



Analysing the findings of the research of the other work packages on policy tools

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Executive Summary

The purpose of this FRAME Report is to map the EU internal fundamental and external human rights toolbox on the basis of the findings of other FRAME reports. This task involved answering two research questions. The first one is about identifying the categories according to which the tools need to be presented. The second question is about describing the concrete tools which compose the toolbox.

The question of categories was addressed on the basis on past and current FRAME research. This report considers the categories identified by previous FRAME reports which seemed to be useful as organising principles for the presentation of the toolbox.

The following categories were identified by other FRAME reports and briefly described in this report:

- internal v. external policy tools;
- paradigmatic instruments;
- soft v. hard law tools;
- tools displaying soft and hard power;
- tools that serve conceptualisation, operationalisation, and evaluation of policies.

It became clear from the outset that the first distinction was so radical in EU policies that it had to underpin any further categorization. Yet beyond this initial distinction, the remaining categories identifying by FRAME reports did not allow to identify a systematic sorting key which would allow to make sense of the toolbox.

This report therefore adopts an approach which, while taking into account the above categories, reorganizes them by focusing rather on the functions of specific categories of tools.

This analytical exercise yielded the following sorting key:

Internal	External	Categories	Function
Policy documents (e.g. Stockholm Programme)	Policy Documents (e.g. Strategic Framework and Action Plan)	Soft law, conceptualisation& operationalization	Objective-setting
Sources of law (distinction according to form and content; focus on human rights specific and non-specific tools, accompanied by the soft law instruments)	Sources of law (multi- and bilateral international agreements, unilateral instruments adopted by the EU accompanied by the soft law instruments)	Hard&soft law, mainly operationalization (but contributing to conceptualization and evaluation)	Concretisation of the objective through documents
Specific implementation instruments characteristic for internal fundamental	Specific implementation instruments characteristic for external human rights	Mainly soft, but sometimes hard measures, operationalization (but	Process towards objective attainment

rights policy Open Method of Coordination	policy (e.g. tools available on international forums)	contributing to conceptualization and evaluation)	
Judicial and other remedies – the EU Fundamental Rights Protection System (courts and other remedies)	Enforcement mechanisms	Hard law measures, hard power measures (if possible)	Enforcement
Tools used to measure or evaluate progress on human rights (qualitative reports, indicators, impact assessments)	Tools used to measure or evaluate progress on human rights (qualitative reports, indicators, impact assessments)	Soft law, evaluation (but used also for conceptualisation and operationalization purposes)	Checking against the advancement of policy objectives

Addressing the second research question involved discussing each concrete tool in every category. Discussion focused on (1) the general positioning of each tool within the EU legal system, (2) human- or fundamental rights specific considerations regarding each tool and (3) challenges that have been pointed to in other FRAME deliverables in relation to each tool.

The findings that emerge from the mapping of EU fundamental and human rights tools are the following:

The European Union has at its disposal a wide range of instruments that can be used to reach EU internal fundamental rights and external human rights objectives. The freedom of the EU to adopt specific measures is limited by the exigencies of the EU and international legal systems on the one hand and political will on the other. Yet, in the current state of affairs – possibly with the exception of monitoring and evaluation tools – everything seems to be in place. This raises the question of how to ensure coherence among all the tools in the whole policy field, but also whether and to what extent tools can push the boundaries of the legal system.

A question which this report was not able to answer relates to the effectiveness of policy instruments. On the one hand, the generalized lack of monitoring mechanisms makes it difficult to understand whether a specific instrument had a positive impact on human rights. It was also difficult to assess what in a given context would amount to effective implementation. Finally, the net results of the interaction or parallel functioning of instruments remain difficult to evaluate.

The report closes with the identification of a number of points which should be taken into consideration for the purposes of the future reports to be produced within the WP 14.

List of abbreviations

AFSJ	Area of freedom, security and justice
CSOs	Civil Society Organizations
CEAS	Common European Asylum System
CFSP	Common Foreign and Security Policy
CHR	Commission on Human Rights
CJEU	Court of Justice of the European Union
COHOM	Human Rights Working Group
CSDP	Common Security and Defence Policy
CSR	Corporate social responsibility
CoE	Council of Europe
DCI	Development Cooperation Instrument
DG	Directorate General
DROI	European Parliament's Subcommittee on Human Rights
EASO	European Asylum Support Office
EC	European Community
EEM	Electoral Expert Mission
EDF	European Development Fund
EEAS	European External Action Service
ENI	European Neighbourhood Instrument
ENP	European Neighbourhood Policy
EOM	Election Observation Mission
EU	European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EIDHR	European Instrument for Democracy and Human Rights
ESCRs	Economic, Social and Cultural Rights
FAC	Foreign Affairs Council
FRA	Fundamental Rights Agency
FREMP	Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GSP	Generalised System of Preferences
HR	High Representative for Foreign Affairs and Security Policy
HRBA	Human rights-based approach
HRC	Human Rights Council
HRD	Human Rights Defender
ICT	Information and Communication Technologies
ICRC	International Committee of the Red Cross and Red Crescent
ICCPR	International Covenant on Civil and Political Rights

ICC	International Criminal Court
IHL	International Humanitarian Law
ILO	International Labour Organization
IHRB	Institute for Human Rights and Business
LAS	League of Arab States
LGBT	Lesbian, Gay, Bisexual, and Transgender
NAP	National Action Plan
NHRI	National Human Rights Institution
OHCHR	Office of the High Commissioner of Human Rights
OECD	Organisation for Economic Cooperation in Europe
OSCE	Organization for Security and Cooperation in Europe
OIC	Organization of the Islamic Conference
PCA	Partnership and Cooperation Agreement
SAA	Stabilisation and Association Agreement
SIS	Schengen Information System
TEU	Treaty on European Union
TFPC	European Police Chiefs Operational Task Force
TFTP	Terrorist Financing Tracking Programme
TFUE	Treaty on the Functioning of the European Union
UN	Organisation of United Nations
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNGP	United Nations Guiding Principles on Business and Human Rights
UNGA	United Nations General Assembly
UPR	Universal Periodic Review
WP	Work Package

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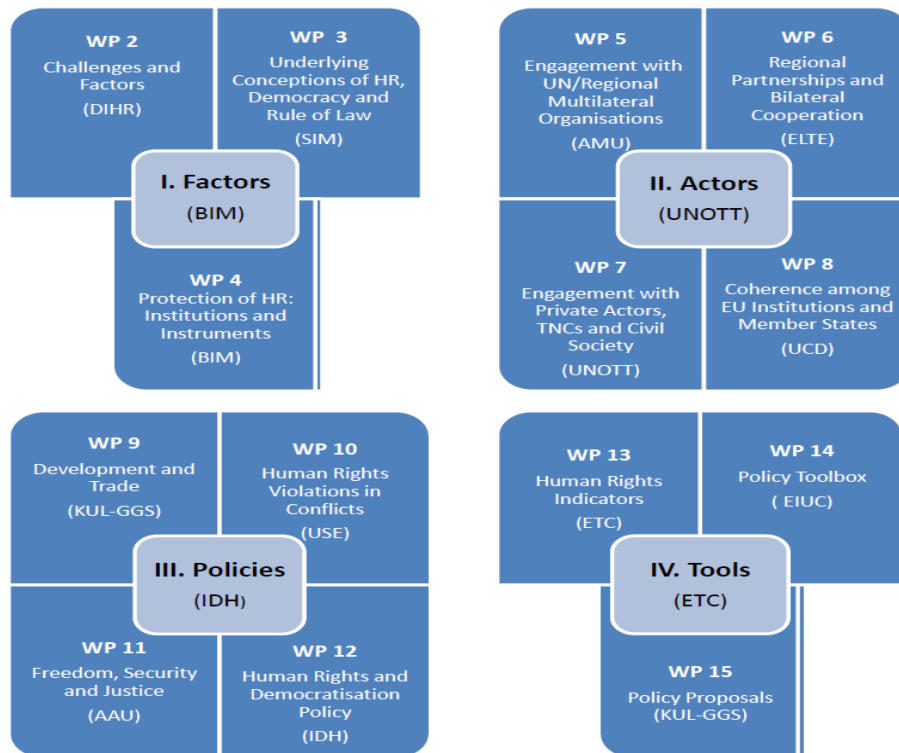
I. Introduction

A. Background

The present report is the first of three reports to be delivered within Work Package 14, entitled ‘Policy Toolbox’, of the FRAME FP7 research project (‘FRAME’). This Work Package focuses on the policy tools of the EU fundamental and human rights policy. The notion of ‘policy tool’, and thus the content of the toolbox, shall be understood broadly as all instruments and devices designed and used to reach specific policy objectives. This report is to ‘map’ such tools and devices and describe them following the categories and findings appearing in other FRAME project publications and literature.

Importantly, to a large extent the analysis presented here must build on the previously published results of FRAME. It should be recalled that the project is divided into four clusters (see: Figure 1), further broken down into 14 substantive work packages (Work Package 1 deals with the management of the project and Work Package 16 with dissemination of its results). The FRAME project scrutinises, in turn: factors affecting promotion and protection of human rights by the EU (Cluster 1); actors with which the EU must engage in order to maximise the positive impact of its policies on human rights (Cluster 2); selected policies (Cluster 3 – trade and development, the EU’s interventions in conflict situations, the Area of Freedom, Security and Justice, and the EU’s human rights and democratisation policy), and, finally, tools (Cluster 4).

Figure 1: Structure of FRAME research (exclusive of management and dissemination work packages)



The final cluster focuses on the instruments of the human rights policy dedicating ample space to policy indicators – a new and desirable instrument used for the evaluation of human rights initiatives. This is where Work Package 14 entitled ‘Policy Tools’ is positioned in the overall architecture of the FRAME project.

The approach taken in Work Package 14 departs from the substantively focused case studies. Usually, policy makers¹ and scholars² tend to present policy toolbox in a vertical manner – taking a specific state or a substantive policy field as the centre of their analysis. This is clearly the case in the FRAME project.³ Such approach, however, does not provide sufficient information on the actual characteristics of tools nor advantages and disadvantages of their use. For the purposes of offering a truly comprehensive picture through the FP7 FRAME research, the said approach must be complemented by the more generic study of tools across disciplines. This is why the FP7 FRAME project’s Work Package 14 (WP 14) entitled ‘Policy Toolbox’ compels a horizontal inquiry into the intricacies of many case studies, identifying in turn categories of tools, particular tools characteristic of internal and external policy fields as well as advantages and disadvantages demonstrated by their use. Its purpose is to present the comprehensive, albeit not conclusive suppositions as to what constitutes the policy toolbox and ultimately its strategic use. This exercise will allow for formulating normative proposals as to the desirable shape and content of a policy toolbox. Such conclusions would parallel those of FRAME Work Package 15, which focuses on substantive ‘Policy Proposals’.

¹ See, for instance, the instruments of the EU human rights policy according to the European Commission: http://europa.eu/pol/rights/index_en.htm; see also the Fundamental Rights Agency theme-dedicated websites: <http://fra.europa.eu/en>.

² See, for example, on trade policy: Lorand Bartels, ‘Human Rights and Sustainable Development Obligations in EU Free Trade Agreements’ [2013] 40 *Legal Issues of Economic Integration* 297, Lorand Bartels, *Human rights conditionality in the EU’s international agreements* (Oxford University Press 2005); on anti-terrorist measures: Conor Gearty, *Situating international human rights law in an age of counter-terrorism* (Hart Publishing 2012). See, also the manner in which the European Neighbourhood Policy is conventionally analysed: Christophe Hillion, ‘The EU’s Neighbourhood Policy towards Eastern Europe’, in Alan Dashwood and Marc Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press 2011); Marise Cremona, ‘The European Neighbourhood Policy More than a Partnership?’, in Marise Cremona (ed.), *Developments in EU External Relations Law* (Oxford University Press 2008); or Andreas Marchetti and Rheinische Friedrich-Wilhelms-Universität Bonn Zentrum für Europäische Integrationsforschung, *The European neighbourhood policy foreign policy at the EUs periphery* (Rheinische Friedrich-Wilhelms-Universität Bonn 2006). Furthermore, in trade policy, human rights clauses are taken under the spotlight or the GSP+: Lorand Bartels, ‘The WTO Enabling Clause and Positive Conditionality in the European Community’s GSP Programme’ [2003] 6 *Journal of International Economic Law* 507, James Yap, ‘Beyond ‘Don’t Be Evil’: The European Union GSP+ Trade Preference Scheme and the Incentivisation of the Sri Lankan Garment Industry to Foster Human Rights’ [2013] 19 *European Law Journal* 283. See also: Reinhard Quick and Ulrike Schmulling, ‘A New Approach to Preferences: The Review of European GSP Scheme’ [2011] 6 *Global trade and customs journal* 9.

³ See, for example, the case studies on Hungary from the point of view of democracy and electoral observers missions as described in FRAME Deliverable 3.2: Alexandra Timmer, Balázs Majtényi, Katharina Häusler and Orsolya Salát, ‘Critical analysis of the EU’s conceptualisation and operationalization of the concepts of human rights, democracy and rule of law’ (2014).

It must be noted that the sheer size of FRAME research project and the fact that it is an ongoing endeavour presents a substantive challenge to the authors of this (and subsequent reports). The analysis of the policy toolbox serves to reflect the continuous process of research and analysis. This means that until the date of the submission of the final WP 14 deliverable in December 2016, the findings of other reports will inform the analysis within WP 14. To date over 20 reports have been published, each consisting of on average of 200 pages of text. Further circa 40 reports are either in the process of being written or reviewed. This large body of research results provides the base for the analysis performed within Work Package 14. This base is at times further complemented through additional research focused predominantly on internal instruments that have not been sufficiently represented in the overall design of FRAME. The research undertaken in order to complement the FP7 FRAME project results is also conducted in stages. As the result, the conclusions presented in the sequence of WP 14 deliverables should be considered as building blocks. Each of the WP 14 reports will build on preceding one(s) published for FRAME in general and WP 14, in particular.

Overall, there will be three building blocks corresponding to drafting and publishing of three reports. Report 14.1 shall map the instruments following the findings of other FRAME Work packages. Report 14.2, again on the basis of research concluded within FRAME, is to draw horizontal – mostly normative - conclusions on the strategic use of tools and integration of approaches. Finally, the report 14.3 will present a novel take on the ‘Policy Toolbox’ – such that it sheds light on the linkages between instruments, and can provide guidance to the EU officials in their work and to the wider audience as to how this work can be observed in an informed manner and evaluated.

The present report constitutes the first step in the overall exercise. It focuses on the instruments and presents the recurrent approaches determining the manner in which these instruments are presented in the reports of the FRAME Work Packages. The ‘mapping’ will take place in relative isolation from the analysis of policy fields, yet instances of such analysis will be indicated as described by other FRAME reports to illustrate challenges, advantages and disadvantages of each of the instruments.

In order to facilitate the analysis of the report and delivery of the final product, the following questions guided drafting this report:

- i. which are the tools used by the EU to reach its fundamental and human rights policy objectives?
- ii. which are the categories, which offer useful insights as to the characteristics as well as advantages and disadvantages of specific tools?

B. Objectives and structure

The principal goal of this report is to map the EU policy toolbox – to give the account of its content providing at the same time basic information as to what the tools are and which challenges each of them pose in the light of research conducted so far within the FRAME FP7 project. Additionally, this report aims to discuss the advantages and disadvantages of the use of each tool, where possible.

Achieving this objective necessitated focusing on a number of research questions, which together form the structure of this report.

The first question refers to whether the internal fundamental and external human rights policy tools can be portrayed together – as an instrumentarium of a one single major policy field. Answering this question relates to the main characteristics of the two policy fields that are at the centre of FRAME FP7 project’s investigation. The EU internal and external policy fields are based on the common constitutional core yet where human rights are concerned they differ vastly. Bridging the gap between the two is not impossible, yet it makes the analysis more difficult and blurry. The authors of this report chose, therefore, to keep the two areas apart which is reflected in the structure of this report.

The second question refers to the identification of fundamental categories, which appeared in FRAME deliverables in the first place, but subsequently in the literature of the field. These basic categories reflect certain convictions about what these tools are, functions they perform and their inherent characteristic features.

Once the problem of categories had been settled, the report could proceed to addressing the core question underlying this report: what are the concrete tools of the EU internal fundamental rights and external human rights toolbox?

The concrete identification and inventarisation of the tools was conducted on the basis of the division into internal and external areas of the EU human rights policy. Subsequently for each of them, the following questions were asked: Which are the tools the EU uses for the purposes of, respectively, internal and external policies? Which characteristic features of the basic classifications do they display? What are the challenges posed by their use?

The conclusions of the report present a summary of the challenges encountered whilst identifying the content of the toolbox, and identifies a number of ‘families’ of tools drawing on tools’ similarities. The families of tools are briefly described to highlight their particular features, and together shed light on the weaknesses of the simple (and at times simplistic) division into internal and external policy tools.

The final part of the report presents further considerations which were born against the background of this report and contains questions, which will be addressed in subsequent reports of Work Package 14.

C. Methodology

This study is based on a desk analysis of a selection of sources. The first point of reference was offered by past FRAME reports. Findings were also informed by the discussions and conclusions reached in the course of FRAME events. Otherwise, the official documents of various institutions of the European Union were consulted as well as secondary sources authored by academics and other experts.

