EU, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12

⁴²³ The Council of the EU, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12

⁴²⁴ The Council of the EU, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12

⁴²⁵ The Council of the EU, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12

⁴²⁶ The Council of the EU, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12

⁴²⁷ The lead author of this report obtained an annotated copy of the Strategic Framework with the status of all points and the responsible parties for each proposed action by an anonymous interviewee of the EEAS. The descriptions in this section are based on that document.

Guiding Principles on Business and Human Rights by drafting a guide for small businesses; and (15) identification of human rights focal points in EU delegations.

4.3 Conclusions regarding the strategy documents

The strategy documents are useful for understanding the programming of EU fundamental and human rights action. However, they also evidence some of the struggles for structural coherence. The divide in internal and external fundamental and human rights policy cannot be more pronounced than it is within the strategy documents of EU human rights policy. The documents reveal a divided union in which policies develop separate and apart from each other. This was also evident in interviews with EEAS and D-G Justice officials. The EEAS officials interviewed by the lead author of this report referenced the Strategic Framework and also admitted no familiarity with the Stockholm Programme.⁴²⁸ While this may have been the result of a newly appointed official still becoming familiar with the details of the position, it also appears that incoherence is built into the very structures and strategies of the Union.

The strategy documents are detailed plans for insertion of human and fundamental rights in internal and external policy yet there is no common temporal development nor is there an umbrella group coordinating the entire human rights policy picture. Currently, actions and responsibilities are divided among the institutions, services, agencies, Member States and other relevant bodies. The

Suggested action:

Create institutional awareness of both fundamental rights and human rights policymaking by establishing one inter institutional committee solely responsible for coordination and cooperation within the Stockholm Programme (and its successor) and Strategic Framework environments.

The Strategic Framework, created two years or more after, does not refer to or cross reference the Stockholm Programme, even as it addresses the external aspects of the AFSJ. This division reveals the structural incoherence in the strategy for human rights policy development. It also opens Union institutions to the threat of policy regime dissonance as the external aspect of human rights tends to outshine or eclipse the internal fundamental rights policy regime. As was pointed out by the study from the Regional Office for Europe of the UN High Commissioner for Human rights, the risk of developing a two tier system where promotion of human rights in third countries is more comprehensive than the fundamental rights the Union must adhere to at home looms large.⁴²⁹ An inter institutional committee that includes representation or contact persons from all relevant institutions, bodies and agencies should be in place to oversee all initiatives and proposals. While the committee does not need to be included in the actual process of the drafting and the day-to-day negotiations, it should be informed of any initiatives at the very

⁴²⁸ See discussion in Section 5.

⁴²⁹ Regional Office for Europe of the UN High Commissioner for Human Rights, *The European Union and International Human Rights* at 6, 8, 11, 31, 31, 50. ('As a result, there is a risk of a two-tier system of protection emerging in the EU. In policy areas falling within EU competence, individuals in Europe risk a lower level of protection than in policy areas falling under Member State competence. The lack of consistency between the EU's policy of promoting adherence to UN instruments in relations with third countries, while not according them prominence internally, also risks undermining its credibility on the world stage.') Ibid at 50.

beginning so as to identify potential conflicts with human and fundamental rights and to simply be aware of initiatives that impact those rights.

5 Findings regarding fundamental and human rights policy and coherence

In Section 2, this report illustrated how policy incoherence in human rights can arise in three contexts: structures, policy regimes and interests. Structural incoherence refers to the way in which policy institutions are structured, how they interact and the coordination among the institutions. Incoherence in policy regimes relate to the substance of the human rights policies themselves and whether they are compatible with the objectives of the institution and the interests of protection and promotion of human rights. In addition, where several policies exist, incoherence can also arise when those policy regimes compete or conflict. Finally, the incoherence related to interests has to do with the influential players and how they approach human rights policy-making, their priorities and their philosophy and mind set regarding human rights. These three areas are analysed below, looking at the human rights competence, mandates of agencies, strategy documents and responses given in interviews to give some preliminary findings regarding the coherence of human rights policy making on a horizontal basis between EU institutions and bodies. This report is the first in the reports to be submitted in Work Package 8. Therefore, these conclusions and findings are preliminary in nature and will likely change as more interviews are conducted and as the vertical aspects of coherence are studied in the next phase of this project.

5.1 Structural coherence of EU fundamental and human rights policies

Structural coherence is important in the cooperation among EU institutions on a horizontal level. Structures are reinforced by clear institutional mandates and well-defined organisational architecture. In the EU context, this report has set forth the legal bases for policymaking in human rights and fundamental rights. The policy and strategy documents are also discussed. This section examines whether the legal and policy groundwork makes for a coherent structural environment in which to develop human rights policies. Particular emphasis is assigned to the horizontal policymaking aspects of EU institutions and bodies.

There is one exemplary practice employed by the FRA that demonstrates how good horizontal cooperation can combat hate crimes. That collaboration is further explored in Annex 1 to this report. That report also highlights the FRA's interaction with other EU institutions, including the border security agency FRONTEX and the European Asylum Support Office.

While the FRA collaboration is encouraging and likely an example of best practices, EU human rights policy is challenged on several fronts to present a coherent structural approach. First, coherence requires clearly-defined mandates for all bodies and institutions. Second, the institutions should cooperate and coordinate legislative processes during both intra- (internal) and inter-institutional exchanges. Finally, resources and personnel are key elements for successfully developing coherent human rights policy approaches. These three main challenges are explained and their impact on coherent human rights policy is discussed below

5.1.1 Mandates

In Section 3.2, this report explained at length the historic evolution of the EU mandate to respect and promote fundamental and human rights, noting that one visible weakness is the lack of a general provision permitting the Union to formulate human rights policy. The lack of a definitive mandate in this area produces obvious challenges for human rights policymaking within the EU. Among the most debilitating is the ad hoc nature in which policies evolve over time, arising only when a new competence is given in the Treaties or when the CJEU broadens the interpretation of a competence. The ability to create a uniform human and fundamental rights regime is seriously compromised under the current structure. This is exacerbated by the attention and resources attributed to external relations and the promotion of human rights while failing to link those initiatives with internal matters that are affected by the external policies.

The Fundamental Rights Agency (FRA) is positioned to contribute greatly to the coherence of fundamental and human rights policy in the EU. The FRA mini-study, attached as Annex I, highlights the best practices of the agency, explaining how well it interacts with other EU institutions. Nevertheless, its mandate provides severe limitations. For example, the failure to extend its mandate to police and judicial cooperation in criminal matters seems incoherent given the abolishment of the pillar structure at the inception of the Lisbon Treaty. Second, the inability to monitor violations of fundamental rights by Member States and its geographical limitation lend to the overall image that the EU is not serious about correcting violations.

Suggested action:

Give a broader mandate and more independence to FRA, enhancing its ability to monitor and report on violations of fundamental rights, including in the area of police and judicial cooperation and permit the agency to have a presence in human rights dialogues.

Originally established as a first pillar institution, **the FRA's mandate is limited to 'Community' competences**. Reports, opinions and conclusions on all other thematic areas have to be requested by the Council, the European Parliament, the European Commission or the Member States. While the Lisbon Treaty abolished the pillar structure of the EU, granting a single legal personality to the EU, the Regulation has not been amended accordingly. The competences of the agency still exclude the scope of the former third pillar, namely 'police and judicial cooperation in criminal matters' on its own initiative.

The FRA's mandate **excludes involvement in legislative procedures** on its own initiative stating: 'The conclusions, opinions and reports [...] may concern proposals from the Commission under Article 250 of the Treaty or positions taken by the institutions in the course of legislative procedures *only where a request by the respective institution has been made* in accordance with paragraph 1(d).'

⁴³⁰

In addition, the FRA **cannot monitor and report on fundamental rights violations of individual Member states**, as is stated in the Regulation: '[conclusions, opinions and reports] shall not deal with the legality of acts within the meaning of Article 230 of the Treaty or with the question of whether a Member State has failed to fulfil an obligation under the Treaty within the meaning of Article 226 of the Treaty.'

⁴³¹ Such

⁴³⁰ Art 4, para 2, Regulation (EC) n° 168/2007 [emphasis added].

⁴³¹ Art 4, para 2, Regulation (EC) n° 168/2007

monitoring however could be extremely helpful for other EU institutions, by providing relevant and reliable data, to formulate and implement adequate policies in such cases. However, with regards to sanction proceedings under Art 7 TEU, namely whenever there is a risk of serious violations of the values set out in Art 2 TEU, the Council made a declaration, in which makes it possible for the Council to avail itself to the expertise of the FRA in such cases.⁴³²

Geographically the mandate of the FRA is **limited to the territory of the European Union**, as is stipulated in Art 3 of the Regulation: ‘The Agency shall deal with fundamental-rights issues in the European Union and in its Member States’.⁴³³ This means that the agency is not involved in human rights dialogues with third countries or in the accession procedures of candidate countries. The latter, with the exception that once States have concluded a Stabilization and Association Agreement with the EU, the Council may decide, that ‘the Agency may deal with fundamental rights issues within the scope of [its mandate] in the respective country, to the extent necessary for the gradual alignment to Community law of the country concerned’.⁴³⁴

The **limited independence of the FRA** hinders the FRA contribution to coherence. While the founding regulation references the body of international standards for human rights institutions that provide for their independence, broad human rights mandate, adequate funding, inclusive and transparent selection and appointment process, known as the Paris Principles⁴³⁵, which the Commission also stated to be ‘a source of inspiration when establishing the Agency’⁴³⁶ and stipulates, that ‘[t]he Agency shall fulfil its tasks in complete independence’,⁴³⁷ the FRA is not able to issue opinions on legislative matters as well as police and judicial cooperation in criminal matters on its own initiative. The Paris Principles however, which set out minimum standards for national human rights institutions stipulate that: ‘national institution[s] shall freely consider any questions falling within [their] competence [...] without referral to a higher authority’.⁴³⁸ Thus, the FRA should be able to concern itself with any topic it deems relevant to fundamental rights and its tasks set out in its founding regulation.

Another important step towards a more proactive and coherent EU human rights policy would be to foresee a more structured, or even obligatory **involvement of the agency in all legal plans and drafts of the Union** that are relevant to the promotion and protection of fundamental and human rights in order to secure conformity with fundamental rights standards and human rights obligations. Such involvement could include expert opinions on legislative proposals or human rights impact assessment. This has been

⁴³² Declaration by the Council on Proceedings under Article 7 of the Treaty on European Union of 12 February 2007, Council Document 6166/07

⁴³³ Art 3, para 3, Regulation (EC) n° 168/2007

⁴³⁴ Art 28, para 2, Regulation (EC) n° 168/2007

⁴³⁵ Introductory Statement (20) of Regulation (EC) n° 168/2007

⁴³⁶ European Commission, Fundamental Rights Agency public consultation document COM(2004) 693 final, p 4.

⁴³⁷ Art 16, para 1, Regulation (EC) n° 168/2007

⁴³⁸ Article 3 para a, Paris Principles

repeatedly recommended by a variety of scholars and experts in the past years⁴³⁹, by the external evaluation as well as by the MB on the basis of that evaluation.⁴⁴⁰

The provision of reliable information and expertise of high-quality is an important basis for policy makers. A proactive and independent FRA, involved in the legislative processes of the Union in a structured and obligatory way, would in addition help to ensure that EU policy is reviewed with regards to its impact on human and fundamental rights and thus make human rights policy more coherent and preventive.

5.1.2 Intra- and inter- institutional matters

One of the main changes in the structure of the EU institutions was the creation of the EEAS. Predictably, any such structural change introduces new potential incoherence in human rights policy because of its prominence in external action, the main function of the EEAS. The EEAS does not fit neatly into the structures - being neither an institution nor an agency, nor does it fall under the aegis of any of the institutions. Much of its mandate is directly associated with the High Representative - acting to assist in her three-fold duties. At the same time, the EEAS has also come to form a type of European diplomatic corps. Its composition coming from Member States, as well as the Brussels-based Commission and Council staff. Evidence of the structural tensions has arisen in the first half of the High Representative's term. For example, the relations between the Commission and the High Representative and EEAS have evidenced struggles over competence (turf battles), particularly because the Commission retained competence over several important dossiers – humanitarian aid, development, trade and enlargement.⁴⁴¹ Therefore, the High Representative has called for several measures to better coordinate policy in external action.