II. Definition of the Main Concepts and Fundamental Categories

The literature on EU external human and internal fundamental rights policies infrequently addresses the policy toolbox in its own right. The examination is usually focused on the policy as a whole – either a human rights specific one⁴ or affecting human rights⁵ as in case of development or migration policies. Sometimes the considerations reflect discussions on specific features of the toolbox such as conditionality, which is analysed in specific contexts. Usually, when the authors include in their scope the broadest range of policy tools they will either be working within the political science field or advocate governance approaches to law.⁶

At other times, the analysis reflects the EU's focus on a specific geographical area or a third country⁷ (see, for instance, the literature devoted to the European Neighbourhood Policy). The whole branch in literature focused, for instance, on the utility of distinction between soft or hard law. Finally, in small number of cases the academic analysis will focus on a specific tool such as human rights clauses in international agreements⁸ or the Charter of Fundamental Rights⁹.

⁴ See, for example, the manner in which the publications on non-discrimination or data protection address the issue: Evelyn Phyllis and Philippa Watson, *EU Anti-Discrimination Law* (Oxford University Press 2012), or Peter Carey, *Data Protection: a Practical Guide to UK and EU Law* (Oxford University Press 2009), or the approach taken in presentation of each particular right in the commentary to the EU Charter: Peers, S., Harvey, T., Kenner, J., *Commentary to the EU Charter* (Hart Publishing 2014) 18.

⁵ See, in particular, the following nexuses the EU develops: trade and human rights, development and human rights, security and human rights. For example of the review of literature on human rights-security nexus, see FRAME Deliverable 6.1: Susanne Fraczek, Beáta Huszka, Claudia Hüttner, Zsolt Körtvélyesi, Balázs Majtényi and Gergely Romsics, 'Report on mapping, analysing and implementing instruments' (2014), 12-13; on trade/development and human rights, see FRAME Deliverable 9.1.: Laura Beke, David D'Hollander, Nicolas Hachez, Beatriz Pérez de las Heras, 'Report on the integration of human rights in EU development and trade policies' (2014), and FRAME Deliverable 9.2: Nicolás Brando, Nicolas Hachez, Brecht Lein, Axel Marx, 'Assessing the impact of EU trade and development policies on human rights' (2015); for the discussion of the intersection of the human rights and migration policy, see FRAME Deliverable 11.1: Viljam Engström and Mikaela Heikkilä, 'Fundamental rights in the institutions and instruments of the Area of Freedom, Security and Justice' (2014).

⁶ For the core literature on new governance in the EU, see: Gráinne De Búrca and Joanne Scott (eds.), *Law and New Governance in the EU and the US* (Hart 2006), Mark Dawson, 'Three waves of new governance in the European Union' 36 *European Law Review* 208.

⁷ See, for instance the European Neighbourhood Policy or relations with specific regional organisations as analysed in FRAME Deliverable 5.4: Anna-Luise Chané, Nora HoTu Nam, Magnus Killander, Tomasz Lewandowski, Remember Miamingi, Bright Nkrumah, 'Report on the EU's engagement with regional multilateral organisations Case study: African perspective' (2015) and FRAME Deliverable 5.6: Filip Balcerzak, Anna-Luise Chané, Chiara Marinelli, Amilcar Romero, Elizabeth Salmón, 'Report on the EU's engagement with regional multilateral organisations Case study: Inter-Council of the European Union: American perspective' (2015).

⁸ See, for example, numerous publications by Lorand Bartels and FRAME Deliverable 9.1, op. cit.

⁹ See, in particular, the monumental commentary to the Charter of Fundamental Rights: Steve Peers, Tamara Harvey and Jeff Kenner, *Commentary to the EU Charter* op. cit.; Allan Rosas, 'The Applicability of the EU Charter of Fundamental Rights at National Level' in Wolfgang Benedek, Florence Benoît-Rohmer, Wolfram Karl, Matthias C. Kettmann and Manfred Nowak (eds.) *European Yearbook on Human Rights 2013* (NWV Verlag 2013), Laurent Pech and Gunnar Thor Petursson, 'The Reach of EU Fundamental Rights on Member State Action after Lisbon' in Ulla Boegh Neergard and Ruth Nielsen (eds.) *European Legal Method in a Multi-Level EU Legal Order* (Djof

Because of such focused vertical analysis, the understanding of what constitutes the EU policy toolbox differs depending on a policy field at stake or an agenda of a specific actor¹⁰. In addition, the fragmentation of the analysis in the field makes it also difficult to draw systematic conclusions as to the use of specific tools as the examples of particular categories. In all the above mentioned cases, the reference to what constitutes a ‘tool’ is made in intuitive manner - the question as what is the meaning of this notion need not be asked – the answer would have been too obvious.

For the purposes of this report (and subsequent ones), however, it is necessary to define the concepts of primary importance. In the course of the research undertaken within Work Package 14, the focus shall be placed on the ‘policy toolbox’. The resulting chief notions are these of a ‘tool’ or an ‘instrument’ and, therefore, a ‘toolbox’, as well as that of ‘a policy’.

As the second step, the distinction will be made between the analytical categories focused on characteristic features of specific tools (internal v external, hard v soft, serving purposes of conceptualisation, formulation and evaluation) and the approaches visible in many tools that reflect specific overarching policy choices.

Thirdly, fundamental categories underlying subsequent presentation of tools will be discussed as they emerge from existing literature. This will be done with a view to examine the potential of each of these categories as an organising feature of this report. Starting off with the division in internal and external tools, the recourse will be made to legal/binding and non-legal/non-binding tools as well as these, which display soft or hard power characteristics.

A. Defining a ‘Policy’, a ‘Tool’, and a ‘Toolbox’

Starting off with the notion of a ‘tool’, it must be emphasised that none of the FRAME reports distinguishes ‘tools’ from ‘instruments’¹¹, thus the two terms will also be used interchangeably in this report. Furthermore, in most cases the notion of a ‘tool’ is used in an intuitive manner as a means to an end, which is reaching a specific policy goal.

Within the FRAME project’s research the most elaborate insights as to the meaning of the concept ‘tool’ may be found the report focused on EU external human rights policy: Deliverable 12.1.¹² This report

Publishing 2012) 135; Jean Paul Jacqu , ‘La Cour de Justice de l’Union et l’application de la Charte dans les Etats membres : « Mehr Licht ? »’ in Wolfgang Benedek, Florence Benoit-Rohmer, Wolfram Karl, Matthias C. Kettemann and Manfred Nowak (eds.), *European Yearbook on Human Rights 2014* (NWV Verlag 2014) 125-148; Vincent Kronenberger, Maria Teresa D’Alessio and Valerio Placco (eds.), *De Rome   Lisbonne: les juridictions de l’Union europ enne   la crois e des chemins: M langes en l’honneur de Paolo Mengozzi* (Editions Bruylant 2013).

¹⁰ See, for example the website of the EEAS dedicated to the human rights in the EU external human rights policy: <http://eeas.europa.eu/human_rights/index_en.htm> accessed 30 November 2015.

¹¹ See: FRAME Deliverable 12.1: Cristina Churruca Muguruza, Felipe G mez Isa, Daniel Garc a San Jos , Pablo Antonio Fern ndez S nchez, Carmen M rquez Carrasco, Ester Mu oz Nogal, Mar a Nagore Casas, Alexandra Timmer, ‘Report mapping legal and policy instruments of the EU for human rights and democracy support’ (2014) 12.

¹² *Ibid* and in Deliverable 6.1, op. cit.

mapping legal and policy instruments of the EU for human rights and democracy support¹³ focuses on the only area in EU external action, which deals exclusively with promotion of human rights and democracy. In this context, the authors of FRAME Deliverable 12.1 offer, first, the definition of a policy, and then that of a policy tool. In their view:

[...]there is not a single shared understanding or response among the researchers engaged in this report. According to one view, there is no unified EU ‘human rights and democracy policy’ as such, but a patchwork of instruments, which together represent such a policy. Other views contend that there is a human rights and democracy policy. **From a policy analysis perspective a ‘policy’ is understood as a deliberate course of (in)-action, selected from possible alternatives, in order to achieve certain outcomes.** The policy cycle refers to the process of formulating, implementing and monitoring and evaluating a policy.¹⁴ Either if one refers to the policy field or to one stage or all of the policy cycle, a policy is never to be found in one single document. There is no example of such a single document at the EU level nor at the State level.^{15,16}

Thus, the ‘deliberate course of (in)-action’ will occur with the use of policy tools.

The tools, in turn, for the purposes of external relations subject to FRAME WP 12 analysis, are defined broadly as ‘the actual means and/or devices at the disposal of the government to advance governance goals/ policy agenda’.¹⁷ There are two key aspects of this definition. The ‘means and/or devices’ part should provide us with the information as to what can be considered a tool. Yet, the expression ‘means and/or devices’ corresponds to the broadest understanding of a tool as any means to an end.¹⁸ In fact, this ‘broad understanding of the term ‘instrument’ prompts therefore the authors of Deliverable No. 12.1 to describe what constitutes the EU human rights toolbox: ‘instruments of traditional diplomacy and foreign policy (e.g. démarches and declarations, human rights dialogues and consultations, restrictive measures), political conditionality (e.g. human rights clauses in agreements with third countries), financial instruments and actors (EU Special Representative for human rights, human rights and democracy focal points).’¹⁹

The second aspect of the definition refers to what ‘lies at the disposal of the government’. In other words, it denotes the constraints the government encounters when acting towards the achievement of

¹³ FRAME Deliverable 12.1, op. cit. 12.

¹⁴ It is important to understand that ‘policy’ is not a single outcome or event and is usually seen as a process or a cycle, which moves from agenda setting and policy formulation to implementation, monitoring and evaluation.

¹⁵ Another question is that for some foreign policy analysts ‘human rights and democracy including the rule of law is not a policy as such but a key issue among others of the foreign policy of the EU’. Stephan Keukeleire and Tom Delreux, *The Foreign Policy of the European Union* (Palgrave Macmillan 2014) 135-155.

¹⁶ FRAME Deliverable 12.1, op. cit. 1-2.

¹⁷ Michael Howlett, Michael M. Ramesh and Anthony Perl, *Studying Public Policy: Policy Cycles and Policy Subsystems* (Oxford University Press 2003) 87, as cited in: FRAME Deliverable 12.1, op. cit. 1-2.

¹⁸ See: Merriam Webster Online Dictionary, accessed 25 October 2015.

¹⁹ Deliverable 12.1, op. cit. 26.

policy objectives. Such constraints may be of legal, political, moral, or economic character. Each of them plays a role when selecting the tools falling within the EU fundamental and human rights toolbox – yet the constraints with, possibly, the most meaningful implications stem from the constant interplay between international, European, and Member States’ national legal systems.

In the view of the authors of FRAME Deliverable 12.1, it is the dual character of the EU as an international organisation and at the same time its *sui generis* autonomous legal character, which affect the presentation of the EU instruments as well as their use in practice.²⁰ When composing its external human rights toolbox the EU moves within the area of measures available under the international law and those, which can be created within the limits of its own legal system. In the internal fundamental rights setting the EU is limited by principles of its legal system: especially that of conferral of powers and the construction of the scope of application of the Charter of Fundamental Rights of the European Union (CFR) under its Article 51. In addition to the above considerations, the sovereignty of its Member States and the subsidiarity principle will limit the discretion of EU’s action. The two parallel existing boundaries determine what the EU can do in the context of EU fundamental/human rights policy and which devices to use.²¹

To sum up, according to the findings of FRAME Deliverable 12.1, a policy tool is **any means or device used to attain a policy objective**. Policy, in this context, means **a deliberate course of (in)-action, selected from possible alternatives, in order to achieve certain outcomes**. Finally, the frame of the toolbox is denoted by what can be actually considered ‘at the disposal’ of the executive in a specific organisation. In other words, **the composition of the toolbox is limited by the conditions of a legal system within which the executive is functioning**.

As it was emphasised above, FRAME Deliverable 12.1 focuses on the EU external policy, however, the observations included there, are equally applicable to the internal EU setting. In effect, the identified definitions will serve as the ground assumptions for the subsequent analysis presented in this report.

It must be noted that similarly to this report, the FRAME Deliverable 6.1²² built on definitions of the above outlined basic notions when constructing its own list of EU human rights tools. On the basis of such selection, the authors identified and described various categories of tools. Among these, there are four, which appear regularly in FRAME or other scholarly contributions and, therefore, may be considered as relevant for the purposes of this report.

Firstly, in most cases the analysis is maintained as separate for the EU external and internal areas of EU human rights action. Clearly, the two differ substantively and because of different legal, political, economic, (and sometimes even moral) constraints will give rise to different sets of considerations. In other words, the EU ‘government’ will have different tools at their disposal dependent on such which

²⁰ Ibid.

²¹ This is true provided that the EU does not wish to push the limits of legality of the EU legal order.

²² FRAME Deliverable 6.1, op. cit.

the presence and extent of such constraints. When presenting the policy toolbox in a comprehensive manner, this report will keep the two separately.

The second recurrent feature of the policy toolbox analyses is their starting point. The authors tend to begin with the analysis of a binding legal framework equipped with enforcement mechanisms as these are considered to be more effective. It is possible that such choices are made due to the lack of accessibility of information referring to the effectiveness of non-binding measures. Further two categorisations thus emerge: the first one is of formal character, which distinguishes between legal, binding and non-legal, non-binding measures. Another category directly connected with the preceding one refers to the impact such measure may have; in other words; whether they can be considered soft or hard.

The final categorisation that comes to surface is that of tools which concern conceptualisation, operationalization, and evaluation of the policy. The distinction vaguely resembles the categorisation adopted by the authors of Deliverable 12.1 where the authors follow the policy cycle stages according to which the policy is, first, formulated, then implemented and finally evaluated. Such distinction presents a functional approach – it reflects the need to deconstruct the meaning of norms that are advanced (conceptualisation), the ways in which this meaning – or a chosen conception of an abstract value such as that of human rights - can be sought after and operationalized, and finally, what is the effect of activities undertaken to advance the specific concepts.

B. Underlying policy approaches as paradigmatic tools

In the view of the authors of this report there is an additional category of tools that should be taken into consideration and analysed separately. This category would encapsulate paradigms, which underlie the ways in which the EU addresses policy objectives.²³ The paradigm should be understood: ‘a set of basic beliefs that deals with ‘ultimate’ or first principles’²⁴ or ‘overarching philosophical systems denoting particular ontologies, epistemologies and methodologies... [which] represent beliefs systems that attach the user to a particular worldview that then guides the researcher’s actions’²⁵. Such convictions, therefore, constitute part of the substance of the policy field as they reflect political choices.

In relation to human rights, following the FRAME deliverables but also the literature on the subject at large, we can identify the following paradigmatic approaches that reflect the EU’s belief both about human rights and the manner through which these should be promoted:

²³ Be it a policy maker or scholar making an inquiry, or a philosopher.

²⁴ Egon G. Guba and Yvonna Lincoln ‘Competing paradigms in qualitative research’, in Norman Denzin and Yvonna Lincoln (eds.), *Handbook of qualitative research* (Sage Publications 2013) 105-117.

²⁵ In philosophical terms, this could be as methodological choices as to how to address the ontological and therefore epistemological notions underlying the creation of a policy field. For example, the conviction according to which human rights constitute the underpinnings of all EU policies; this conviction should be reflected in how this underlying approach will need to find its way into the policy process. The conviction itself needs to be implemented with a use of specific tools – it will not be a tool in itself. The conviction will constitute answer the question as to what is the content of the policy, and not how to arrive to this point. Idem.

1. Conditionality²⁶
2. Mainstreaming²⁷
3. Multilateralism²⁸

Each of these denotes a specific set of beliefs visible in the adoption of various tools, which constitute a manifestation of one or several paradigms. From the conceptual level, not all of them have been centrally developed. Yet, through the development of the policies each of these has gradually taken the predominant place within the EU human rights policy and reflection in the design of tools.

For example, the authors of FRAME Deliverable 5.1 recall the political choice made by the EU as to the commitment to ‘effective multilateralism’. The concept denotes the EU’s preference in the first place to act with the entities that, similar to itself, are a result of a collaboration of more than two states. Quoting FRAME Deliverable No. 5.1, it was only in the 2003 Communication ‘The European Union and the United Nations: The choice of multilateralism’ that the European Commission reflected on the meaning of the concept. In line with that document the commitment to effective multilateralism by the European Union means:

taking global rules seriously, whether they concern the preservation of peace or the limitation of carbon emissions; it means helping other countries to implement and abide by these rules; it means engaging actively in multilateral forums, and promoting a forward-looking agenda that is not limited to a narrow defence of national interests.²⁹

The Commission further named the following objectives to be addressed by the action in the multilateral forums: (1) ‘[e]nsuring that the multilateral targets and instruments have the impact they deserve’, (2) ‘achieving greater efficiency and impact by working together’, and (3) ‘[p]romoting the EU’s values and interests effectively’³⁰. Authors claim that the operationalization of the concept of effective multilateralism never came about, yet the EU continues pursuing its objectives with the use of tools it has at its disposal in the multilateral forums (See below, [Section III.C.3.1](#)). From the point of view of

²⁶ See, above other FRAME Deliverable 2.1 op. cit. 9 in relation to the discussion of enlargement criteria; FRAME Deliverable 12.1, op. cit. 54 in relation to the use of restrictive measures and the Council Conclusions on the use thereof: Council of the European Union, ‘Basic Principles on the Use of Restrictive Measures (Sanctions)’ 10198/1/04 REV 1 [2004]: FRAME Deliverable 11.1 op. cit. 89 and the following in relation to the migration arrangements in relation to the accession states. For extensive analysis of conditionality in external relations, see FRAME Deliverable 9.1, op. cit. 19-87 when discussing the trade and human rights instruments; FRAME Deliverable 13.1 when discussing the enlargement policy op. cit. 58 and the following.

²⁷ FRAME Deliverable 9.1, op. cit. 16-19, FRAME Deliverable 6.1 where authors discuss the role of values and interests in EU foreign relations, op. cit. 52 and the following;

²⁸ See for example: FRAME Deliverable 5.1, op. cit. 14-15; FRAME Deliverable 6.1, op. cit. 89-90 in relation to the unilateral v multilateral application of human rights instruments; FRAME Deliverable 9.1, op. cit. 55-58 in relation to the discussion of bilateral and reciprocal instruments.

²⁹ Commission, ‘The European Union and the United Nations: The choice of multilateralism’ (Communication) COM(2003) 526 final as quoted in FRAME Deliverable 5.1, op. cit. 14-15.

³⁰ Idem.

human rights the multilateral approach is the more important as the EU is not predominantly a human rights organisation. As such, cooperation with other bodies – be it the UN or the Council of Europe – is very much desirable.³¹

As far as mainstreaming is concerned, for example, the authors of Deliverable 9.1 recall the concept in the discussion of the EU trade and development policies. It is about ‘deliberately incorporating human rights considerations into processes or organisations which are not explicitly mandated to deal with human rights’.³² Further operationalization of the concept involves ‘reorganisation, improvement, development and evaluation of policy processes, so that a human rights perspective is incorporated in all policies at all levels and at all stages’³³. The classification of mainstreaming as an underlying concept – a tool different from the other ones echoes considerations of Olivier de Schutter who pointed to the fact that mainstreaming is of instrumental importance – it induces creation of new instruments and ‘energises’ inter-institutional learning. It has a potential of enhancing coordination between different institutions.³⁴ In addition, it will need to be undertaken by all the institutions acting in the field and on all levels of governance (internal mainstreaming, mainstreaming in bilateral relations and policies, mainstreaming at the multilateral level).³⁵ In fact, the efforts of mainstreaming involved adoption of the human rights guidelines, development of impact assessments methods, and the introduction of rights based approaches to development³⁶ are all to be taken into consideration above all by the actors implementing the EU fundamental and human rights policies.

Yet even if potentially the mainstreaming efforts may aid in achieving coherence in the EU human rights policies, internally they suffer from the same facets of the malady – the various paces of Member States EU law implementation efforts lead to the fragmentation of the field both vertically (between the EU and the Member States) and horizontally (across the Member States and, within the EU, across the institutions). This clearly may be said of many other EU instruments, yet with relation to mainstreaming such shortcoming seems to be particularly painful to observe.

³¹ Elena Jurado, ‘Assigning Duties in the Global System of Human Rights: The Role of the European Union’ in Hartmut Mayer and Henri Vogt (eds), *A Responsible Europe? Ethical Foundations of EU External Affairs* (Palgrave 2006) 132 as cited in: FRAME Deliverable 6.1, 90.

³² Florence Benoit-Rohmer, Horst Fischer, George Ulrich et. al., ‘*Human Rights mainstreaming in EU’s external relations* (2009) European Parliament Directorate-General for External Policies of the Union), EXPO/B/DROI/2008/66, <www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO-DROI_ET%282009%29407003>, accessed 30 November 2015: <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO-DROI_ET%282009%29407003>

15 as cited in FRAME Deliverable 9.1, op. cit., 16.

³³ Christopher McCrudden, ‘Mainstreaming Human Rights’, in Colin Harvey (ed.) *Human Rights in the Community: Rights as Agents for Change* (Hart Publishing 2005), 9 as cited in FRAME Deliverable 9.1, op. cit. 16.

³⁴ Olivier de Schutter, ‘The New Architecture of Fundamental Rights Policy in the EU, in Wolfgang Benedek, Florence Benoit-Rohmer, Karl Wolfram and Manfred Nowak (eds.), *European Yearbook on Human Rights* (Neuer Wissenschaftlicher Verlag 2011) as cited in FRAME Deliverable 9.1, op. cit. 17.

³⁵ Ibid.

³⁶ See: FRAME Deliverable 9.1, 130-138.

The final example of the underlying approaches of the EU human rights policy is that of conditionality. The analysis of the concept in Deliverable 6.1³⁷ links the development of the concept with the emergence of European identity, which led to the creation of the system of positive conditionality. Such system can punish but predominantly is geared towards incentivizing specific behaviours. Whilst such approach can be subject to a pronounced criticism, there is no doubt that conditionality has become one of the most characteristic features of the EU foreign policy. As its object it can have a wide range of policy objectives including, for example, the non-proliferation of weapons of mass destruction. The condition of human rights observance has been routinely included in the international agreements made by the EU, unilateral measures (in particular, GSP+), and development cooperation financed on the basis of geographic or thematic financial instruments). Probably it found its most profound manifestation in the accession and neighbourhood contexts – areas that are yet to be explored within FRAME.

It must be noted that the choice of specific approaches to the EU policies, as pointed to by de Schutter above will, therefore, affect the design of other instruments. As usual, the boundaries are not set in stone and frequently given tools will reflect more than one paradigmatic approach.

The below table reflects in rough terms how different tools can be seen as incorporating specific convictions.

Table 1: Paradigms and Tools in EU human rights policy

Paradigmatic tool	Tools (examples)
Mainstreaming	CFR, guidelines, rights based approaches, internal legislation, financing instruments
Multilateralism	Involvement in international forums, responding to international challenges through multilateral instruments (e.g. UN Convention on the Rights of Persons with Disabilities), shaping the EU's relations and human rights policy in multilateral modes (enlargement, ENP, Cotonou)
Conditionality	GSP+, Enlargement, ENP, <i>ex ante</i> ESI Funds conditionality, human rights clauses, Article 7 TEU conditionality

In all of the above examples the tools reflect the adopted paradigms, and in many cases they would have not existed had a given paradigm not been chosen on a political level. For example, there would have not been a need for the EU to adopt rights based approaches³⁸ for the purposes of its development policy had it not chosen to commit to mainstreaming in the first place, and had it not been integrated in the UN system where multilateralism is the chief mode of approaching challenges.

³⁷ FRAME Deliverable 6.1 9-12.

³⁸ FRAME Deliverable 9.1 in particular 130-138.

This short section hints only at the implications these three paradigms have for the totality of the EU internal fundamental rights and external human rights framework. As indicated, FRAME reports offer in-depth analysis for each one of them and further analysis will be conducted within FRAME Work Package 14.

For the purposes of this report, it needs to be concluded that the requirement that a policy tool reflects the prerequisites of a given paradigm belongs to a substantive policy choice area and, therefore, denotes more approach rather than the form through which specific objectives are pursued. In other words, the choice of a paradigm will affect the choice of tools and, therefore, the overall shape of policy toolbox. In fact, each of the identified paradigms could constitute the policy field in their own right.

All in all, for the purposes of this report, the “paradigmatic tools” should be considered as a overarching category contributing to the content and conceptualisation of the EU fundamental and human rights policies. The understanding of the ways through which they affect the design of tools remains to be explored in the course of the future research.

C. Tools of internal and external policies

The distinction between tools of internal and external policies is possibly of the highest importance from the point of view of this report. It sets the tone for the whole analysis and also brings to the forefront the chief difference in the setting the EU must take into consideration when pursuing its internal fundamental and external human rights policy objectives.

The divergence between the two policy fields starts already with the name. Beyond the EU borders ‘human’ rights objectives are sought, within: the ‘fundamental’ rights’ ones. Human rights are universal and indivisible, and so are fundamental rights, yet they are also special as they reflect the common European identity based on values pronounced in Article 2 TEU: Fundamental rights result from the constitutional traditions of the EU Member States and the European Convention on Human Rights and are enshrined in the European Union fundamental/human rights document – the Charter of Fundamental Rights.³⁹

The internal and external policy areas have been developing parallelly. Though their paths were common at times⁴⁰, there are deeply embedded differences in the two fields if only to name these resulting from the legal frameworks – the internal EU law one and the external international legal one.

The symbolic and historical differences in the EU internal fundamental and external human rights policy fields are only a tip of the iceberg inasmuch as the differences are concerned. Beyond the surface there are complex mechanisms and an equally complicated toolbox reflecting, in the first place, the distribution of competence between the EU and its Member States and, the maintenance of particular ‘specific’ policy areas inherited after the pillar structure of the pre-2008 European Union. The

³⁹ We are reminded of the fact in Article 6 TEU, Preamble to the Charter of Fundamental Rights, and Article 52 of the Charter of Fundamental Rights.

⁴⁰ As in case of the changes introduced by the Treaty of Lisbon that affected the two policy fields simultaneously.

description of the complex toolbox thus starts with the brief de-tour to the constitutional legal aspects of the EU, and in particular – the attribution of its competence.

1. The EU and its competence⁴¹

The principle of conferral is one of the basic principles underlying the EU legal system. It recounts that the European Union is an organisation of states that voluntarily transferred their powers to the EU (and earlier on to the European Economic Community as well) thus creating its competence. This implies the inability on the part of the EU to single-handedly expand its powers according to its need or liking.⁴² On the other hand, the EU in majority of cases acts together with the Member States, which has implications for the type of tools it can adopt.

Even though the principle of conferral has always been at the core of the EU legal system, it was only the Treaty of Lisbon that did provide for an exhaustive list of various forms of competence the EU can enjoy. The codifications included in the earlier Treaties were partial, not taking into consideration the subtler forms of cooperation between the European Union and the Member States. Currently, according to Articles 4-6 TFEU, the EU may enjoy (i) exclusive competence, (ii) shared competence, and (iii) coordinating competence.⁴³ In all cases, where the EU is equipped with an internal competence, the

⁴¹ FRAME Deliverable 5.1: Grazyna Baranowska, Anna-Luise Chané, David D'Hollander, Agata Hauser, Jakub Jaraczewski, Zdzisław Kędzia, Mariusz Lewicki, Anna Połczyńska, 'Report on the analysis and critical assessment of EU engagement in UN bodies' (2014); FRAME Deliverable 11.1, op. cit.; FRAME Deliverable 12.1, op. cit.

⁴² The explicit rejection of the possibility that the EU may enjoy the power to shape its own powers (in other words *Kompetenz-Kompetenz*) can be found in the Treaty of Maastricht decision of the German Constitutional Court, Judgment on the Maastricht Treaty, 12 October 1993, BVerfG 89,155.

⁴³ Article 3: 1. The Union shall have exclusive competence in the following areas:(a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Article 4: 1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:(a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Article 5: 1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies. Specific provisions shall apply to those Member States whose currency is the euro.

external one will parallel and complement it. This principle, known as the doctrine of implied powers, has been included in the text of the Treaty of Lisbon⁴⁴ as codification of the earlier case law of the CJEU⁴⁵.

Within the exclusive competence it is only the EU that will act both internally and externally. Internally, the Member States will participate in decision-making only inasmuch as their representatives are part of EU institutions, or within the controls of national parliaments. Externally, the Member States are not parties to international legal instruments the EU makes with third countries or EU. Instead, the MS are tasked with implementation of the EU measures – both the internal and external ones and in line with the principle of loyal cooperation they must refrain from taking measures which could in any way, also as a collateral damage, affect the reaching of the policy goals by the European Union.⁴⁶

In the area of shared competence, the EU acts together with its Member States. This means that both the EU and the Member States may adopt parallel measures. Yet the level of the Member State's liberty depends on the level of harmonisation imposed by the EU. At all times the Member States must not endanger the obtaining of the EU objectives specified by the EU measures. At times the Member States will be requested not to act in line with the doctrine of pre-emption meaning that even in the area of shared competence the MSs will not be permitted to act legislatively if it could conflict with the European Union prior action.⁴⁷ The inclusion of the EU Member States as side measures, which are undertaken is of prime importance in particular in the external sphere as there both the EU and its Member States shall act and represent parallel interests. The Member States will also be parties to international legal instruments made by the EU. In fact, the majority of the international agreements will be made by the European Union together with the Member States.

Finally, the coordinating competence are granted to the EU where there has been no clear EU competence in the past, but where the Member States would make use of the EU in order to facilitate their cooperation which otherwise would have used international legal measures. This is, for instance,

2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.

3. The Union may take initiatives to ensure coordination of Member States' social policies.'

Article 6

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation.

⁴⁴ Article 216(1) TFEU.

⁴⁵ Case 22/70 *Commission v Council (ERTA)* [1971] ECR 26, Joined Cases 3, 4, and 6/76 *Cornelis Kramer and others* [1976] ECR 127, Case 804/79 *Commission v United Kingdom* [1981] ECR 1045, Opinion 2/91 *ILO Convention* [1993] ECR I, Opinion 1/94 *WTO* [1994] ECR I-5267-1061, Opinion 2/92 *Third Revised Decision of the OECD on National Treatment* [1995] ECR I-521, Case 431/92 *Commission v Germany (Re Open Skies)* [1992] ECR I-2189. Opinion 1/03 *Lugano Convention* [2006] ECR I-1145.

⁴⁶ Codified in Article 4(3) TEU.

⁴⁷ E.g. CJEU, Joined Cases 3, 4, and 6/76, *Kramer* op. cit.

the base for the measures in the area of employment and social policies (Article 5 TFEU), education or research (Article 6 TFEU).

The problem with the enumeration of the types of competence in the EU policies is singular – apart from the mention in the Articles 4-6 TFEU, for a measure to be adopted, there must exist a specific competence norm to be found in the section of the treaty dedicated to a specific area.

In addition to the above, despite the attempted simplification of the European Union legal system, the Treaty of Lisbon maintained the particularity of the Common, Foreign and Security Policy keeping it outside of this basic distinction into the types of competence and preserving its own rules and procedures enshrined in Articles 21 and the following of the Treaty on European Union.

Having outlined the chief challenges of competence attribution in the EU, the analysis will move to the relevance of an area of competence to the tools undertaken for the realisation of human rights objectives. The question of division of competence echoes to an extent the considerations relating to whether a given policy tool is a manifestation of an EU direct human rights action (such as the whole contested EU human rights and democracy support policy field)⁴⁸ or whether it is an added issue as a result of mainstreaming of human rights to other EU policy fields.

2. The EU competence and the EU internal fundamental and external human rights policies

The attribution of the competence has clear implications for the EU internal fundamental rights and external human rights policies and the toolbox available in a given area. This is connected in the first place with the need to indicate a concrete Treaty competence provision for the EU institutions to adopt a given measure. By implication, the involvement and the range of measures the EU may undertake will depend on the competence area.

In the first place it must be noted that none of the areas included in the range of exclusive competences of the European Union focuses on human rights : (a) customs union; (b) the establishment of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy. This means that anything that all the initiatives undertaken by the European Union will be undertaken parallelly to the Member States.

Furthermore, it must be reminded that whilst in the EU internal fundamental rights policy the EU has no general competence to adopt legislative measures solely with reference to human rights, there exists such general competence attributed to the EU in external realm, under the CFSP.⁴⁹

⁴⁸ See: FRAME Deliverable 12.1, op. cit. 1-2.

⁴⁹ See: Article 3(5) TEU and Article 21(1) TEU.

Internally, there are four ‘mainstreaming clauses’ focusing on inclusion of concerns relating to equality (Art. 8 TFEU), social protection (Art. 9 TFEU), non-discrimination (Art. 10 TFEU) and environmental protection (Art. 11 TFEU) in all adopted measures. Furthermore, we can find specific competence provisions relating to non-discrimination⁵⁰ or data protection⁵¹ fields. In addition, the EU has been working on harmonisation of the Member States’ rules relating to establishing minimal thresholds for the protection of the rights of victims and the accused⁵². Yet, Articles 2 and 6 TEU as well as Article 51 CFR point to the need to take into consideration – or mainstream – fundamental rights in the actions of EU bodies, institutions and organs. Thus effectively, we can distinguish between **human rights specific instruments**, which address human rights specific issues on the basis of a concrete competence provisions. On the other hand, there are instruments, which may affect in indirect manner human rights; instruments that have been adopted to attain other objectives. We will refer to them here as to **non-human rights specific instruments**.

This focus on incorporating fundamental rights to all the endeavours undertaken by the EU has three implications: Firstly, the fundamental rights position in the overall system of rights protection as underlying values predominantly places the EU institutions, organs, and bodies in the spotlight. They must act in compliance with fundamental rights, on the one hand, but also they must ensure that all the measures they adopt are human rights compliant or at least their human rights impact has been duly considered. This means that they should, as a second point, assess *a priori* and *a posteriori* the impact of any measure they adopt on human rights. Thirdly, since in the vast majority of cases, these will be the Member States that are implementing EU law – and clearly the fundamental rights provisions are addressed to them in these instances in line with article 51 CFR - the EU must develop measures that will ensure that the Member States will abide by fundamental rights if only inasmuch as their Charter minimum standard.⁵³

When identifying the EU internal fundamental rights toolbox within the Treaty setting, the categories seem rather obvious. In line with the Treaty provisions, within the internal sphere, in general, the EU institutions may issue a range of secondary legal tools as well as policy or intra-institutional documents or other executive measures. In terms of the form, the first group consists of regulations, directives, decisions, recommendations and opinions. The second group will be composed of staff working papers, communications, guides, but also council conclusions or executive methods such as the open method of cooperation. Yet, this basic categorisation (as adopted in FRAME Deliverables 11.1 and FRAME Deliverable 2.2 for instance) provides only for the basic outline of the picture.

⁵⁰ Articles 18-19 TFEU.

⁵¹ Article 21 TFEU.