The High Representative has stated in the mid-term review that **closer cooperation is needed between the High Representative/EEAS on a number of issues** with the institutions. For example, the High Representative proposed that she put forward 'specific external relations proposals for inclusion in the Commission annual work programme;' that the EEAS present medium-term strategies on thematic issues for discussion in the Council at different levels, including ministerial meetings and working groups.⁴⁴² A second area where the High Representative in her capacity of Vice President of the Commission, together with the EEAS could be more involved was in regular D-G Relex meetings, a group that is chaired by the High Representative. In that configuration, she called for a lead co-ordinating role, supported by the EEAS geographical and thematic services for external relations issues.⁴⁴³

⁴³⁹ See inter alia: Armin von Bogdandy and Jochen von Bernstorff, Die Europäische Agentur für Grundrechte in der europäischen Menschenrechtsarchitektur und ihre Fortentwicklung durch den Vertrag von Lissabon, Zeitschrift Europarecht (EuR) - Nomos, 2010/2, p 114-164

⁴⁴⁰ FRA Management Board recommendations, available at: http://fra.europa.eu/sites/default/files/fra-management-board-recommendations-external-evaluation_0.pdf

⁴⁴¹ Centre for European Policy Studies, The New EU Foreign Policy Architecture: Reviewing the First Two Years of the EEAS (2013) at 7, 31, 42. Prior to the EEAS formation, the Commission had also transferred several units from D-G RELEX to Directorates-General dealing with energy and climate action. This move was viewed as an attempt to retain competence in external relations matters.

⁴⁴² EEAS, EEAS Review, at 16. See especially Short-term recommendations 9 and 10.

⁴⁴³ EEAS, EEAS Review, at 16. See especially Short-term recommendation 12.

One EEAS official interviewed indicated that the greatest challenge to achieving coherence is to change the culture within the institutions.⁴⁴⁴ This official opined that the EU sees human rights as values only and has not successfully transferred those values into concrete realities.⁴⁴⁵

The lack of concrete manifestations of EU values is evident in the multiple bodies and institutions which **lack an administrative culture consistently recognizing ramifications for human rights**. Without an administrative culture of knowing when fundamental and human rights are implicated, the Union risks developing policy that contravenes basic rights. While the Commission has been using impact assessments for several years and guidelines for checking fundamental rights were also disseminated, the Union has still been found by the CJEU, in several of its recent decisions, to have issued directives that violate the Charter.⁴⁴⁶ Therefore, something in the legislative process is deficient. One official working at D-G Justice indicated that more informal consultations early in the process would ensure that an idea is steering along the best path.⁴⁴⁷ Two other officials noted that there is no similar process for impact assessments for legislation once it leaves the Commission and moves into the Parliament or the Council.⁴⁴⁸ One official was particularly critical of the process noting that although the Council process can get ‘messy’, at the Parliament everyone is desperate for a deal and coupled with the short time spent on amendments, the end result is ‘ugly legislation.’⁴⁴⁹ While democratic processes necessarily involve amendments in Parliament, it is also of utmost importance to ensure coherence by confirming that any modifications are also subject to a rigorous fundamental rights impact assessment. (The legislative process also lends to other incoherence, as explained below in Section 5.1.2.2) One example of how far legislation can progress without being properly vetted for fundamental and human rights tensions is illustrated by the beleaguered smart borders initiative, explained below.

5.1.2.1 Smart borders legislation⁴⁵⁰

One interviewee elaborated on reasons the institutions have not achieved an atmosphere where fundamental and human rights are a natural and automatic consideration for proposed legislation, directives, agreements with third countries and other official actions. Citing the smart borders package proposed by the Commission in 2013, the official explained that officials wanted to address the issue of ‘over staying’ visas in the Schengen zone. The official was disturbed by the proposal to store names, dates of birth, and fingerprints to create a register in a database that would potentially be shared with police. In this official’s opinion, such legislation was ill-conceived from a fundamental rights perspective because nobody was asking why such data should be collected. The official stated that, following the events of September 11, there is an emphasis on the fight against terrorism. The official noted that nobody in the

⁴⁴⁴ Interview, 4 February 2014, EEAS Official 1.

⁴⁴⁵ Ibid

⁴⁴⁶ CJEU, C-584/10 P Commission and Others v Kadi (Kadi II), Appeal Case against T-85/09 Kadi v Commission (Kadi I), 18.7.2013 and Joined Cases C-293/12 and C-594/12, 8 April 2014, available at http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=req&docid=150642&occ=first&dir=&cid=313776

⁴⁴⁷ Interview, 14 July 2014, D-G Justice Official 2.

⁴⁴⁸ Interview, 27 May 2014, D-G Justice Official 1; Interview, 4 February 2014, Irish Permanent Representation Official 1.

⁴⁴⁹ Interview, 4 February 2014, Irish Permanent Representation Official 1.

⁴⁵⁰ All information regarding the smart borders proposal, in this section, is based on the following: Interview, 27 May 2014, D-G Justice Official 1

Commission or among the Member States opposed the legislation. For this official, the proper approach is to give well-supported evidence explaining why fundamental rights must be curtailed, then ask whether the response is proportionate. Applying this approach to the smart borders proposal, the official did not believe that there was sufficient evidence (of visitors overstaying visas and contributing to terrorist activities) to support such a measure; therefore, this official emphasized that the proportionality test was not even reached because the proposal failed to have proper evidential support.

The smart borders proposal highlights a weakness recognized by the High Representative in a mid-term review. Declaring that '[c]lose co-operation between the EEAS and the Commission is also vital on the various global issues where the external aspects of internal EU policies have a growing foreign policy dimension,' the High Representative stated that the 'allocation of responsibilities and resources was such that the expertise for addressing such policies remained in the Commission services.'⁴⁵¹

The Smart borders scenario highlights some weaknesses that can be addressed with the proper training and subject matter expertise among personnel. Therefore, the following measures are recommended. More required **training opportunities within all Directorates** can be introduced to build capacity in all of the Directorates to recognize human rights concerns, predict impacts or otherwise account for human rights impacts and effects. Similarly, expertise or at least **minimum knowledge about human rights standards should be a basic requirement for holding a deputy head or unit or a higher-level position in all directorates.**

Suggested action:

Continue training and other awareness-raising activities in all Commission services and among other institutional staff so that fundamental and human rights impact are assessed early and throughout (informally and formally) all policymaking processes.