⁵² Directives used to establish minimum rules concerning the rights of individuals in criminal procedure or victims of crimes Article 82(2) TFEU.

⁵³ And also promote them. See the formulation of Article 51(1) CFR: ‘The provisions of this Charter are addressed to the [...] Member States only when they are implementing Union law. They shall therefore respect rights, observe the principles and **promote the application thereof** in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties’ (emphasis added).

If one was to further divide the group of the secondary law sources, this time on the basis of their content, there would be such as address the essential elements of a given policy field (legislative acts) and those which address non-essential elements (non-legislative acts, amongst which there are delegated and implementing acts). The distinction denotes the diverse procedures used for the adoption of the acts. A big part of the instruments that either focus on or relate to fundamental rights will be adopted in the form of directives.⁵⁴ The instruments tend to be supported by the implementation guides (See [Section III.B.1.b](#) for detailed examples) adopted as Commission Communications or Staff Working Papers) and their adoption and elaboration will fall within the framework set by the policy documents. In the FRAME research, pointing to secondary law and ‘other’ instruments usually denotes this distinction.⁵⁵

In addition, one must mention the interplay between the EU and its Member States bringing in the multi-dimensionality of the policy area. Member States must implement the acts of the European Union, and it is on the national level that the main enforcement takes place. The European Commission provides guidance to the Member States as to how the implementation should proceed and be further ensured in the practice of administrative and judicial organs of the Member States. This so far has been achieved through informal documents. The implementation of EU law by the Member States is closely monitored and assessed by the European Commission and, if need be, enforced before the Court of Justice of the European Union. This can take place on the basis of an action initiated by the Commission itself (Article 258 TFEU) or the Member States (Art. 259 TFEU). Yet, if such scrutiny takes place, it will focus on the areas within the EU competence, with EU internal measures adopted. This will not be the case where the Charter of Fundamental Rights provides for the sole legal basis of the EU action.

Externally, with reference to the areas belonging to the EU competence in line with Articles 3-5 TFEU, the mentioned doctrine of implied powers will apply stating that wherever the EU has competence internally, the external one will follow. With the entry into force of the Treaty of Lisbon and attributing the legal value of the Treaties to the Charter of Fundamental Rights, the elaborated mainstreaming approach seems to be similarly affecting the EU external action. Thus whatever applies internally, will also have an effect externally – for the range of tools available.

The second aspect of the EU foreign policy – the Common Foreign and Security Policy – complements the areas where following the doctrine of implied powers the EU may or may not act. There the EU is not bound by the competence provisions, but must act in line with the broadly defined objectives (Article 21 TEU) which foresee promoting and upholding human rights as the EU values.

The competence as the framework within which specific tools may be adopted has been also emphasised in relation to the external sphere of the EU action. The authors of FRAME Deliverable 12.1

⁵⁴ See, for instance the concretization on the part of the Treaty-makers that minimum rules as to the rights of victims of crimes and individuals in criminal proceedings must be made in the form of a directive (Art. 82(2) TFEU), non-discrimination directives etc.

⁵⁵ See FRAME Deliverable 11.1, op. cit. and FRAME Deliverable 2.2., op. cit.

explicitly draw on the importance of this notion to determine the potential range of available instruments in the external relations:

The potential range of policy instruments is vast at all levels of government and the EU is no exception.⁵⁶ But in the EU, the actors involved in the policy process do not have complete freedom to select any type of instruments they please. Treaty provisions guide this selection process and determine in many cases what instruments are available to choose from, between legal acts and a wide range of voluntary and coordinative instruments (soft law) of a various range, including for example CFSP declarations and Commission papers.⁵⁷

The external sphere in line with the Treaty provisions is a complex one as it entails Common Foreign and Security Policy (Title V TEU) on the one hand and the EU's External Action regulated in Title V of the TFEU. The two areas complement one another, are closely related, yet cover two different competence regimes.

Within the realm of the Common, Foreign and Security Policy, the EU is not bound by competence limits and, in theory, can undertake any measure as long as they serve achievement of policy objectives specified by Article 21 TEU, in particular these connected with human rights and democracy. Nevertheless, within the CFSP, the EU has a limited toolbox which boils down to: '(a) defining the general guidelines; (b) adopting decisions defining: (i) actions to be undertaken by the Union; (ii) positions to be taken by the Union; (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii); and (c) strengthening systematic cooperation between Member States in the conduct of policy'⁵⁸. Furthermore, the Common Foreign and Security Policy:

shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.⁵⁹

The decisions, which are adopted by the European Council and Council in implementation of the CFSP, must be taken by unanimity. This means that the political will to attain a specific objective must be

⁵⁶ See: Esther Versluis, Mendeltje van Keulen, and Paul Stephenson, *Analyzing the European Union Policy Process* (London: Palgrave MacMillan, 2011), 55-78.

⁵⁷ FRAME Deliverable 12.1, op. cit. 2.

⁵⁸ Article 25 TEU.

⁵⁹ Article 24 TEU.

extremely strong; otherwise a specific initiative is not likely to succeed. The unanimity requirement explains in part the EU's commitment to multilateralism and above all to the established platforms of collaboration (such as the accession or European Neighbourhood Policy frameworks) with the prevalence of non-binding instruments. At the same time, it must be emphasised that legislative measures in the area of the CFSP are prohibited, which also explains why there is a tendency to search for an external action legal basis and adopt a legislative instrument.

The implementation of the CFSP lies in hands of the High Representative and the Member States. This means that the usual creative implementing role is left with the EEAS and the EU Delegations.

As for the EU's external action its content will much more depend on the competence granting provisions of the TFEU (in general terms – Articles 3-5 TFEU and the concrete area defined under Title V TFEU) and the associated doctrine of implied powers.⁶⁰

In particular, the provision of Article 216 TFEU codifying the latter should be quoted here: '1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.' This provision introduces the three conditions within which the EU can act in external relations field, yet as such has been criticised as being a simplifying codification of the EU implied powers doctrine.⁶¹

From the point of view of the tools the EU has at its disposal in this area, the EU can adopt unilateral measures under Title V TEU and Parts 4 and 5 TFEU or enter into international agreements on the basis of Article 218 TFEU and related. In order to conclude any agreement, the EU legislators must refer to a concrete provision providing for the legal basis and thus authorisation of such action⁶², or on the basis of the EU provisions permitting for the internal action be it in explicit or implied manner. It is still disputable whether this provision can be considered as a general competence provision and thus whether the EU can enter into international agreements whenever needed.⁶³

⁶⁰ Consider, for instance, the complex legal basis adopted for the UN Convention on the rights of persons with disabilities. There, the EU based its competence to become the party to this agreement on Article 19 TFEU (ex. Art. 13 TEC), and Article 114 TFEU (ex. Art. 95 TEC) in connection with Article 218 TFEU (ex. Article 300(2) TEC). It must be noted that Article 95 referred to the possibility to "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market". Thus even with an explicit basis in the Treaties, the EU (then the European Community) had to resort to the link with internal market to be able to conclude this particular international agreement. See: EU Council Decision 7404/07 of 20 March 2007 on signing on behalf of the European Community the United Nations Convention on the Rights of Persons with Disabilities.

⁶¹ Theodore Konstadinides, 'EU Foreign Policy Under the Doctrine of Implied Powers: Codification Drawbacks and Constitutional Limitations' (2014) 39 *European Law Review* 511 <<http://ssrn.com/abstract=2584994>>, 512.

⁶² See for instance Article 191(4) foreseeing collaboration with third countries for the purposes of environmental protection.

⁶³ *Ibid.* See, in particular the author's discussion of the two Opinions of AG Kokott in case C-431/11 *United Kingdom v Council of the European Union* and case C-137/12 *European Commission v Council of the European Union*.

To sum up in a somewhat simplistic manner, the EU external human rights measures consist of, on the one hand sources of law – binding measures adopted in line with the competence provisions of the EU Treaties, and on the other, diplomatic measures adopted within the EU CFSP policy. In addition, there are evaluative tools. The evaluation of the EU external human rights policy is also a complex matter. Traditionally, it has been conducted through the publication of qualitative reports on the EU's action recounting particular initiatives on a specific subject and in a specific geographic setting.⁶⁴ The EU does not conduct *ex post* human rights impact assessments of its policies, but there is a standing call for their presence.⁶⁵ Indicators are frequently mentioned in the particular instruments, yet no coherent set has been established to date nor used in a concise manner.⁶⁶

From the competence attribution point of view, the EU has a very strong impact on the approach undertaken to the attainment of human rights objectives. In the first place, it will determine whether (i) the EU measures will be the sole mechanisms adopted for the pursuit of human rights objectives, (ii) whether the measures pursue solely human rights objective or address other areas and because of this they must involve mainstreaming approach, (iii) whether the measure is focused on 'promotion' of human rights both within or without the European Union.

3. The Particularity of the Primary Law and the Charter of Fundamental Rights of the European Union

Because of and in line with the Treaty provisions pertaining to conferral of competence to the EU, the position of the primary law is of a particular type. It provides for foundations on which the EU human rights policy is built. In other words, primary law constitutes the starting point for the conceptualisation and formulation of the policy objectives and the content.⁶⁷ Primary law marks also the boundaries within which the policy makers will act in order to realise objectives stipulated in the treaty acting within the limits of competence ascribed to them. It is also up to the primary law, at least up to a certain degree, to determine the tools with which these objectives are to be attained.

Against this background the Charter of Fundamental Rights (CFR) and its particular function within the policy instruments of the EU stands out. It is the most prominent fundamental rights tool in the EU legal system with the force of primary law (Art. 6(1) TEU). This means that, on the one hand it provides for the normative setting on the grounds of which the fundamental rights policy will be built. Because of this both the strategy for implementation of the Charter of Fundamental Rights⁶⁸ and reports on its implementation⁶⁹ form a solid foundation within the EU legal setting, yet such that seems parallel to the

⁶⁴ The reports have been published since 2009: <http://eeas.europa.eu/human_rights/docs/index_en.htm>.

⁶⁵ See: FRAME Deliverable 9.2, at 97 and following.

⁶⁶ See: FRAME Deliverable 13.1, at 58-62 on instruments within enlargement policy and 62-76 for the use of indicators in EU foreign affairs and external action.

⁶⁷ See: FRAME Deliverable 3.2, *op. cit.* which discusses the forms in which the EU conceptualises its values.

⁶⁸ Commission, 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union' (Communication) COM(2010) 573 final.

⁶⁹ Commission, '2014 report on the application of the EU Charter of Fundamental Rights', European Union, Luxembourg, 2015.

efforts undertaken in relation to other policy fields (especially those for which the Treaties provide a separate legal basis such as Article 8 TFEU providing for the principle of equality, Article 10 TFEU referring to non-discrimination, with a specific competence attributed to the EU under Article 19 TFEU, as well as Article 16 TFEU referring to the right to data protection).

In addition, however, the Charter of Fundamental Rights of the European Union is an instrument in its own right. It is to be implemented by the EU institutions and the Member States with the use of other tools within the EU policy toolbox and can be enforced before the courts (albeit subject to limitations). In this context the multi-dimensionality of the EU fundamental rights policy comes to the forefront. This is directly connected with the particular rules of the applicability of the EU Charter of Fundamental Rights, which are connected to the competence issues discussed before⁷⁰.

As a reminder: the EU Charter of Fundamental Rights entrenches the values of the European Union based on the constitutional traditions of the EU Member States and the European Convention of Human Rights, updated so as to match the changes that took place within the European societies. As a novel instrument added to the existing legal setting of the EU, the Charter raises very many questions as to its relationship in particular with the systems of the EU Member States (but also, though to a lesser extent, with the ECHR).

The Charter is divided into six chapters devoted to Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. It provides for both the rights and the principles whereby the latter may be enforceable only in interpretation or ruling on a legality of 'legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers' (Article 52(5) CFR). The final chapter of the Charter describes the rules of application and interpretation of its provisions.⁷¹

This is where the competence question is addressed by Art. 51(2) CFR which emphasises (in line with Article 6 TEU) that '(t)he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'. The Charter is 'addressed' to 'the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'.⁷² Again, they are to 'respect the rights, observe the principles and promote the application thereof **in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties**' (emphasis added).⁷³

The horizontal provisions of the Charter of Fundamental Rights of the EU have given rise to at least three important questions, which have been, to-date only partially clarified by the CJEU. The first of the issues

⁷⁰ See: Article 51(1) CFR and in general Title VII of the Charter.

⁷¹ Chapter VII entitled 'General Provisions governing Interpretation and Application of the Charter of Fundamental Rights'.

⁷² Article 51(1) CFR.

⁷³ Idem.

related to the level of human rights protection granted by the CFR and its relationship with the constitutional systems of human rights protection in the Member States, on the one hand, and the ECHR system. The Charter provisions reflected the *Bosphorus* and *Solange*/'as-long-as' type of doctrine. According to Art. 52(3) CFR, the ECHR guarantees are the base standard. Yet, in the first place the Charter and then the constitutional systems of the Member States can introduce a higher level of protection for their citizens (Art. 53 CFR).⁷⁴ This principle, as it turned out, is limited by the exigencies of ensuring the effectiveness of the EU law as confirmed by the CJEU in *Melloni* judgment.⁷⁵ The already mentioned article 52(5) CFR contains also explanation as to what the distinction between the rights and principles entails. The former are enforceable, the latter depend on the enactment of implementing legislative and executive measures.

The Court of Justice also had its say with reference to defining the extent to which the Charter binds the Member States when they are 'implementing the EU law'. In the first place the CJEU reiterated its earlier jurisprudence on the applicability of fundamental rights guarantees to the Member States action. In the first place it reconfirmed to the *Wachauf* principle⁷⁶ according to which the Member States are obliged to observe EU fundamental rights when they implement the EU legislative acts. Secondly, it recalled the *ERT* principle⁷⁷ according to which the Member States must observe EU fundamental rights when derogating from market freedoms. Finally, the CJEU in *Akerberg Fransson* judgment coined the definition of the 'scope of EU law', which the Court deduces from the Explanations to the Charter (they provide guidance in interpretation of the Union law according to Art. 52(7) TEU):

20. That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C-279/09 DEB [2010] ECR I-13849, paragraph 32). According to those explanations, **'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'**.

21 **Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law**, situations cannot exist which are covered in that way by European Union law without those

⁷⁴ Article 53 CFR.

⁷⁵ Case C-399/11 *Melloni* [2013] ECR I-0000.

⁷⁶ Confirmed in Case C-400/10 *J. McB* [2010] ECR I-8965, ECLI:EU:C:2010:582 and C-447/09 *Prigge* [2011] ECR I-8003, ECLI:EU:C:2011:573.

⁷⁷ Case 22/70 *EC Commission v EC Council (ERTA)* [1971] ECR 263, confirmed subsequently in case C-390/12 *Pfleger and others* ECLI:EU:C:2014:281,.

fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.⁷⁸

The CJEU further clarified its position in the *Siragusa* judgment establishing in paragraph 25 the criteria according to which the scope of Union law should be evaluated:

In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it (see Case C-309/96 *Annibaldi* [1997] ECR I-7493, paragraphs 21 to 23; Case C-40/11 *Iida* [2012] ECR, paragraph 79; and Case C-87/12 *Ymeraga and Others* [2013] ECR, paragraph 41).⁷⁹

Clearly, the Court's stance amounts to an abstract and therefore limited guidance, yet to-date it has become sufficiently clear that the scope of EU law in relation to the Member States action covers all of the areas, which may have a connection (even if of functional character only) to the objectives of the EU law.⁸⁰

The last ambiguity concerning the Charter of Fundamental Rights that, as it seems, will need to be resolved on case-by-case basis is the distinction between the rights and principles. The Charter clearly defines the legal consequences of a given guarantee being classified as a right or a principle: The former enjoy the quality of enforceability whilst the latter can be justiciable only as a result of implementation to the EU legal order. The Charter does not provide for an exhaustive catalogue of guarantees, which shall be perceived as rights and those that are considered principles.⁸¹ Instead, the legislators and courts must make this evaluation. In particular, it is the CJEU that is charged with such task. It decided, for example, in the *AMS* judgment⁸² that Article 27 CFR⁸³ providing for workers' right to information and consultation within the contains a principle. The decisive factor in the classification lies in the open-ended structure of the Charter's provision indicating the need by public power to adopt further measures.

⁷⁸ Case C-617/10 *Åkerberg Fransson* [2013] ECR I-0000, paras. 20-21.

⁷⁹ Case C-206/13 *Siragusa v Regione Sicilia*, ECLI:EU:C:2014:126.

⁸⁰ See the early (2012) claim of judge Safjan advocating such approach: Marek Safjan, 'Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of Conflict?' (2012) EUI Working Papers 22 <<http://hdl.handle.net/1814/23294>> accessed 17 January 2016.

⁸¹ The only indication is provided for in the Explanations on the Charter which recall as examples of principles: articles 25 (rights of the elderly), 26 (integration of persons with disabilities), and 37 (environmental protection) whilst the provisions that include elements of rights and principles are articles 23 (equality between men and women), 33 (protection of family life), and 34 (social security and social assistance).

⁸² Case C-176/12 *Association de médiation sociale*, ECLI:EU:C:2014:2.