In a related matter, the required turnover within the Directorates General and the EEAS appear to also **encourage an atmosphere where no expertise in a subject area is fostered.** One official stated that the mobility scheme does encourage frequent turnover.⁴⁵² Such turnover contributes to a perennial loss of institutional memory. In human rights, expertise and experience is essential to spot potential hazards and to advise on better measures to least impact rights. A

similar phenomenon occurs at the Council, where the presidency rotates every six months; therefore, agenda-setting is at the mercies of the interests and favoured concerns of the Member State holding the helm.

5.1.2.2 Impact assessments are incomplete

The Commission developed its own methodology for impact assessment, adopting the Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments,⁴⁵³ on which a consultation was opened in 2014 in order to further develop the policy. There are some aspects of this process that can be fine-tuned. The impact assessments are only conducted at the beginning of the

⁴⁵¹ EEAS, EEAS Review, available at http://eeas.europa.eu/library/publications/2013/3/2013_eeas_review_en.pdf

⁴⁵² Interview, 14 July 2014, D-G Justice Official 2

⁴⁵³ European Commission, Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments, SEC (2011) 567, Brussels, 6 May 2011

proposal process. They are not reconsidered when policies are amended at the Parliament and there is no post-legislation impact assessment. Finally, the impact assessments are not carried out if the new action is based on an old agreement.⁴⁵⁴ Therefore, policies already in place are not subject to scrutiny in an impact assessment, a fact that was lamented by an EEAS official interviewed for this report.⁴⁵⁵ One D-G Justice official interviewed for this report also stated that terms of reference for any proposal should also include both the positive and negative possible human rights impacts.⁴⁵⁶

The co-decision process and involvement of the European Parliament has added an extra process whereby proposals from the Commission can be amended, yet **no transparent process for assessing impact on fundamental rights for legislative amendments**, as is more fully explained below. In the same vein, the European Parliament sometimes calls for **additional commitments from third countries regarding their human rights records** in connection with Free Trade Agreements.⁴⁵⁷ The authors do not dispute that these agreements seek to enhance respect for human rights in the nations where the EU trades goods; nevertheless, these additional conditions are deals that are made on the side and therefore are outside of the trade framework and appear to be agreements directly with Parliament itself. In most cases, they are more related to ex-post assessment. As one D-G Trade official explained, the roadmap is not part of the formal agreement and D-G Trade is not involved in the follow-up measures.⁴⁵⁸ In the current climate, the only way to ensure consistency in proposed policy and legislation after the parliament amends a proposal is through the European Court of Justice and the legal services department.

The Parliament has stressed that the EU should base its policies on studies, impact assessments and analyses that cut across the entire EU system. Alongside with this important strategy, which the EP called 'joint programming',⁴⁵⁹ it was suggested that 'more regular and transparent information-sharing, policy co-ordination and teamwork between EU actors through all phases of EU action' is necessary, both internally and externally.⁴⁶⁰ The EU Annual Report on Human Rights and Democracy in the World in 2013 urged the Commission to 'conduct extensive impact assessments of EU development cooperation projects, which should include an assessment of their impact on the human rights situation'.⁴⁶¹

⁴⁵⁴ The non-governmental organisation, FIDH, recently issued an open letter pleading with the EU to apply a human rights impact assessment in its negotiations with Vietnam for a trade agreement, stating that the lack of an assessment was wrongfully based on the presumption that no such evaluation was necessary for agreements and understandings reached before the entry into force of the Lisbon Treaty. FIDH, Open Letter: EU negotiations with Vietnam, D-G Trade called on to carry out HRIA, available at <http://www.fidh.org/en/european-union/15826-open-letter-eu-negotiations-with-vietnam-dg-trade-called-on-to-carry-out>

⁴⁵⁵ Interview, 4 February 2014, EEAS Official 1

⁴⁵⁶ Interview, 27 May 2014, D-G Justice Official 1.

⁴⁵⁷ See Section 15 of European Parliament resolution of 13 June 2013 on the EU trade agreement with Colombia and Peru (2012/2628(RSP)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0249+0+DOC+XML+V0//EN> (calling on the Andean countries to ensure the establishment of a transparent and binding road map on human, environmental and labour rights, which should be aimed essentially at safeguarding human rights, enhancing and improving trade unionists' rights and protecting the environment.)

⁴⁵⁸ Interview, D-G Trade Official 1 and 2, 6 May 2014.

⁴⁵⁹ European Parliament Resolution of 3 April 2014 on the EU comprehensive approach and its implications for the coherence of EU external action (2013/2146(INI)) Para 27.

⁴⁶⁰ Id, para 28. This is essential, especially in crisis and post-crisis monitoring where the EU has to rapidly react. In this regard, the EP suggests that a 'Crisis Response Board' should be created within the EEAS, to be chaired by the HR/VP.

⁴⁶¹ EU Annual Report on Human Rights and Democracy in the World in 2013, 7965/14, 6 June 2014, 121.

The Parliament also acknowledges its own deficiencies in the area of impact assessment, due to its lack of a capacity to systematically check the human rights conformity of certain policies and their follow-up, making it dependent on the human rights impact assessments of the Commission. While Parliament checks the conformity of its initiatives with human rights, generally, and with the Charter of Fundamental Rights of the European Union, more specifically, it has not devised a specific procedure or mechanism to systematically assess the human rights conformity of certain policies or their follow-up. This makes the EP dependent on the human rights impact assessments of the Commission. The fundamental rights impact assessment could also benefit the EP, especially in legislative areas.⁴⁶² It might, however, also be problematic for coherence, when the EP is not convinced by the impact assessments conducted by the Commission and, consequently, decides to depart from them. This was the case in the FTA with Colombia and Peru, where the Parliament called for several additional measures, including a roadmap to ensure the respect for labour rights. In the resolution regarding that trade agreement, the Parliament stated:

whereas the European Union is the second biggest trading partner of Colombia and Peru, and whereas the planned Trade Agreement provides for total liberalisation of trade in industrial products and fisheries, which could increase the Colombian GDP up to 1.3 % and Peruvian GDP by 0.7 % in the long term, but might also have a considerable negative impact at the environmental and social levels, according to an independent sustainability impact assessment study.⁴⁶³

The fundamental rights impact assessment, as part of the general impact assessment, relates only the legislation being prepared in the field of internal competence of the EU. In the external relations, there appears to be no comparable systematic human rights impact assessment, although this may be the case in certain fields like trade agreements or development, where a human-rights based approach is foreseen. The relevant rules and practice would need further research, in particular also with regard to their implications for problems of human rights coherence.

A related concern is the **absence of ex post monitoring of human rights impact**. In general, impact assessment for fundamental rights applies at the stage where policies are proposed and made into legislation, but there is no way to assess the impact after the proposal becomes law and is implemented in the Member States. In the area of trade policy, there is a degree of ex-post assessment found in the agreements with Chile and Mexico, but this is a very new measure.⁴⁶⁴

5.1.3 Resources and personnel

A final note regarding resources finishes this section on structural incoherence. As human rights (and other) strategies are drawn up, fairly little emphasis is placed on whether there are resources available to implement the action plan. One official from EEAS noted that some measures in the Strategic Framework

⁴⁶² EIUC Working Paper, *Beyond Activism: The Impact of the Resolutions and Other Activities of the European Parliament in the Field of Human Rights Outside the European Union*, <http://www.humanrightsimpact.org/fileadmin/hria_resources/BEYONDACTIVISM_final.pdf>, last accessed 12 July 2014, 8.

⁴⁶³ European Parliament resolution of 13 June 2013 on the EU trade agreement with Colombia and Peru (2012/2628(RSP)), Whereas clause B.

⁴⁶⁴ Interview, D-G Trade Official 2, 6 May 2014.

take more economic resources than others and this should be considered during the process of setting priorities.⁴⁶⁵

Resource and burden sharing has been identified as a priority for the EEAS.⁴⁶⁶ While it is out of the scope of this report to consider this aspect in detail (it touches more on vertical coherence), it is necessary to note that the High Representative has noted it as a subject of concern for the future.⁴⁶⁷ The composition of the EEAS as a mixture of staff from the Commission and Council Secretariat as well as some posts from national diplomats is equally acknowledged in the mid-term review as posing ‘complex challenges of combining different traditions and organisational cultures alongside the difficult task and on-going inter institutional negotiations linked to setting up the service.’⁴⁶⁸ Not having yet settled into its true institutional form, the EEAS will no doubt continue to experience growing pains in coming years that will undoubtedly also impact the coherence of policymaking in human rights.

5.2 The Human Rights Policy Regimes

A second type of incoherence related to policy regimes. Policy regimes are the larger contexts within which policies are created and implemented. Ideally, within an organisation, there should be one policy regime with sub policy fields related to the larger regime. Where more than one regime emerges in an organisation, a policy regime conflict can arise enabling two or more regimes to vie for power. This type of conflict is evident on two levels in the EU’s human rights policy. First, the EU has always distinguished external relations and internal affairs, thereby creating a false dichotomy of human rights and fundamental rights. Second, EU policy highlights a conflict between the policies of the internal market and the policies of fundamental and human rights. These two human rights policy regime conflicts are further developed below.

5.2.1 Fundamental v. Human Rights

While the general understanding of academics and practitioners alike is that human rights are indivisible and universal, the EU has historically distinguished between external human rights and internal fundamental rights. This report does not purport to revisit that debate; however what is important for this report is that this division has created competing policy regimes in EU human/fundamental rights. Currently, the marked division between external and internal rights creates a picture of separation and isolation where greater interdependence is necessary. External promotion of human rights has received the spotlight and the resources. But, without the internal respect for fundamental rights, the image and credibility of what is preached abroad is undermined. While this may be more evident in the vertical relationship of EU institutions to Member States, upon closer scrutiny, it is also a horizontal matter. There is no red line distinction between external action and internal market activities. Activities carried out abroad have impact within the EU borders. As is shown by both the human rights and trade discussion below as well as the energy and asylum policy mini-case studies, the consequences of external action are

⁴⁶⁵ Interview, 4 February 2014, EEAS Official 1.

⁴⁶⁶ EEAS, EEAS Review at 17. See especially points 15 through 22 of Short-term recommendations.

⁴⁶⁷ EEAS, EEAS Review at 11.

⁴⁶⁸ Ibid, at 4.

often seen in the internal dimension; accordingly, EU officials must work in an environment that encourages them to see a global picture while engaging in policymaking.

The tendency to divide policymaking into internal and external spheres leads to the undesirable possibility of creating a two-tier system, alluded to earlier in this report, which would undermine the principles of universality and indivisibility of human rights. This is particularly true because the Charter of Fundamental Rights, though broader than the ECHR in its scope of rights, is still narrower than the spectrum of human rights guaranteed in the International Human Rights core treaties. In particular, the Charter does not afford the wide gamut of rights to minorities (Article 27 of the International Covenant on Civil and Political Rights) nor the right to adequate housing or food (Article 11 of the International Covenant on Economic, Social and Cultural Rights) found in the International treaties. As a result, the EU is in the position of urging third countries to enter International covenants that provide a wider range of rights than those to which it is itself obligated to respect. The Regional Office for Europe of the UN High Commissioner for Human Rights has noted that the EU can voluntarily engage with the UN human rights infrastructure by agreeing to comply with UN treaties (or by acceding to the same)⁴⁶⁹ and thereby avoid the dual system and its resulting credibility dilemmas.⁴⁷⁰

5.2.1.1 Stockholm Programme eclipsed by Strategic Framework

This division was marked in the early days after the Lisbon Treaty with the advent of when the co-legislators – the Commission, the Council and Parliament – jockeyed for ownership of the area of freedom security and justice (AFSJ).⁴⁷¹ The Council's power in setting the agenda and legislative priorities in this area (formerly referred to as Justice and Home Affairs (JHA)) was significantly diluted by the introduction of co-legislators in the Lisbon Treaty because, as pointed out by Carrera and Guild, ' [a]mong the more relevant reforms introduced by the Lisbon Treaty on JHA cooperation at EU levels, perhaps the more far-reaching has been the application of the EU ordinary legislative procedure as a principle encompassing the decision-making processes, which now implies that the JHA Council is no longer the sole actor unilaterally delineating the strategy(ies) and legislative outputs in these domains. '⁴⁷² Carrera and Guild further point out the Commissions emphasis of its right of initiative in AFSJ policy and the Parliament's LIBE Committee's increased workload in AFSJ-related matters since 2009.⁴⁷³

While the Stockholm Programme encountered early difficulties resulting from the institutional battles, the Union announced a very ambitious plan to promote human rights in all external action – the Strategic Framework on Human Rights and Democracy. Unlike the Stockholm Programme, the strategic framework has been relatively popular and has eclipsed the Stockholm Programme, the latter not even recognized

⁴⁶⁹ Regional Office for Europe of the UN High Commissioner for Human Rights, *The European Union and International Human Rights* at 43.