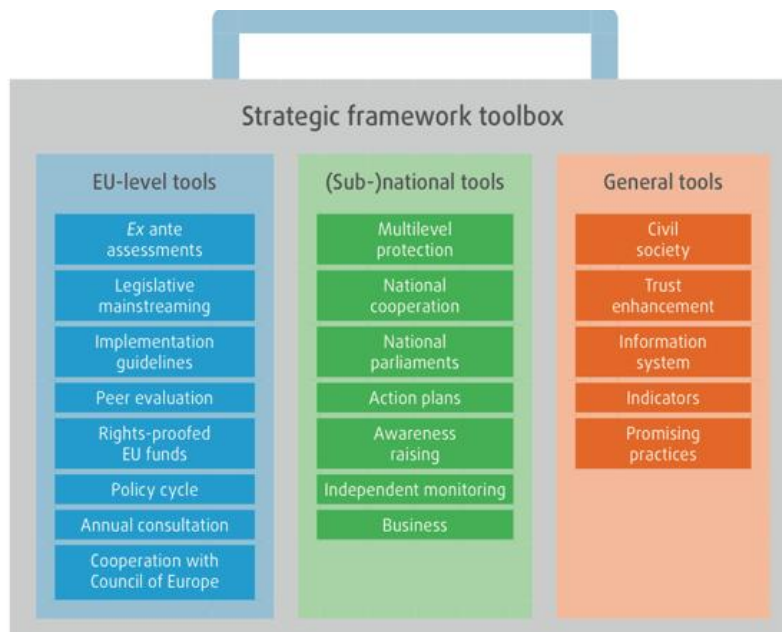
⁸³ Workers' right to information and consultation within the undertaking.

The three problems connected with the application of the Charter of Fundamental Rights reflect to the large degree the problematic position of this instrument in the fundamental rights protection in Europe. Positioned between the international, European human rights protection system, and the national constitutional fundamental rights protection system, the provisions of the Charter needed to reflect its relationship between other levels of the fundamental rights protection in Europe. However, the makers of the Charter did not manage - and it would have been unreasonable to expect that they would have – to provide for a clear picture as to where are the boundaries of each of the layers. This tasks the Court of Justice with higher burden, whilst at the same time challenging the EU⁸⁴ as well as the Member States' legislative and executive powers inasmuch as the implementation of the Charter is concerned.

This observation brings back this analysis to the particularity of the Charter which not only needs to be implemented and applied in the vertical and horizontal setting, but points to the multi-dimensionality of the tool. In fact, the work of the Fundamental Rights Agency (FRA) is very informative with respect to perceiving the CFR of the EU from such point of view.

Within the initiative undertaken by the FRA named 'Joining up Fundamental Rights', the FRA developed the strategic framework toolbox, which reflects the experiences of its work ensuring the coherence in the legal responses on various levels. The toolbox suggested by FRA provides the suggestion for how activities that can be undertaken on general, sub-national and EU level to mainstream Charter guarantees. The model brings in the element that has not been discussed so far here – the Member States whose tools (i. e. multi-level protection of human rights) and general addressees and participants of the human rights movements – civil society.

⁸⁴ Commission, 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union' (Communication) COM(2010) 573 final. According to this document the EU is to guarantee that at every step - from the EU legislative process to the application of EU law at the national level - the rights and principles of the Charter are taken into account: improve EU citizens' understanding of fundamental rights protection within the EU, providing them with concrete information on possible remedies and the role of the Commission in this field; monitor - through presenting Annual Reports - the progress achieved regarding the Charter's application, see the official portal of the European Commission, <http://ec.europa.eu/justice/fundamental-rights/charter/implementation/index_en.htm> 39 November 2015.

Figure 2: FRA Strategic Framework Toolbox⁸⁵

In fact, in the realm of internal policy these are actually the Member States that are predominantly charged with the protection of fundamental rights. There, firstly, it is not only in respect of the EU's capacity to introduce legislative solutions, but also as to the ability to either coordinate the Member States action or to induce the collaboration on the part of the Member States. In this aspect, one should take into consideration also the sub-national type of tools the EU may make use of.⁸⁶ Secondly, the Member States may have either human rights protection standards that are too low or higher than the ones present on the EU level.⁸⁷ In terms of the lower standards, there is an internal conditionality mechanism introduced by the Treaty of Lisbon in Article 7 TEU, explained by the European Commission in the Communication on Rule of Law⁸⁸. This mechanism has not been subject to closer scrutiny, yet brings in similar considerations as regards the conditionality used in external relations. Its presence demonstrates the need for a more elaborate enforcement mechanisms geared at systemic issues rather than concrete fundamental rights violations. The difficulties faced in relation to these issues are

⁸⁵ Commission, '2013 Report on the Application of the EU Charter of Fundamental Rights', (Luxembourg 2014), <http://ec.europa.eu/justice/fundamental-rights/files/2013_charter_report_full_version_en.pdf> accessed 18 September 2015. EU Agency for Fundamental Rights Agency, 'An EU internal strategic framework for fundamental rights: joining forces to achieve better results' op. cit. 19.

⁸⁶ See the analysis of Work Package 11 pertaining to the migration policy. See also the findings of FRAME Deliverable 4.1, op. cit. on the National Human Rights Institutions and the EU's role in their support and promotion of their initiatives.

⁸⁷ See, for a more in depth analysis for instance, the FRAME Deliverable 2.2 in relation to equality. The report makes reference to the survey conducted by the European Network of Legal Experts in the non-discrimination field, which underlines that the non-discrimination standard amongst the Member States is often much higher than that expected by the European Union. FRAME Deliverable 2.2, op. cit., 70.

⁸⁸ Commission, 'A new EU Framework to strengthen the rule of law' (Communication) COM (2014)158.

analysed in FRAME Deliverable No. 3.2 on the basis of the case study of Hungary.⁸⁹ It remains to be seen whether it is going to be activated in case of Poland.⁹⁰

In this vein the FRA's proposal to systematise the EU's fundamental rights toolbox includes a somewhat bitter undertone of the usual criticisms concerned, whereby the EU has a fully-fledged toolbox externally, yet internally it struggles to formulate a corresponding one. The authors of the FRA's proposal reflect:

making use of such a toolbox could shape an EU internal framework for fundamental rights that mirrors the existing external fundamental rights framework. This would send a strong signal to the outside world, showing that the EU and its Member States are prepared to 'walk their talk' and increase the consistency between the Union's internal and external behaviour. The challenge now is to get all the actors concerned to make use of these tools to achieve the expected results: promoting fundamental rights to safeguard the rule of law.⁹¹

In this vein, the EU may act within its own orbit, induce fundamental rights observance and promotion from sub-national level and use general tools. The last level in this image includes civil society, trust enhancement, information systems, indicators and promising. On the EU level FRA identifies *ex ante* assessments of impact of policies on human rights, legislative mainstreaming, rights proofed EU funds. Furthermore, the implementation guides usually referring to specific directives shall be considered in connection with these, as well as the procedures set for their implementation (such as programming conducted on the basis of action plans within the EU internal financial instruments). Finally FRA refers to the cooperation with the Council of Europe as means of achieving fundamental rights objectives by the EU. Within the sub-national mechanisms category, the instrument that comes to the forefront is the multilevel protection of fundamental rights system. In other words, the case law and the enforcement mechanisms both on national, EU and the ECHR levels should be considered as a separate category of tools. The induction of national cooperation or cooperation of national parliaments will belong to the orbit of the procedures characteristic of the internal decision-making. Furthermore, action plans coined for the Member States and collaboration with businesses are named.

This approach to the EU fundamental rights policy toolbox should be kept in mind below when engaging in a discussion of the EU internal instruments.

⁸⁹ FRAME Deliverable 3.2., op. cit.

⁹⁰ See, the decision of the European Commission of 13 January 2016 regarding the launching of the orientation debate on Poland within the rule of law framework of the European Commission: Commission, 'Rule of Law in Poland. Commission starts the dialogue' <http://ec.europa.eu/news/2016/01/20160113_en.htm> accessed 15 January 2016.

⁹¹ EU Agency for Fundamental Rights, 'An EU internal strategic framework for fundamental rights: joining forces to achieve better results' <www.fra.europa.eu/sites/default/files/fra-2015-internal-strategic-framework-for-fundamental-rights_en.pdf> accessed 20 April 2015 19.

D. Legal - binding and non legal - non binding Tools

The second of base distinctions concerning tools that emerge both from the hitherto conducted FRAME research at large, and even from the brief presentation of the internal-external divide, refers to whether a given tool belongs formally to the legal realm or not.

For example, in the FRAME research we have seen the analysis based on classifications involving whether an instrument is classified as a 'primary' or 'secondary' or 'other' source of law.⁹² The 'other' sources refer to the vast category of any type of legal measure that does not fulfil the characteristics of a legal norm. This categorisation builds on a rigorous, positivistic understanding of what a legal norm is made of. Here, it is the binding nature of law, the procedural aspect behind adoption of a measure and the connected enforceability before courts that matter.

In general terms, this distinction gave rise to vigorous scholarly debates focusing on the use of soft law instruments by national and international actors.⁹³ It is beyond the scope of this study to enter into the discussion or even point to the disagreements amongst those that try to pinpoint the nature of soft as opposed to hard law. To recall the basics, it suffices to say that their initial concept in international legal sphere was coined by Lord McNair

to describe 'instruments with extra-legal binding effect'. More generally, soft law is used in legal literature to describe principles, rules, and standards governing international relations which are not considered to stem from one of the sources of international law enumerated in Art. 38(1) ICJ Statute.⁹⁴

Possibly, one characteristic feature of soft law that authors tend to agree about is its non-binding character.⁹⁵ In addition, soft law instruments are to be 'of special relevance' and are characterised by four intrinsic aspects: (1) they express the common expectations concerning the conduct of international relations, (2) they are created by subjects of international law – as opposed to privately created codes of conduct, (3) they do not stem from formal legislative process thus lacking binding effect, but nevertheless they (4) still produce certain legal effects.⁹⁶

Within the international law, to the categories of soft law tools belong: resolutions of international organisations, non-binding international agreements, and abstract non-committal clauses of international agreements. Against this background Abbott and Snidal identified three characteristics of

⁹² FRAME Deliverable 11.1 op. cit., FRAME Deliverable 2.2 op. cit. etc.

⁹³ See, for example, the Soft Law Oxford Bibliographies website <<http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0040.xml>> accessed 10 January 2016.

⁹⁴ Daniel Thürer, 'Soft Law' [2009] Max Planck Encyclopedia of Public International Law <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1469?rskey=jokUmZ&result=1&prd=EPIL>> accessed 10 January 2016 para 5.

⁹⁵ *ibid*, para 7.

⁹⁶ *ibid*, paras 8-9.

legal provisions determining obligation, precision and delegation to third party dispute settlement thus creating the typology of international agreements from this point of view.⁹⁷

Applying the distinction of hard versus soft law to the toolbox of the European Union is relatively easy. Externally, there will be international agreements, and agreements made between the EU and 3rd countries outside of the binding framework (for instance Action Plans under the European Neighbourhood Policy). On the other hand, there are many instruments adopted as internal instruments of the EU institutions amounting to and equivalent of international organisations internal resolutions:

Among the instruments [that can be undertaken by the EU institutions], recommendations and opinions have a non-binding or soft law character. Looking at Community practice, soft law may also be discovered, whether enacted separately or jointly by different organs, under various headings such as interpretative declarations, programmes, resolutions, and reports. These instruments can be categorized according to their form, their content, or the organs from which they emanate. What they all have in common is the intention of their drafters to establish standards outside the formal sources of law. Apart from their role in the field of the European Communities, soft law measures are the main instruments of action provided for in the Treaty on European Union, particularly in its second pillar (Common Foreign and Security Policy) and in its third pillar (Justice and Home Affairs).⁹⁸

What are the implications of an instrument being classified as a soft or a hard law tool? The recalled classification of Abbott and Snidel help to determine them.

In the first place they refer to the level of obligation – in other words, to what extent a given provision provides for fulfilment of a certain obligation. Secondly, it is about precision – soft law instruments tend to be much more precise than hard legal ones. Finally, it is about the possibility to delegate the resolution of a dispute to a certain body – quality with which soft law instruments are not equipped. Since the last part relates to the possibility of employing coercion, it may be of use to discuss this aspect below with reference to the distinction between soft and hard power instruments.

⁹⁷ Kenneth W Abbott and Snidal Duncan, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421.

⁹⁸ Thüerer, at para. 12.

E. Hard power and soft power tools

In dichotomy between hard and soft power, the distinguishing factor lies in the existence of enforcement or coercive mechanism, which is characteristic for hard measures. Importantly, the attribution of hard power characteristics differs vastly, depending on whether one deals with internal or external tools.

In relation to the external tools, the authors of Deliverable 6.1 refer to the work of Janne Haaland Matlány.⁹⁹

In Matlány's interpretation soft power tools refer to 'non-coercive policy tools such as cooperation, persuasion and co-optation, but also to criticism and 'shaming' in public fora. Hard power tools are coercive, including sanctions and military intervention, while political and economic conditionality should be placed in the soft power category although they are 'tough' uses of power which often do not leave the state in question very much choice. Nonetheless these tools are not enforced; they are 'strong suggestions for compliance.' It means that soft power tools contain not only weak political instruments (e.g. public statements and hearings), but also strong instruments such as the Copenhagen criteria or human rights clauses in agreements, e.g. the revised Lomé Convention. This categorisation precludes that a hard power tool should necessarily be coercive, having a punitive impact or military nature (e.g. force in the case of crisis management operations).¹⁰⁰

It seems that application of this distinction to the external action of the EU leads to a conclusion that in the vast majority of cases, the EU will be resorting to soft law cooperative measures. In the international setting, the enforcement mechanisms may be directed both at state and non-state actors (e.g. restrictive measures).

In internal legal contexts the special importance from this point of view is attributed to courts – they are the guardians in ensuring rule of law, be it through judicial review of measures or delivery of justice to both private and legal entities. Arguably, the courts can evaluate any hard measure of a state or the EU affecting fundamental rights of EU citizens. The doubt echoing in this statement refers to the 'grey zone' – acts of a state which could be considered hard, but belong to the realm of soft law, or due to the particular collaborative EU-Member State setting, escape judicial authority with regard to compliance with the human rights based standards, in particular.

⁹⁹ Janne Haaland Matlány, *Intervention for Human Rights in Europe* (Palgrave 2002) 8 in FRAME Deliverable 6.1, op. cit. 79.

¹⁰⁰ Idem.

Still, especially in relation to the EU context there is an abundance of literature focused on the court enforcement of fundamental rights¹⁰¹ and lack thereof in external human rights policies of the EU. The importance attributed to the role of the Courts makes the authors search constantly for the ways in which the legal standards enshrined in the European Convention on Human Rights and the Charter of Fundamental Rights could find application to the external relations of the EU. There at least the close vicinity of the EU its actions would have been subject to scrutiny of at least one court.¹⁰² Still in many instances, the EU would rather resort to soft measures rather than impose its own understanding of human rights and the ways of dealing with specific issues.

The choice between measures need not be determined by the levels of coerciveness in line with the common belief that the EU prefers soft over hard power in its dealings. It is the evaluation of a concrete case study that will determine the use of the instruments. The challenge for the EU and the academic community is to find good components of the mix and an appropriate container (framework) that can fit all such elements and the instruments to pick specific ingredients when there is need for them.

F. Tools used for conceptualisation, operationalization and evaluation

The final distinction to be found in the FRAME reports and of importance for the analysis of the toolbox is that between tools used for conceptualisation, operationalization and evaluation of the policy. The distinction is a classical one against the background of the social sciences at large. It permits for the separation between theory and practice (conceptualisation v operationalization) as well as instruments

¹⁰¹ See, for example, on non-discrimination: Mirjam de Mol, The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law [2011], 18 MJ 1–2. (2011), <http://www.iuscommune.eu/html/prize/pdf/2011_De_Mol.pdf>. On the variation in the work of the ECHR and the CJEU, see: Patricia Popelier, Catherine Van de Heyning and Piet Van Nuffel (eds.), *Human rights protection in the European legal order: The interaction between the European and the national courts*, (Intersetia 2011); on migration and human rights, see: Roger Errera, 'A new supranational court for refugee and asylum law: The Court of Justice of the European Union. A commentary of its recent law' (*International Association of Refugee Law Judges - 9th World Conference - Between border control, security concerns and international protection: A judicial perspective* 7-9 September 2011), <www.iarlj.org/general/images/stories/BLED_conference/papers/20_Errera_-_Bled_2011.pdf>, accessed 30 November 2015; on right to privacy and data protection, see for instance: Francesca Bignami, 'Case for Tolerant Constitutional Patriotism: The Right to Privacy before the European Courts' (2008) 41 Cornell International Law Journal; Evelien Brouwer, 'The Other Side of the Moon - the Schengen Information System and Human Rights: A Task for National Courts', (2008) CEPS Working Document No. 288 <www.ceps.eu> accessed 30 November 2015; Noah C. N. Hampson, 'The Internet is Not a Lawless Prairie: Data Protection and Privacy in Italy' (2011) 34 Boston College International and Comparative Law Review. On border protection, see the analysis in: Evelien Renate Brouwer, *Digital borders and real rights : effective remedies for third-country nationals in the Schengen Information System* (Martinus Nijhoff Publishers 2008), A. Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press, 2009), on legal consequences of CJEU judgments, for instance in the context of freedom of association, see: Andreas Bückner and Wiebke Warneck (eds.), *Viking — Laval — Ruffert: Consequences and policy perspectives* (2010) ETUI Report 111 <www.etui.org/content/download/1971/22261/file/10+R111+Viking+Laval+R%C3%BCffert+WEB.pdf> accessed 30 November 2015.

¹⁰² See, for example: Steve Peers and others, *The EU Charter of Fundamental Rights* (Hart Publishing 2014).

used to evaluate effectiveness of operationalization against the assumptions set at the conceptualisation level.