⁴⁷⁰ Article 21(3) TEU states '3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, **and of the external aspects of its other policies.**' [Emphasis added]. While some may argue that the Charter is not necessarily applicable to external policies others cite this section to say that it is. Here, the question does not need to be addressed because the EU could voluntarily subject itself to international standards.

⁴⁷¹ Carrera and Guild 3

⁴⁷² Carrera and Guild 4

⁴⁷³ Carrera and Guild

by some of the EU officials interviewed for this report.⁴⁷⁴ The troubles in the internal fundamental rights arena compared with the relative ease of promotion externally are also a result of the Treaty structure. The Union has not been given the broad competence in fundamental rights; therefore, it has been conservative in its interference in Member State fundamental rights violations. While it is certainly necessary to find a legal basis to act, in the legal sphere, the conservative reading of Union competence rules out the possibility of sending a political message to Member States who violate fundamental rights. One EU official interviewed for the report stated that the EU is a political body and there is nothing to stop the Commission from calling the attention of Member States who are violating fundamental rights of their citizens. The official recommended making a political declaration or writing a letter of protest to the Member State.⁴⁷⁵ In addition, the Commission could give wider meaning to AFSJ and find ways to link its actions to AFSJ in order to broaden its influence on promotion of respect for fundamental rights. In other words, at the Union level, there is a need to more broadly define what tools are available to address fundamental rights violations. This leads to coherence at the Union level, since it is at that level where promotion of human rights abroad is carried out in third countries.

5.2.1.2 Enlargement focus on human rights v. laxity toward Member State violations

Another widely-cited example of the competing external and internal divide is that of Hungary, where the enlargement process focused heightened scrutiny on the human rights record of the country when it was meeting accession requirements. Nevertheless, once inside of the EU, Hungary has been associated with violations of minority (Roma) rights and suppression of media freedoms.⁴⁷⁶ In other cases, third countries, particularly African nations, are encouraged by the EU to prosecute persons accused of war crimes or crimes against humanity. In contrast, within the EU, there is nothing in place to protect those accused of terrorism with EU Member States, as was evidenced by the Bosphorus case and other asset freezing cases later brought before the European Court of Human Rights. In other words, the failure of the EU Member States to properly recognise the rights of accused persons in terrorism –related charges renders it difficult for them to call on other nations to properly deal with the prosecution of crimes committed in their territories. These issues impact the image of the EU institutions as a whole and therefore weaken its horizontal coherence (even if it includes a vertical dimension).

In order to fight against the perceived gap between rhetoric and practice and to maintain its credibility as an institution, the EU must first implement and respect the policies that it preaches externally. To do this, the EU must, on the one hand, promote the ratification of prominent international human rights treaties (in this respect, the Parliament generically mentions ‘those on women’s rights and all non-discrimination agreements, core labour rights conventions’, the UNESCO Convention on the Protection and Promotion

⁴⁷⁴ Three officials interviewed for this report admitted to not having heard of the Stockholm Programme.

⁴⁷⁵ The French expulsions of Roma were criticised in a statement. See Europa, Statement by Viviane Reding, Vice-President of the European Commission and EU Commissioner for Justice, Fundamental Rights and Citizenship, on the Roma situation in Europe, available at http://europa.eu/rapid/press-release_MEMO-10-384_en.htm

⁴⁷⁶ Here again, there was some division among the institutions themselves in how to address the Hungary situation. To its credit, the European Parliament passed a resolution strongly condemning the violations in Hungary and calling for, among other things, ‘respect of rights of persons belonging to minorities.’ European Parliament resolution of 3 July 2013 (2012/2130(INI)), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-315>

of the Diversity of Cultural Expression, The Istanbul Convention on Violence against Women,⁴⁷⁷ The Optional Protocol to the Convention Against Torture, the International Convention for the Protection of All Persons from Enforced Disappearance, the Third Protocol to the UN Convention on the Rights of the Child⁴⁷⁸) and, on the other, ensure that EU member states repeal existing laws which contradict fundamental human rights. The EU, cognizant of this predicament, has introduced the EU framework to strengthen the rule of law, acknowledging that ‘recent events in some Member States have 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...’⁴⁷⁹ and that, in the past ‘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.’⁴⁸⁰ The rule of law framework permits the Commission to assess situations where threats to the rule of law are systematic, including in cases of the compromise of a Member State’s constitutional structure, separation of powers or partiality of the judiciary, but where Article 7 TEU (preventive and sanctioning mechanism for clear breaches) and Article 258 TFEU (infringement procedures) measures are not in order.⁴⁸¹ This mechanism was put in place in March 2014; therefore, more time is needed to see how it will correct the current credibility issues.

5.3 Interests

Policy creation takes place in political environments. Therefore, special interests can influence proposals and other measures. Some of the interest conflicts are found within the EU institutions themselves. EU policy highlights a conflict between the policies of the internal market and the policies of fundamental and human rights. One mini-study highlights the conflicts between internal market consumption of energy and the promotion of human rights in the energy supply countries. Another mini-study looks at the interests of the Commission versus that of Parliament – the last being influenced by Member State fears regarding immigration. That study shows how those interests played out in an asylum seeker directive. Finally, this section will highlight the conflict between internal market needs and the inclusion of human rights clauses in trade agreements.

Attached in Annex 2 is a study of the energy policies in the EU. The author demonstrates that the EU interest in maintaining a stable energy supply by diversifying away from its dependence on Russia for oil and gas, has led to less emphasis on poor human rights records in Central Asian nations (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan) for fear of ruining potential partnerships in those energy-rich lands.

⁴⁷⁷ European Parliament Resolution of 25 February 2014 with recommendations to the Commission on combating Violence against Women (2013/2004(INL)), para 4.

⁴⁷⁸ European Parliament Resolution of 11 March 2014 on the eradication of torture in the world (2013/2169(INI)) para 72, where the EP calls on Belgium, Finland, Greece, Ireland, Latvia and Slovakia) to ratify The Optional Protocol to the Convention Against Torture and on the other 21 member states that have not ratified the International Convention for the Protection of All Persons from Enforced Disappearance to do so urgently.

⁴⁷⁹ European Commission, A new EU framework to strengthen the rule of law COM(2014) 158 final/2,

⁴⁸⁰ Ibid at 2.

⁴⁸¹ Ibid at 7-9.

Dr. Liam Thornton's mini-study, in Annex 3, frames the drafting process for the Recast Reception Directive as a battle of interests where the socio-economic rights of the asylum seekers was squeezed out in favour of provisions that failed to link reception conditions for asylum seekers with the social benefits of nationals in the host state. The study shows how the Commission stripped away favourable provisions of the directive to satisfy a Parliament and Council that wanted provisions to permit the detention of asylum claimants for reasons of public policy. The directive itself limits many of the rights of the asylum seeker and creates conditions for disparate treatment of asylum seekers as compared to citizens (nationals).

5.3.1 Internal market considerations take precedence over fundamental and human rights

The general impression that external relations is the area where the Union gives unfettered promotion of human rights is only partially true. In Annex 3, the energy policy is critically examined. While the discussion focuses on the conflict of interests, the dependence on energy and the related reluctance to raise human rights issues with nations from whom the EU hopes to diversify its energy supplies, also illustrates how internal market considerations receive more attention than fundamental and human rights. Even the European Court of Justice has not escaped this tendency, being criticized of giving more emphasis to the four freedoms of the internal market than to fundamental rights (including social and economic rights).⁴⁸²

The credibility and coherence of EU's approach towards human rights and trade has been consistently challenged by developing countries and NGOs, alongside with UN human rights institutions. Some of this criticism refers to alleged double standards, the 'narrow focus and arbitrary application of the trade-related human rights instruments, to the almost exclusive orientation of the EU's own trade policy towards European economic interests, as reflected in the 'Trade, Growth and World Affairs' strategy and in the bilateral trade agreements'.⁴⁸³ There is also a discrepancy in interests, as D-G Trade typically considers trade a 'carrot'⁴⁸⁴ or incentive for nations to improve their human rights records, while other institutions, particularly Parliament believe action should be taken against nations with poor human rights records in accordance with the trade sanction regime.⁴⁸⁵ (This matter is treated in depth in a related FP7 FRAME report, Deliverable 9.1 in the discussion of country-specific measures in section 3.2.1.2.1).

While the **free trade agreements** are said to have **human rights clauses** automatically applied, there are a variety of approaches to such clauses: incorporation of the human rights clause into the actual agreement itself, incorporation into a parallel political agreement that is then incorporated by reference to the trade agreement or other hybrid options. Having so many different structures for the written agreements makes it difficult to monitor where the parties stand in regard to compliance with their duties

⁴⁸² See John Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution', 12 European Law Journal (2006); Marcin Kielbasa, 'The Internal Market Freedoms vs. Social Rights in European Union Law - a fragile balance or a weakness of the latter's protection?' Electronic International Interdisciplinary Conference 2012, available at http://www.gojil.eu/issues/41/41_article_voogsgeerd.pdf

⁴⁸³ ECOFAIR Trade Dialogue, 'Strengthening the Role of Human Rights in the EU Trade Policy' (Expert Seminar outline), <http://www.ecofair-trade.org/content/strengthening-role-human-rights-eu-trade-policy>.

⁴⁸⁴ Interview, D-G Trade Official 3, 13 May 2014.

⁴⁸⁵ DevCo, Thematic evaluation of the European Commission

support to respect of Human Rights and Fundamental Freedoms (including solidarity with victims of repression), available at <http://ecdpm.org/wp-content/uploads/2013/11/2011-Thematic-Evaluation-EC-Support-Human-Rights-Fundamental-Freedoms.pdf>

under the agreement (if, indeed, such monitoring were to take place). In addition, all officials interviewed who worked on trade policies acknowledged a general preference in D-G Trade to engage with partners rather than suspend agreements for human rights violations. This tendency may explain why human rights violations have rarely resulted in a suspension of trade.

The human rights clause in trade agreements has also come under strict scrutiny. It has been stated that its negotiation and implementation lack transparency (including a proper human rights impact assessment),⁴⁸⁶ that the clause might actually be detrimental to human rights protection in countries that go through severe political disturbances, if the EU decides to suspend the trade agreement,⁴⁸⁷ that there is currently no mechanism permitting civil society to bring complaints so as the European Commission could look into alleged human rights violations related to trade agreements and also no proper supervisory committee or body responsible for monitoring the parties' compliance with human rights under a trade treaty.⁴⁸⁸

The European Parliament criticizes the lack of reference to human rights in (true) sectorial trade agreements.⁴⁸⁹ The alternative to the inclusion of human rights clauses in trade agreements would be the conclusion of a different agreement, which would be more acceptable to the parties. The pitfall of this option, however, is that the separate agreement might end up not covering the situations referred to by the trade agreement. This has happened, partially, with the 2013 Protocols to the EU-Morocco and EU-Cote d'Ivoire Fisheries Partnership Agreements. The two Protocols include provisions that link them to human rights clauses existent in other applicable agreements.⁴⁹⁰

Furthermore, the EU-US Transatlantic Trade and Investment Partnership (TTIP) has triggered a lot of concerns and debates related, in a nutshell, to the fact that social and human rights aspects might be undermined by trade interests. Faced with an 'unprecedented level of public interest', the EU Trade Commissioner, Karel De Gucht, assured the European population that 'no trade agreement will be able to change the European and the American models we base our societies on'.⁴⁹¹ While TTIP intends to set up the world's largest free trade area by protecting investment and removing 'unnecessary regulatory barriers', it is not clear how beneficial this will be for ordinary people, as it could lower social, labour,

⁴⁸⁶ Bartels Lorand, *The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements*, Directorate-General for External Policies Study, 2014.

⁴⁸⁷ Prabhath Ranjan, *International Trade and Human Rights*, in Cottier Thomas/Pauwelyn Joost/Bürgi Elisabeth (eds.), *Human Rights and International Trade*, Oxford (OUP), 2005, 317.

⁴⁸⁸ Bartels Lorand, *A Model Human Rights Clause for the EU's International Trade Agreements*, German Institute for Human Rights Study, 2014, 32-35. However, in recent trade agreement, a 'sustainable development chapter' referring to labour rights is included (Cariforum EPA, Colombia/Peru FTA, Korea FTA), and provides for a civil society body which monitors human rights.