Within FRAME research, it is Deliverable 3.2 that contains observations as to the meaning and extent of conceptualisation and operationalization. It starts off with the overview of the approaches to a 'concept' as a legal theoretical phenomenon. Seeing the dynamic and inconclusive nature of the notion of 'concept' the authors abandon the idea to close it within a set definition. Because of this FRAME Deliverable 3.2:

while recognizing that the concepts of human rights, democracy and rule of law have no clear boundaries and that they are dynamic, [...] will delineate the main trends in the EU's usage of human rights, democracy, and rule of law.¹⁰³

On the other hand, operationalization should involve such translation of concepts into factors, variables or observations, that these can be measured subsequently through evaluation tools.¹⁰⁴

This distinction seems to be much more complex than the ones referred to above, as it does not deliver very clear-cut results. In fact, in the introductory chapter, authors of FRAME Deliverable 3.2 that focused on conceptualisation of the three values of the EU, observe:

By differentiating between conceptualisation and operationalisation, it is not the authors' intention to reinforce the difference between the two. The authors recognise that concepts emerge and are formed by practice, and that practice is formed by concepts. In other words, concepts and practice inform each other; there is interaction between them. Separating the two might thus seem artificial, especially in an applied conceptual analysis like the present one. However, the report is structured in this manner to allow room for two levels of inquiry: first is a more general analysis of EU law, and then follows an analysis of how these concepts are applied in concrete case studies. The authors hope that, in this way, the report successfully blends general conceptual analysis with more particular questions of implementation.¹⁰⁵

This brief observation provides already an insight in the difficulty one enters into when trying to pin the tag of conceptualisation or operationalization to a given tool. Similarly, the authors of FRAME Deliverable 13.1 have identified the contributing factor of measurement methods of the advancement of EU human rights policy to both formulation and implementation of the policy as they call it.¹⁰⁶

Having said this, it is clear that the three: conceptualisation, operationalization, and evaluation, whilst mutually reinforcing, are in fact separate categories. This means that there exist tools which will

¹⁰³ FRAME Deliverable 3.2, op. cit. 4-5.

¹⁰⁴ Michael S. Lewis-Beck & Alan Bryman & Tim Futing Liao (eds), *The SAGE Encyclopedia of Social Science Research Methods* (SAGE 2004) in: FRAME Deliverable 3.2, op. cit. 5.

¹⁰⁵ FRAME Deliverable 3.2, op. cit. 5.

¹⁰⁶ FRAME Deliverable 13.1, op. cit. 39-87.

predominantly serve the functions of one or another of these categories, yet single-minded classification would have not given the justice to all the functions such tools perform.

Before this report proceeds to the analysis of the EU fundamental and human rights toolboxes, it is necessary to bring in one last observation from the mentioned FRAME Deliverable 3.2.

With reference to conceptualisation of the three EU values, the authors of the report observe: the EU has moved from more 'thin'/formal to more thick/substantive conceptions of these three ideals. The thin/thick terminology is derived from rule of law literature, but might be applied to human rights and democracy as well. The point is that, over the years, the EU has come to interpret these concepts in a fairly broad and holistic manner, which is conceptually underpinned by a respect for human dignity.¹⁰⁷

This conclusion was drawn on the basis of the analysis of the chief primary law instruments – the Treaties and the Charter of the European Union. This means that these are the first reference instruments drawing the foundations for the EU legal action. They provide the starting point for operationalization of the EU chief values; whilst at the same time setting the framework within which the EU can act. The need to legitimise the EU action through demonstration of effects (in part connected with an enhanced pressure to base the policy making on evidence) provides for the foundations of the evaluation tools. In the light of the above, this report, as it seems will focus above all on the operationalization and evaluation tools of the EU.

The distinction into tools that are used for conceptualisation, operationalization and evaluation echoes to a large degree the analysis adopted within many other FRAME reports¹⁰⁸ which builds on stages in public policy or the image of a policy cycle. The policy is formulated, implemented and evaluated and once the three stages are completed the whole process restarts again. The design of the policy cycle can be viewed in multiple ways¹⁰⁹ - from the basic three¹¹⁰ or five element format¹¹¹ to eight components¹¹².

¹⁰⁷ FRAME Deliverable 3.2, op. cit. 101.

¹⁰⁸ FRAME Deliverable 12.1, op. cit.; FRAME Deliverable 13.1, op. cit.

¹⁰⁹ See, for instance: Judith V. May and Aaron B. Wildavsky, *The policy cycle* (Sage Publications 1978); Michael Howlett, Michael Ramesh and Anthony Perl, *Studying Public Policy Cycles and Policy Subsystems* (Oxford University Press 2003); Jann Werner and Kai Wegrich, K. '4 Theories of the Policy Cycle' in Frank Fischer and Gerald J. Miller (eds.) *Handbook of Public Policy Analysis: Theory, Politics, and Methods* (USA: CRC Press 2006), 43-62; Hal Colebatch (ed.) *Beyond the policy cycle: The policy process in Australia*. (Sydney 2006); Jann Werner and Kai Wegrich, K. 'Phasenmodelle und Politikprozesse: Der Policy Cycle', in Klaus Schubert and Nils C. Bandelow (eds.) *Der 'policy cycle' Lehrbuch der Politikfeldanalyse 2.0* (München/Wien: Oldenbourg Verlag 2009) 75-113; The policy analysis is also presented according to stages of a process; see: Paul A. Sabatier, 'The need for better theories', in Paul: P. A. Sabatier (ed.), *Theories of the policy process* (Westview Press 2007) 3-17; Hank Jenkins-Smith and Paul A. Sabatier, 'The study of public policy processes', in Hank Jenkins-Smith and Paul Sabatier (eds.) (1993), *Policy change and learning: An advocacy coalition approach* (Westview Press 1993) 1-9; Philip Randolph, Carroll Estes and Rodriguez Fatima (2003), *The nation's health* (Sudbury, Jones & Bartlett Learning 2003) 523.

¹¹⁰ See: FRAME Deliverable 12.1, op. cit., 4-5.

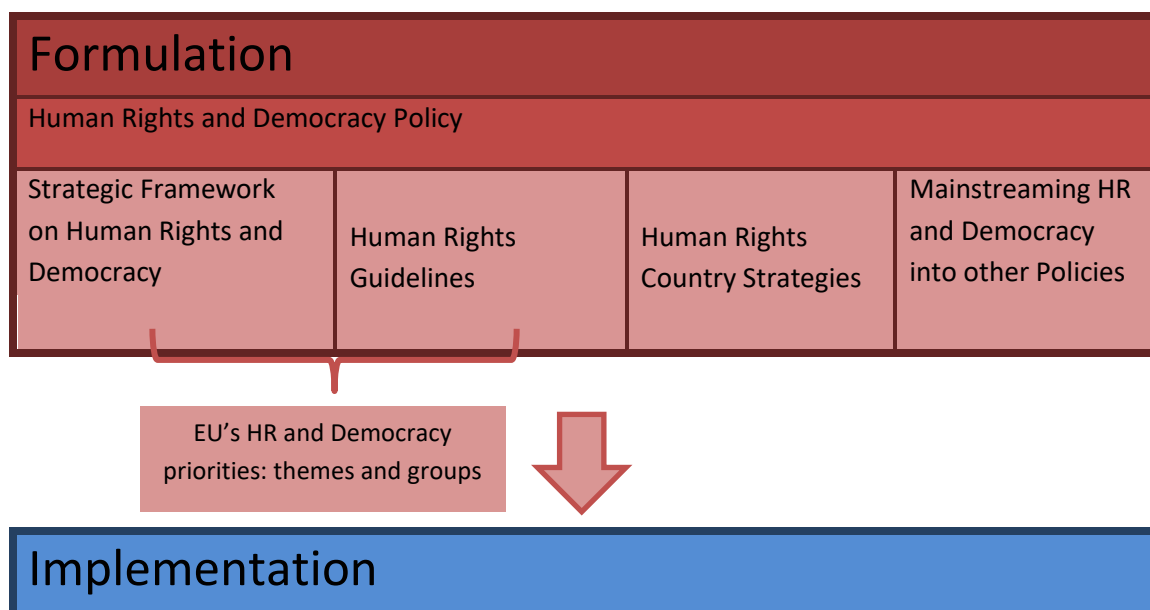
¹¹¹ Daniel Lerner and Harold Lasswell (eds.), *The policy sciences; recent developments in scope and method*. (Stanford University Press 1951).

The choice of the one lying at the basis of the study is determined by the objectives of that are to be achieved in the course of such analysis.

Within FRAME, the policy cycle approach was adopted in Work Package 12.¹¹³ This Work Package deals with the external human rights and democratisation policy of the European Union and, therefore, the mapping has been conducted only in relation to this area. As one may recall, it is also within the Work Package Deliverable 12.1 that the authors specified their understanding of the ‘policy’ and a ‘tool’ (see above, Section [I.A](#)).¹¹⁴

Subsequently, the authors of FRAME Deliverable 12.1 proceeded to mapping the tools around the policy stages, acknowledging the circularity of the policy process.¹¹⁵ The instruments are thus to be used for (1) Formulation, (2) Implementation, and (3) Evaluation of the policy objectives. On the basis of evaluation of the policy, the formulation of the policy would take place yet again. Figure 1 presents the approach adopted with regard to the Human Rights and Democracy Policy Framework.¹¹⁶

Figure 3: FRAME Work Package 12 Visualisation of Human Rights and Democracy Framework



¹¹² Catherine Althaus, Peter Bridgman and Glyn Davis, *The Australian policy handbook*. (4th edn., Allen & Unwin, 2007).

¹¹³ Building to a large extent on the classification applied by the Council of the European Union in its thematic reports on the basis of the institutional logic of sources of such instruments. Such a classification was brought into the context by FRAME Deliverable 3.1: Alexandra Timmer (with the collaboration of Jenny Goldschmidt, Antoine Buyse and Anja Mihr), ‘Report state-of-the-art literature review human rights, democracy and the rule of law’ (2013), 50-53.

¹¹⁴ Ibid.

¹¹⁵ Building to a large extent on the classification applied by the Council of the European Union in its thematic reports on the basis of the institutional logic of sources of such instruments. Such a classification was brought into the context by FRAME Deliverable 3.1, op. cit. 50-53.

¹¹⁶ FRAME Deliverable 12.1, op. cit. 4-5.

Specific human rights and democracy instruments	Other CFSP instruments
<ol style="list-style-type: none"> 1. Financial instrument: European Instrument for Democracy and Human Rights 2. Human rights clauses 3. Human rights and democracy focal points 4. EU Special Representative for human rights 5. Human rights dialogues and consultations 6. Election support 7. European endowment for democracy 	<ol style="list-style-type: none"> 1. Action in multilateral fora 2. Bilateral political dialogue 3. Démarches and declarations 4. CFSP joint actions, common positions and strategies and CSDP decisions <ol style="list-style-type: none"> a. Restrictive measures 5. Thematic financial instruments 6. Geographic financial instruments



Evaluation	
Specific: EU's Annual Report on Human Rights and Democracy in the World	Annual reports on the implementation of other policies relevant to human rights. Other evaluation documents

Similarly as in the distinction between tools used for conceptualisation, operationalization and evaluation, also in the one based on policy stages or cycles, the boundaries are blurred. For example, the evaluative activity feeds directly the subsequent policy formulation one. Frequently, one should analyse a number of policies and respective cycles in order to be able to identify tools fulfilling one or another function. The attribution of tools to specific stages in the policy cycle as performed by the authors by FRAME Deliverable 12.1 is a very useful starting point, yet in many instances inclusion of a tool in a given stage will not be uncontested (for instance HRs Guidelines).

For this reason, the rigid approach to present the tools according to the three logical categorisation will be used as a guiding, albeit not rigidly observed principle for the subsequent analysis.

III. Inventory and categorization of tools based on the internal - external divide

A. Key to the inventory

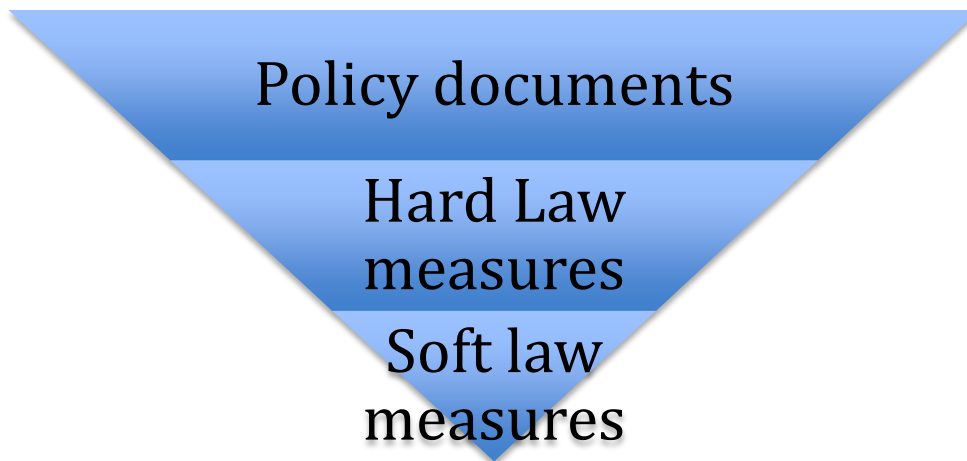
The organisation of the tools in the below presentation is informed by the logic of the main categories discussed in the previous section. Yet, as it has turned out, with the view of drawing a comprehensive map which would be based on specific parameters, the above distinctions could have not been adopted in rigid ways.

In the process of designing the subsequent sections, the authors of this report considered the following:

- Firstly, from the outset, it was clear that the division between the internal and external toolbox would be adopted as the principal one. This was a clear consequence of the legal setting within which the EU operates, where two separate (though inter-related) legal systems intersect. From the perspective of tools at disposal of the EU, the two spheres (internal and external) differ largely (though formally the instruments may be similar). In addition, the Treaty competence provisions rule on whether and how the EU may engage in specific policy areas further limiting the EU action. This is particularly visible against the problematic provisions on applicability of the Charter of Fundamental Rights by the Member States (who are considered as addressees of the Charter 'when they are implementing EU law' according to Article 51 (CFR)). Having discussed the primary legal provisions in the previous sections, it was decided that the primary law provisions would not be addressed in the inventory of EU fundamental and human rights tools below.
- The division into hard and soft law measures was considered as a potential guiding principle for the discussion of the toolbox. Yet, following the initial attempt to structure the report accordingly, it turned out that the separation into the two groups is largely artificial. This is the case because many soft law instruments accompany almost each hard legal instrument providing for both the policy setting or implementation guidance. Thus, if the policy documents provide for the policy boundaries and implementation documents guide the process on the ground, how can these be separated? Can a hard tool be isolated from the environment where it functions?

If one considers that the majority of instruments adopted in reference to fundamental rights in the EU takes a form of directive, then their implementation very much depends on the modalities of the legal systems of the Member States. There again, the policy and soft law guidance setting seems to be important as it complements and concretises the EU hard law action. If, in addition, one considers that soft law instruments are subject to the judicial scrutiny inasmuch as interpretation is concerned, then their linkage to hard law instruments becomes even of higher importance. In fact, in every single FRAME report the discussion of hard legal measures would be followed by the detailed analysis of the soft legal framework entwining the hard legal instruments, concretising them, or simply setting the general objectives. In visual terms, one can present this relationship as presented in the following figure:

Figure 4: Contextualisation and concretisation of hard law tools through the use of soft law tools



In the view of the authors of this report, at least in internal setting, any hard law instrument should be considered against this broader setting. To represent this approach, the choice was made to present the internal instruments as ‘sources of law’ which in the study of the EU law are usually considered from the point of view of the form of legal act and their content. In some ways, this distinction refers to the hierarchy of norms within the EU law. Whilst it is not possible to determine the interrelationships between each and every piece of the EU legislation (for instance, between directives and regulations of legislative or non-legislative force), it is clear that at the top of the scale there are sources of primary law¹¹⁷ and below sources of secondary law. The categorisation follows the Treaty based distinctions culminating in brief presentation of instruments relevant for the EU human rights policies or alternative human rights policies.

- The distinction between soft and hard power is of use inasmuch as possibility of using the coercion is concerned. For purposes of the report here, one shall include a category of tools that reflect the existence of coercive measures to enforce specific obligations existing on the basis of specific tools.
- The distinction between tools used for conceptualisation, operationalization and evaluation seemed to have the biggest organising potential. Yet, in the light of FRAME research, it soon became clear that that this categorisation as well as the one based on policy stages (thus division into policy formulation, implementation and evaluation) does not permit to ‘compartmentalise’ specific tools in strict categories. In addition, the particular characteristics of the EU primary law came to the forefront where the Treaties as well as the Charter of Fundamental Rights proved to be on the one hand instruments in their own right, but at the same time provided for the operational contours of the EU action. At the same time, the

¹¹⁷ See for instance the key to presentation of the EU instruments in Chapter 4 of Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2015) 105-124. Amongst the primary law sources, there are the Treaties, acts of the Council of the European Union and the European Council of constitutional character, general principles of EU law. Amongst the secondary law sources, the EU adopts legislative and non-legislative acts – they can take the form of directives, regulations, and decisions. Soft law sources are considered outside of the hierarchy of norms section – in the section focusing on the form of the legal sources.

distinction into tools used for conceptualisation, operationalization and evaluation offer a very logical approach, tracing the development of policy solutions from the birth of an idea to its full realisation.

Having considered the above, the authors of this report concluded that in order to categorise the tools taking into account all approaches – combining the above categorisations must be found. Through partially blending the above presented categories, a ‘functional approach’ is proposed. In this approach, tools are linked with the functions they are to fulfil. Policy documents are about identifying and realising objectives in a time frame. These need to be concretised through either adopting and implementing sources of law or undertaking specific activities, or engaging in concrete processes available in a given area (internally for instance collaborative sub-national measures, externally through diplomatic channels). Should these prove unsuccessful, one needs tools which serve enforcement. Finally, throughout the process the attainment of the objectives is monitored – and for that tools for measurement and evaluation must be used.

As a starting point, it was assumed that internal and external policy tools should be treated separately. Secondly, when presenting the EU policy process, the logic of following the birth of a policy objective until its full realisation in practice and evaluation is followed. At the same time, it must be noted that whenever a policy objectives are set, conceptualisation will continue until their evaluation, operationalization will feed conceptualization and evaluation, and evaluation will be present in subsequent conceptualization exercise. The borders even between these concepts are very difficult or impossible to establish even on a case-by-case basis. The authors of this report decided to apply the defined logic, yet without attempting to use it rigorously to delineate between the groups of existing instruments.

In their view, a part of this logic demonstrates itself in two aspects. Firstly, it is about the concretisation of norms, which starts from drafting the contours of the policy to its detailed depiction in the soft law frameworks adopted to aid the implementation of hard law tools in specific contexts. On the other hand, it will be about designing subject specific implementation tools that possibly do not correspond to the classical legal approaches as to what it means to implement a norm.

Once the tools are adopted in line with the general design of the EU and international systems, they can be enforced with the use of existing coercive mechanism.

Finally, there is a vast category of tools used to monitor, measure, and evaluate the progress made – in this particular case on human rights. These will both provide for the possibility of analysing the existing mechanisms and will contribute to the vast category of experiences used for conceptualisation of the policy objectives.

Following the considerations described above, and in the light of the reflection performed so far in the FRAME research, the authors of this report adopted the following organisational approach to the presentation of the policy tools:

Table 2: Organisational Logic of the Toolbox Presentation

Internal	External	Categories	Function
Policy documents (e.g. Stockholm Programme)	Policy Documents (e.g. Strategic Framework and Action Plan)	Soft law, conceptualisation and operationalization	Objective-setting
Sources of law (distinction according to form and content; focus on human rights specific and non-specific tools, accompanied by the soft law instruments)	Sources of law (multi- and bilateral international agreements, unilateral instruments adopted by the EU accompanied by the soft law instruments)	Hard and soft law, mainly operationalization (but contributing to conceptualization and evaluation)	Concretisation of the objective through documents
Specific implementation instruments characteristic for internal fundamental rights policy Open Method of Coordination	Specific implementation instruments characteristic for external human rights policy (e.g. tools available on international forums)	Mainly soft, but sometimes hard measures, operationalization (but contributing to conceptualization and evaluation)	Process towards objective attainment
Judicial and other remedies – the EU Fundamental Rights Protection System (courts and other remedies)	Enforcement mechanisms	Hard law measures, hard power measures (if possible)	Enforcement
Tools used to measure or evaluate progress on human rights (qualitative reports, indicators, impact assessments)	Tools used to measure or evaluate progress on human rights (qualitative reports, indicators, impact assessments)	Soft law, evaluation (but used also for conceptualisation and operationalization purposes)	Checking against the advancement of policy objectives

The below sections follow the above logic presenting briefly specific categories of tools in the light of FRAME research results. Each of the tools shall be briefly described in general terms. Secondly, chief challenges connected with the use of the tool shall be identified on the basis of FRAME results and beyond, in particular pointing to the anticipated future research results.

B. Internal Fundamental Rights Tools

1. Strategic Policy Documents – Conclusions of the European Council and the Council of the European Union

a) General comments

The European Council conclusions are the instruments serving for the purposes of determining the general directions of European policies. The Treaties provide a general legal basis granting the European Council the power ‘to provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions’ (Art. 15(1) TEU). Similarly, the Council ‘shall carry out policy-making and coordinating functions as laid down in the Treaties’ (Art. 16(1) TEU). The specific legal bases for coordination of various policies are laid down in the relevant chapters of the Treaties.

Council conclusions are immensely useful for the policy analysis process providing for the first impressions as to the content of the policy. Clearly, as any first impressions they will be subject to change in the course of the activity of the European Parliament through its resolutions and the European Commission in its communications. In theory they lay ground for the EU’s ‘philosophy’ on a given matter and permit for evaluation of the level of political commitment.

Within the internal setting, the issues of fundamental rights are considered the matter of Justice and Home Affairs and this is where the specific Council Conclusions shall be adopted under Article 68 TFEU¹¹⁸. Accordingly, the European Council is to define the strategic guidelines for ‘strategic and operational planning for the area of freedom, security and justice’. Here obviously the Charter of Fundamental Rights stands out as a separate legal instrument. There is no single general legal basis pertaining to the setting the strategic policy planning for the Charter of Fundamental Rights. Instead, the conclusions follow the activities of the European Commission with relation to the monitoring of the Charter implementation.

Within the wealth of conclusions issued by the Council, the two specific documents stand out of relevance of the EU human rights policies at large: the Stockholm Program¹¹⁹ (and its subsequent prolongation)¹²⁰ and the EU Strategic Framework and Action Plan for Human Rights and Democracy as

¹¹⁸ See the positioning on the Council agenda of matters relating to fundamental rights. See, for instance: General Affairs Council, Outcome of the Council Meeting Document, 3401st meeting, 23 June 2015, 10228/15.

¹¹⁹ The Stockholm Programme – An open and secure Europe serving and protecting citizens [2010] OJ C 115.

¹²⁰ The detailed program of action for the Justice and Home Affairs – the heir to the Stockholm program is yet to be adopted. For the time being the European Union and its Member States decided to continue the activities towards the full implementation of the Stockholm one. For discussions of the future of the Stockholm programme, see:

adopted in 2012¹²¹ and revised in 2015¹²². These two instruments can be considered as the backbone of EU coherence of the EU action in the area of human rights. The two constitute strategic documents in relation to which the authors of Deliverable 8.1 state the following:

‘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. (...) 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.^{123,124}

Yet, even if the two strategic documents do not achieve coherence, there certainly constitute the first step in this direction. After all, in each one of them, for the first time did the EU institutions step back and list the existing and needed initiatives undertaken in the area of fundamental and human rights policies.

b) The Stockholm Programme

Since 1999 the European Council has provided an initial impetus for the development of the Justice and Home Affairs field of EU policies in the form of the five-year long programs.¹²⁵ Following the Tampere and the Hague Programs, the Stockholm Programme was adopted in 2010 and scheduled to expire in

European Parliamentary Research Service, *Overview* <[www.overview: http://epthinktank.eu/2014/06/25/justice-and-home-affairs-after-the-stockholm-programme](http://epthinktank.eu/2014/06/25/justice-and-home-affairs-after-the-stockholm-programme)> 13 September 2015.

¹²¹ Council of the European Union, ‘EU Strategic Framework and Action Plan on Human Rights and Democracy’ (11855/12).

¹²² Commission, ‘Action Plan on Human Rights and Democracy (2015-2019) "Keeping human rights at the heart of the EU agenda"’ (Communication) JOIN(2015) 16 final; The Council of the European Union, ‘Conclusions on the Action Plan on Human Rights and Democracy 2015-2019’, 10897/15.

¹²³ Regional Office for Europe of the UN High Commissioner for Human Rights, ‘The European Union and International Human Rights’ <http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf> accessed 30 November 2015 6, 8, 11, 31, 31, 50.

¹²⁴ FRAME Deliverable 8.1, op. cit. 78

¹²⁵ Presidency, ‘Tampere European Council 15 and 16 October, 1999 Conclusions’, <http://www.europarl.europa.eu/summits/tam_en.htm>, accessed 30 November 2015; Commission, ‘The Hague Programme: 10 Priorities for the Next 5 Years’, (Communication) COM (2005) 84 final <http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/l16002_en.htm> accessed 30 November 2015.

2014.¹²⁶ The heir to the Stockholm Programme is yet to be adopted, to-date the Member States continue striving towards achieving objectives that have been stipulated in Stockholm Programme's provisions.

The Stockholm Programme followed the logic of the Lisbon reform whereby the AFSJ was incorporated to the main pillar of the EU action with the use of the 'Community method' and the external action aspects in this field became more prominent.¹²⁷ As authors of FRAME Deliverable 11.1 observe in the context of changes introduced by the Stockholm Programme: 'the development of an external dimension of the AFSJ [should be observed] as a change in the Union's external action, rather than merely as a change within the AFSJ (a move from a policy area that is merely internal, to an area that both has an internal and external dimension). The AFSJ has thus caused "the EU to act beyond the classic areas of international cooperation [...] such as trade and development cooperation and foreign security and defence policy."^{128,129}

The Stockholm Programme focused on the following areas:

- 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.¹³⁰

Importantly, the Stockholm Programme was accompanied by an action plan ascribing specific roles to various actors within the EU fundamental rights policy field (the legislative technique adopted when drafting the Strategic Framework and Action Plan for Human Rights and Democracy). On the basis of the Stockholm Programme further documents were adopted aiming at providing coherence in the EU's fundamental and human rights action.¹³¹

¹²⁶ The European Council, 'The Stockholm Programme – An open and secure Europe serving and protecting citizens', op. cit.

¹²⁷ Ibid, Section 1.1.

¹²⁸ Ramses A. Wessel, Luisa Marin and Claudio Matera, 'The External Dimension of the EU's Area of Freedom, Security and Justice' in Christina Eckes and Theodore Konstadinides (eds.), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011) 272.

¹²⁹ FRAME Deliverable 11.1, op. cit. 13.

¹³⁰ The European Council, 'The Stockholm Programme - An Open and Security Europe Serving and Protecting Citizens', op. cit.

¹³¹ See: FRAME Deliverable 8.1, op. cit. 67.

The Stockholm Programme was a starting point of the analysis of the FRAME Deliverable 11.1 pointing to the comprehensiveness of the whole area in which the EU is to ensure justice in connection to security and freedom to the EU citizens. The consultations on the new action plan have so far not provided any result, yet for sure the new strategic document for the EU internal fundamental rights policy is awaited with impatience.¹³² As soon as it is adopted, it will be curious to find out which areas of action has been considered successful in the understanding of the policy makers.

2. Sources of EU law

The category of sources of EU law connects the secondary sources of EU law that are adopted by the EU institutions for the attainment of the objectives specified in the Treaties. Starting off with the Treaties' formulation the analysis will focus on the sources of EU law as defined by the Treaties, bringing in also the instruments to which the Treaties do not explicitly refer.

The acts issued by the European Union, in line with the Treaty provisions, can be divided according to the following criteria: content and form.

- A. On the basis of their content – i.e. whether they provide for essential regulatory elements or non-essential ones, or whether they serve the purpose of introducing common criteria for the implementation of the acts within the Member States:
 - a. Legislative acts (Article 289 (3) TFEU)
 - b. Non-legislative acts
 - i. Delegated acts (Article 291 TFEU)
 - ii. Implementing acts (Article 292 TFEU)
 - c. Complementary instruments not classified in the Treaties

- B. On the basis of their form and subsequent action required to be taken by the Member States:
 - a. Regulations (Article 288 TFEU)
 - b. Directives (Article 288 TFEU)
 - c. Decisions (Article 288 TFEU)
 - d. Recommendations and Opinions (Article 288 TFEU)
 - e. Inter-institutional agreements (Article 295 TFEU)
 - f. Other soft law instruments adopted by the institutions

There is a vast group of tools escaping this rigid formal categorisation – that of 'other' instruments – which will encompass all of the remaining soft law instruments that are issued by the EU Institutions in order to accompany either the general policy process or to guide the implementation processes of specific policy instruments by the Member States (and at times also other institutions or bodies of the Union). Thus, we usually find for each policy area the specific tool accompanied (if necessary) by non-binding policy or soft law instruments. The interaction between two category of tools will be addressed in the subsequent section.

¹³² See, the preparatory documents: Commission, 'The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union' (Communication) COM(2014) 144 final.

Beyond Treaty based acts and soft law instruments, we can list documents according to whether they are human rights specific ones or merely have an impact on human rights.

- A. Human rights specific tools
- B. Non-human rights specific tools

These tools shall be discussed in line with the above structure.

(1) EU Institutions' acts according to their content

(a) *Legislative legal acts*

In general terms, to exercise the Union's competences, the EU Institutions shall adopt legislative and non-legislative legal acts. This differentiation was introduced with the Treaty of Lisbon.¹³³ Legal acts adopted by legislative procedure shall constitute legislative acts.¹³⁴ The legislative legal acts address the essential elements of a specific regulation and are adopted jointly by the Council and the European Parliament in the course of the legislative procedure. This means that every single essential element of the EU policy, which concerns fundamental and human rights issues should be found in legislative acts.

(b) *Non legislative legal acts*

In addition, the European Union institutions, in specific, Treaty determined circumstances, may adopt non-legislative acts. These acts are to complement legislative acts inasmuch as they are to determine the non-essential elements of a specific policy field (delegated acts) and set the common criteria for implementation of legislative acts directed at the Member States (implementing acts).

In the former case, a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.¹³⁵ The delegated acts are adopted by the European Commission in execution of a delegation included in a legislative act of the EU.¹³⁶

For the latter case, the adoption of implementing acts is connected with the fact that these are Member States must implement the acts of the European Union,¹³⁷ and it is on the national level that the chief enforcement takes place. The European Commission provides guidance to the Member States as to how the implementation should proceed and be further ensured in the practice of administrative and judicial organs of the Member States. Implementing acts provide for uniform conditions for implementing EU law by the Member States.¹³⁸

¹³³ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon [2007] OJ C 306, Institutions (17).

¹³⁴ Article 289(3) TFEU.

¹³⁵ Article 290(1) TFEU.

¹³⁶ Article 291 TFEU.

¹³⁷ Article 291(1) TFEU.

¹³⁸ Article 292 TFEU.

Regulation (EU) No 182/2011 of the European Parliament and the Council¹³⁹ lays down the rules and general principles concerning mechanisms for control by EU countries of the Commission's exercise of implementing powers. This control is performed by means of what is known in EU jargon as 'comitology' procedures, i.e. the Commission is assisted by committees consisting of EU countries' representatives and chaired by a representative of the Commission. Any draft-implementing act is submitted to the committee by its chair.¹⁴⁰

As it was indicated in the introductory paragraph, the non-legislative instruments were introduced as a separate category of tools only in 2009 with the entry into force of the Treaty of Lisbon. This means that in many areas there has been so far no opportunity to adopt them. This is the case, for instance, in the non-discrimination field, where the most recent instrument (Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law) was introduced before the Treaty of Lisbon came into force.

The classification of instruments on the basis of their content bears significance for the possible future developments in the EU fundamental rights protection area. In particular, especially the implementing acts may be considered as adequate tools not only to encourage but also to advance implementation of human rights specific instruments. Furthermore, it will be curious to observe and analyse the utility of the implementing acts for the enhancement of the implementation of the Charter of Fundamental Rights in the Member States.¹⁴¹

(c) Complementary instruments not classified in the Treaties

Beyond legislative legal acts and non-legislative legal acts, the EU institutions, agencies and other bodies produce a number of fundamental rights instruments that do not fall into the above categories as they are not classified in the Treaties but remain important tools of policy conceptualization, operationalization and evaluation – especially from a practical point of view.

Especially within the AFSJ, the EU institutions have adopted non-binding measures, such as roadmaps, strategies, action plans, handbooks, and guides on best practices, etc. containing not only guidance on how EU law should be implemented/interpreted but also more general guidelines to improve AFSJ practices.¹⁴² In this regard, the Stockholm Programme explicitly recognises that: "The development of action at Union level should involve Member States' expertise and consider a range of measures,

¹³⁹ Council and Parliament Regulation (EU) 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L 55.

¹⁴⁰ European Union legal acts, Summaries of EU legislation <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:ai0032>> accessed 26 January 2016

¹⁴¹ The choice between implementing and delegated acts is up to institutions entrusted with their adoption. See: CJEU, Case C-427/12, para 40 as cited in *EU Law: Text, Cases, and Materials* (Oxford University Press 2015).

¹⁴² FRAME Deliverable 11.1, op. cit. 82.

including non-legislative solutions such as agreed handbooks, sharing of best practice [...] and regional projects that address those needs, in particular where they can produce a fast response.”¹⁴³

It is also very common, that internal legislative acts are equipped with their own implementation or enforcement mechanisms, which are often of procedural character. Nevertheless, the adoption of soft law instruments is lacking procedural decision-making exigencies. Therefore, the focus should be on the issue they intend to tackle and if it is essential within a specific policy area, the matter should be regulated through a legislative legal act rather than by a soft law instrument.

Criticism towards the use of non-legislative instruments also touches upon the policy significance given to evidence (in particular risk assessments) generated by agencies, as well as the unclear legal status of working arrangements concluded by agencies and third countries.¹⁴⁴ Further concerns regarding technocratisation, expertisation and agencification are discussed in Deliverable 11.1.¹⁴⁵ Here the main concern is the power of these entities, as usually they are not entrusted with decision making powers – unless their foundational document allows them to submit their opinion or recommendation.