⁴⁸⁹ See European Parliament Resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements, para 12. The Commission mentioned that it was 'not convinced' that (sectoral agreements on steel or fisheries) provide a 'suitable context to negotiate human rights clause' while the Council Secretariat said that 'political' clauses are as well unsuitable for sectoral agreements. Cited in *Florence Benoit-Rohmer et al*, *Human Rights Mainstreaming in the EU's External Relations*, European Parliament Study EXPO/B/DROI/2008/66, September 2009, 36. See also the European Parliament Resolution on the human rights and democracy clause in European Union agreements, 2005/2057 (INI) of 14 February 2006, Strasbourg.

⁴⁹⁰ [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET\(2014\)433751_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET(2014)433751_EN.pdf)

⁴⁹¹ European Commission, 'Stepping up a Gear': Press Statement by EU Trade Commissioner Karel De Gucht following the stocktaking meeting with USTR Michael Froman on the Transatlantic Trade and Investment Partnership, Washington, 18 February 2014, http://trade.ec.europa.eu/doclib/docs/2014/february/tradoc_152198.pdf.

environmental and consumer standards. An additional worrisome aspect is the fact that the identity of the members of the High Level Working Group on Jobs and Growth, that has been very much involved in the initiation and further development of the negotiating process, is undisclosed. A lack of transparency and of direct responses to human rights concerns surrounding the TIPP can be easily remarked,⁴⁹² very much like in the case of the EU-India FTA.⁴⁹³

To conclude, despite the fact that we do not know for sure what human rights standards are or will be included in the negotiated texts, there seems to be a discrepancy, at the EU level, between the high human rights standards expected from and preached to smaller trade partners (such as it has recently been the case with the EU-Vietnam FTA)⁴⁹⁴ and the apparently lower ones required from important trade partners, such as India or the US. The EU must bear in mind that it is bound, by international treaties, to respect and protect human rights, that it has committed to having ‘human rights running as a silver thread through a truly integrated range of external policies’⁴⁹⁵ and that, ultimately, the efficiency of its policies and overall credibility depend on whether and how it mainstreams human rights.

6 Conclusions and suggested courses of action

At the outset of this report, we set forth the aim of this undertaking as well as the main research questions to be asked during the study. The main aim to ‘analyse questions of coherence of the EU’s internal and external policies in the field of human rights across different policy fields such as the CFSP, CSDP, development policy, commercial policy, migration and asylum, AFSJ and counterterrorism’ has been realized through desk studies of the legal and policy instruments, together with interviews of key officials.

We divided the task into these research questions:

- What are the competences and responsibilities of the EU institutions and agencies regarding human rights? In what ways do they lend to greater (in)coherence in EU human rights policy?
- What are the relevant policy instruments for human rights found in the EU institutions? In what ways do they lend to greater (in)coherence in EU human rights policy?
- What horizontal incoherence is identified from the competence of EU institutions, their legal and policy instruments and interviews with EU officials and other stakeholders?

With respect to the competences and responsibilities of EU institutions and agencies, this study finds that the Treaty basis for incorporating human rights into the external relations of the EU and to respect the fundamental rights of EU citizens is recognized as an aspirational goal under the Treaty provisions and reiterated in strategy documents. However, we also concluded that the mandates of the EU institutions

⁴⁹² For the failure of the Commission to provide with information regarding TIPP, see *Todhunter Colin*, US-EU Free Trade Agreement: A Corporate Stitch Up By Any Other Name, available at: <http://www.globalresearch.ca/us-eu-free-trade-agreement-a-corporate-stitch-up-by-any-other-name/5339789>.

⁴⁹³ For more information regarding EU-India FTA, see <http://ec.europa.eu/trade/policy/countries-and-regions/countries/india/>.

⁴⁹⁴ In this regard, see European Parliament Resolution of 17 April 2014 on the state of play of the EU-Vietnam FTA, 2013/2989 (RSP).

⁴⁹⁵ Speech by EU HR Catherine Ashton on the Annual Human Rights Report, available at http://www.eu-un.europa.eu/articles/en/article_11696_en.htm (16 January 2014). See also European Parliament, Human Rights – A Silver Thread through all External Policies, Press Release, 16 December 2010.

and bodies are not always clear and are often created in an *ad hoc* manner. More purposeful mandate setting is recommended.

The Stockholm Programme and Strategic Framework have identified actions that must be undertaken by the institutions are the main strategic policy instruments for fundamental and human rights in EU institutions. Our analysis of these documents has yielded that more awareness of what occurs in the other framework is necessary among officials in directorates-general, services and other institutions. This could be achieved by creating a body with the sole responsibility of coordinating fundamental and human rights responsibilities, activities and processes for policymaking.

This study yielded one example of exemplary coordination and cooperation in combatting racial discrimination. An initiative led by the FRA. The example was a possible best practice in how the EU institutions and services can better employ FRA for awareness raising and provision of statistics and other relevant data for fundamental and human rights policies.

There were also several examples of structural, policy regime and interest incoherence in EU human rights policy, including examples of incoherence in the counterterrorism measure of smart borders, human rights and trade tensions and the dichotomy between fundamental rights in the internal dimension and human rights in external action. The related mini-studies annexed to this report further explore FRA best practices and show that in energy and migration, further incoherence has real (negative) consequences for lives and people.

This report makes the following suggested course of action to enhance coherence in fundamental and human rights policies among and within the EU institutions:

- **Adopt a definition of coherence to be consistently used by EU institutions when developing policy.**
- **Develop mandates with clear references to legal bases and policy area (AFSJ, CSDP, development, etc.)**
- **Create institutional awareness of both fundamental rights and human rights policymaking by establishing on directorate-general solely responsible for coordination and cooperation within the Stockholm Programme and Strategic Framework environments.**
- **Give a broader mandate and more independence to FRA, enhancing its ability to monitor and report on violations of fundamental rights, including in the area of police and judicial cooperation and permit the agency to have a presence in human rights dialogues.**
- **Continue training and other awareness-raising activities in all Commission services and among other institutional staff so that fundamental and human rights impact are assessed early and throughout (informally and formally) all policymaking processes.**
- **Use impact assessments in both internal policy-making and external action to determine the effects of all proposals on fundamental and human rights.**

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