In fact, regulatory powers of the EU agencies have been increasingly under the spotlight of the EU scholars. There are over 40 agencies in the EU that are distinctive bodies from the EU Institutions set up by secondary legislation to perform specific tasks under EU law.¹⁴⁶

- Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L63/1.
- European Commission: Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust) [2013] COM(2013) 535 final.
- Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency [2004] OJ L77/1.
- Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1, as amended by Regulation (EC) No 863/2007 OJ L 199/30.
- European Commission: Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union [2005] COM(2005) 280 final.
- Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1.

¹⁴³ European Council, ‘The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens’, op. cit.

¹⁴⁴ FRAME Deliverable 11.1, op. cit. 83.

¹⁴⁵ FRAME Deliverable 11.1, op. cit. 146-149.

¹⁴⁶ European Union, ‘Agencies and other EU bodies’, <http://europa.eu/about-eu/agencies/index_en.htm> accessed 27 January 2016.

- European Commission: Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA [2013] COM(2013) 173 final.
- Council Decision (EU) 2009/371/JHA establishing the European Police Office (Europol) [2009] OJ L 121/37.
- Regulation (EU) No 1077/2011 of the European Parliament and of the Council of 25 October 2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2011] OJ L286/1.
- Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2011] OJ L304/1.
- Regulation (EU) No 526/2013 of the European Parliament and of the Council of 21 May 2013 concerning the European Union Agency for Network and Information Security (ENISA) and repealing Regulation (EC) No 460/2004 [2013] OJ L165/41.
- Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L180/1.

Some of the instruments regulate the cooperation of the agencies with each other or with EU Institutions, as well as other regional human rights organisations:

- Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2010] OJ L111/20.
- Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe [2008] OJ L186/7.

By other instruments, the EU Institutions regulate and monitor the agencies operation:

- Council Decision 252/2013/EU of 11 March 2013 establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights [2013] OJ L79/1.
- European Commission Communication 'The operating framework for the European Regulatory Agencies' [2002] COM(2002) 718 final.

- Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralized agencies [2012] 19 July 2012.
- Roadmap on the follow-up to the Common Approach on EU decentralised agencies [2012] 19 December 2012.

Agencies mainly perform tasks of technical, scientific, operational and/or regulatory nature. They also serve as bridge between the EU and national governments by providing technical and specialist expertise from and to the EU Institutions and national authorities.¹⁴⁷ They do so typically through soft law instruments.

Within FRAME research, it has been noted that the use of soft law and informal practices by agencies might escape fundamental rights scrutiny.¹⁴⁸ Not only the nature of the tool they produce but the “technical and specialist expertise” they provide might be problematic as its nature defers from agency to agency. Different ways of data collection or different interpretations of terms “research” or “intelligence” may lead to different understanding of role as a producer of knowledge having an overall impact on the reliability of the knowledge produced.¹⁴⁹ Scholars also observed that there is an increasing reliance on agencies in the implementation of AFSJ policies.¹⁵⁰ Therefore, authors call for enhanced agency accountability pointing to transparency, visibility, and participation as chief principles on which agencies activities should be based.¹⁵¹

(2) EU Institutions’ acts according to the form

Both legislative and non-legislative acts can take forms of regulations, directives and decisions. The Treaty on the Functioning of the European Union (TFEU) determines the characteristic features, applicability and binding force of these acts as follows in Article 288.

(a) Regulations

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all the Member States.

(b) Directives

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety.

¹⁴⁷ FRAME Deliverable 11.1, op. cit. 40.

¹⁴⁸ FRAME Deliverable 11.1, op. cit. 127.

¹⁴⁹ FRAME Deliverable 11.1, op. cit. 147-148.

¹⁵⁰ FRAME Deliverable 11.1, op. cit. 146.

¹⁵¹ On extensive analysis of activities and accountability of EU executive agencies, see: Madalina Busuioc, *European Agencies: Law and Practices of Accountability* (Oxford Scholarship Online, May 2013).

(c) Decisions

A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force.¹⁵²

Of all the instruments of the EU the last ones are of interest from the point of view of this analysis.

(d) Recommendations and Opinions

Recommendations and opinions are the only species of soft law directly evoked in a Treaty provision. According to Article 292 of the TFEU, the Council, the Commission, and the European Central Bank may adopt recommendations.

For example, particularly important from the point of view of fundamental rights protection system, is the power of the Council to hear any Member State and address recommendations to it if there is a clear risk of a serious breach by that Member State of the values referred to in Article 2 of the TEU.

Opinions, on the other hand, can be issued by the European Commission, the Council, the Parliament, the European Court of Justice, the Committee of the Regions and the European Economic and Social Committee. There are certain areas where opinions are typically given. For example, once a country submits an application for EU membership to the Council, the Commission is tasked with elaborating an opinion on this application, assessing how far the country in question fulfils the conditions of membership eligibility as laid out by the European Council.¹⁵³ Further examples can be seen in the field of finance, as there, for instance, the Commission is supposed to offer an opinion to the EIB on the conformity of the project with relevant EU legislative acts and tools, which include human rights obligations.¹⁵⁴

Importantly, as Craig and de Búrca point out, these measures cannot produce direct effect, but they are not immune from the judicial process.¹⁵⁵ A national court may, for example, ‘make a reference to the ECJ concerning the interpretation or validity of such measure’ as confirmed in the judgment *Grimaldi v Fonds des Maladies Professionnelles*.¹⁵⁶

The EU Agency for Fundamental Rights (FRA) must be mentioned here as an example of a body which issues opinions of particular importance for the EU fundamental rights protection. Its task is to provide evidence based advice to decision makers in the EU Institutions and to guide Members States in implementing EU law.¹⁵⁷ When acting on a request from EU institutions, FRA can deal with all issues that fall within the scope of EU competencies. When acting on its own initiative, FRA’s engagement is restricted by the focus of the multi-annual framework.¹⁵⁸ The multi-annual framework adopted in 2013

¹⁵² Article 288 TFEU.

¹⁵³ FRAME Deliverable 6.1, op. cit., 129

¹⁵⁴ FRAME Deliverable 7.2, op. cit. 82

¹⁵⁵ Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2015) 107.

¹⁵⁶ CJEU, Case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407.

¹⁵⁷ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1.

¹⁵⁸ *Ibid.* Article 5(3).

established that FRA shall carry out its tasks in the following areas: access to justice; victims of crime including compensation to victims; information society and, in particular, respect for private life and protection of personal data; Roma integration; judicial cooperation (except in criminal matters); rights of the child; discrimination; immigration and integration of migrants, visa and border control and asylum; and racism, xenophobia and related intolerance. Notably, this excludes police cooperation and judicial cooperation in criminal matters from the ambit of FRA's work.

In this area, due to the lacking control exercised by FRA, the need for ensuring independent judiciary, as well as enforcement bodies at the national level is emphasised by the FRAME researchers.¹⁵⁹ Deliverable 2.1 states that human rights are dependent primarily on state institutions in terms of enforcement as international enforcement mechanisms are relatively weak.¹⁶⁰ It is equally important that there exists effective judicial enforcement mechanisms, such as courts, that can ensure that legal standards on human rights protection are implemented and enforced in practice.¹⁶¹ The importance of the establishment of independent and efficient judicial systems at the national level has been discussed also in the context of accessions. For example, more recently effective and accountable law enforcement institutions were one of the pre-conditions to prepare for membership of Western Balkan countries.¹⁶²

(e) Inter-institutional agreements

According to Article 295 TFEU 'the European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude inter-institutional agreements which may be of a binding nature'. From the fundamental rights perspective this tool is of relevance in particular where fundamental rights lay at the heart of the policy making. In particular, the recent 2015 Proposal for an Inter-institutional Agreement on Better Regulation provides for the European Commission obligation to explain the effects of its legislative proposals on fundamental rights and the enhanced importance of impact assessments:

The Commission will also explain in its explanatory memoranda how the measures proposed are justified in the light of the principles of subsidiarity and proportionality and are compatible with fundamental rights. The Commission will also give an account of both the scope and the results of any stakeholder consultation, ex-post evaluation of existing legislation and impact assessment that it has undertaken.¹⁶³

¹⁵⁹ FRAME Deliverable 3.1, op. cit. 30.

¹⁶⁰ FRAME Deliverable 2.1, op. cit. 30.

¹⁶¹ FRAME Deliverable 2.1, op. cit. 42.

¹⁶² European Commission, 'On the Stabilisation and Association Process for Countries of South-Eastern Europe' (Communication) COM (1999) 235 final.

¹⁶³ European Commission, 'Proposal for an Inter-institutional Agreement on Better Regulation', COM(2015) 216 final 7.

(f) Other soft law instruments adopted by the EU institutions

(i) Council of the European Union's documents

The Council of the European Union adopts not only legal acts but also documents such as draft conclusions, resolutions and statements, which do not have legal effects. They reflect the Council's political position on one or the other topic related to EU activities and set out future work foreseen in the specific policy area, including inviting the Commission to make a proposal or take further action. Regarding their adoption process, Council conclusions are adopted after a debate during a Council meeting. In relation to fundamental rights, the following internal documents can be mentioned:

- Draft Council Conclusions, Strategic engagement for gender equality and Actions to advance LGBTI equality (8 January 2016), ST 15299 2015 INIT.
- Council Conclusions, Equality between women and men in the field of decision-making (7 December 2015), ST 14327 2015 INIT.
- Council Conclusions, Advancing gender equality in the European Research Area (1 December 2015), ST 14846 2015 INIT.
- Draft Council Conclusions on measures to handle the refugee and migration crisis (9 November 2015), ST 13799 2015 INIT.
- Draft Council Conclusions on supporting people living with dementia: improving care policies and practices (28 October 2015), ST 13261 2015 INIT.
- Council Conclusions, Gender Action Plan 2016-2020 (26 October 2015), ST 13201 2015 INIT.
- Council Conclusions on Migration (12 October 2015), ST 12880 2015 INIT.
- Draft Council Conclusions on the future of the return policy (6 October 2015), ST 12420 2015 COR 1.
- Draft Council Conclusions, A new Agenda for Health and Safety at Work to foster better working conditions (6 October 2015), ST 11072 2015 INIT.
- Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019 (20 July 2015), ST 10897 2015 INIT.
- Draft Council Conclusions on the Eurojust Annual Report 2014 (15 July 2015), ST 10323 2015 REV 1.
- Council Conclusions, Equal income opportunities for women and men: Closing the gender gap in pensions (19 June 2015), ST 10081 2015 INIT.
- Draft Council Conclusions on the application of the Charter of Fundamental Rights in 2014 – Adoption (12 June 2015), ST 9319 2015 INIT.

(ii) European Commission's tools

The conclusions adopted by the European Council and the Council of the European Union are further processed, altered and transformed into more concrete policy proposals. This usually takes the form of the Commission Communications and Staff Working Papers. As a rule these are drafted by one of the

DGs, consulted according to the internal, often oral (and because of this informal) procedures¹⁶⁴ and approved by the College of Commissioners. They constitute the first step towards the implementation of any policy within and beyond the European Union. In addition, they formulate proposals that can be subsequently adopted in the form of conclusions a legislative bills. It must be asserted that the conclusions and the Commission documents affect one another with the latter performing double function and serving the purposes of policy formulation and implementation.

For example, since 2005 the European Commission has been striving to induce the Charter compliance actions on the part of the EU and its Member States even before the entry into force of the Lisbon Treaty and granting of the binding force to the provisions of the Charter of Fundamental Rights.¹⁶⁵ The actual Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union was adopted in 2010.¹⁶⁶ Importantly, apart from other substantive issues, the strategy calls for the development of impact assessments and emphasize the need for the monitoring of the Member States Charter compliant implementation of EU law and possible enforcement proceedings. The Commission has subsequently addressed these issues in the Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments.¹⁶⁷ The document purports to be 'for Commission staff preparing impact assessments and for impact assessment support units.'¹⁶⁸

The above-cited communications of the European Commission constitute the chief human rights specific ones. Virtually for every policy area there are developed policy documents, which build on one another, making the earlier ones more precise and focused. The content of the Commission Communications find its reflection in the subsequently adopted legislative acts or provides guidance for the implementation of specific instruments (See [Section III.B.2.b](#)).

(iii) *European Parliament's tools*

The European Parliament adopts Resolutions, which are not legally binding instruments. They mainly contain suggestions on desired actions in the given policy field and on guidelines for coordination of national legislations or administrative practices.

The European Parliament Committees monitoring EU policies produce reports and opinions. They often invite the relevant Members of the European Commission to provide with their expert explanations before the Committee or the plenary itself. Even if these reports and opinions prepared by specialist committees have no legally binding force, they often influence Commission proposals and hence

¹⁶⁴ European Commission, Rules of Procedure, OJ 2000 L 308/26.

¹⁶⁵ European Commission, 'Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union', COM(2010) 573 final, 8, Commission, 'Compliance with the Charter of Fundamental Rights in Commission legislative proposals - Methodology for systematic and rigorous monitoring' (Communication) COM(2005) 172 final.

¹⁶⁶ European Commission, 'Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' (Communication) COM(2010) 573 final.

¹⁶⁷ European Commission, 'Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments' (Staff Working Paper) SEC(2011) 567 final.

¹⁶⁸ Ibid. 3.

common policies. Their added value lies in their content that builds on extensive expert knowledge of the areas relevant for the integration process.¹⁶⁹

b) Human rights-based categorization

The above analysis focused on the Treaty based, very formal understanding of EU internal policy tools. Yet from the point of view of fundamental rights considerations, we may further categorise the EU internal tools into these that focus solely on human rights issues and these that address other areas, which have or may have, however, very clear human rights implications.

(1) Human rights specific tools

The policies of the EU cover several topics and are framed in various contexts, often with one theme that must be addressed by several institutions and policies at once. As a result, the EU engages to some extent in virtually every major human rights area, both in the realm of civil and political rights as well as economic, social and cultural rights (ESCR).¹⁷⁰ Considering human rights specific tools, the most advanced policy areas are non-discrimination, data protection and the right to fair trial. These are also the ones adopted on a specific competence basis to be found in the Treaties.

(a) Non-discrimination

The EU's equality and anti-discrimination law and tools have seen a remarkable proliferation over the last decades. The principles of non-discrimination and equality have been core values of EU's foundations from its early days. Already the Treaty establishing the European Coal and Steel Community signed in Paris on 18 April 1951 contained a stipulation to remove limitations on employment with regard to nationality. The Treaty of Rome (1957) required equal pay between men and women, and provided the competence to develop the first equality directives. Since then, the number of provisions on equality and anti-discrimination has been growing in primary law. Subsequently, also a considerable amount of secondary law on non-discrimination has been adopted developing further the policy area promoting equality and combating discrimination.¹⁷¹

Since the Treaty of Amsterdam (1997), the EU Council was given specific powers to unanimously adopt legislation to combat discrimination and to extent the scope of prohibition and protection against discrimination from only covering gender equality and nationality, to also cover discrimination on the bases of racial or ethnic origin, religion or belief, disability, age or sexual orientation.¹⁷² In 2000, after a good deal of pressure by NGOs, the Council of Ministers adopted two key pieces of EU anti-discrimination legislation: the Racial Equality Directive (Race Directive)¹⁷³ implementing the principle of

¹⁶⁹ European Parliament, European Parliament Committees <<http://www.europarl.europa.eu/committees/en>> accessed 25 January 2016.

¹⁷⁰ FRAME Deliverable 4.2, op. cit. 118.

¹⁷¹ FRAME Deliverable 2.2, op. cit. 4.

¹⁷² Treaty of Amsterdam, Article 13 (Art. 19 TFEU).

¹⁷³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180 22–26.

equal treatment between persons irrespective of racial or ethnic origin in many areas of social life and the Employment Equality Framework Directive (General Framework Directive).¹⁷⁴

Article 19 TFEU confers on the EU the power to take appropriate action to combat discrimination on grounds of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation. In addition, there are other references in the Treaties aiming, for example, to address discrimination and enhance equality between men and women (e.g. Article 8 and Article 157 of the TFEU). Based on this legal foundation provided by EU primary law, a broad range of secondary legal acts has been adopted over the years.¹⁷⁵

In line with the previous comments, Council Directives and Regulations formulate specific objectives for the Member States.¹⁷⁶ Each of these measures on different aspects of non-discrimination are accompanied by soft law policy frameworks that further elaborate the given policy area.

- Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006) [2000] OJ L 303/23.
- European Commission Communication 'Non-discrimination and equal opportunities: A renewed commitment' COM (2008) 420 final.
- European Commission, DG Justice, 'Discrimination in the EU in 2012. Summary' [2012].
- Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L 045.
- Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 039.
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23.
- European Commission Communication 'A Strengthened Commitment to Equality between Women and Men: A Women's Charter' COM (2010) 78 final.
- European Commission, 'Strategy for equality between women and men 2010-2015' COM (2010) 491 final.
- European Commission, 'Actions to implement the Strategy for Equality between Women and Men 2010-2015 Accompanying the Strategy for Equality between Women and Men 2010-2015' (Staff Working Document) SEC (2010) 1079/2.
- European Commission, 'Accompanying the Strategy for Equality between Women and Men 2010-2015' (Staff Working Document) SEC (2010) 1080 final.

¹⁷⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303 16–22.

¹⁷⁵ FRAME Deliverable 4.2, op. cit. 93.

¹⁷⁶ Section II. B. 3.

- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.
- 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' COM (2008) 426 final.¹⁷⁷

The table below shows that hard law instruments can be arranged based on specific topics and each of them is matched by one or more soft law instruments.

¹⁷⁷ FRAME Deliverable 2.2, at 51. For more soft law instruments on non-discrimination, see the European Commission's website: <http://ec.europa.eu/justice/discrimination/index_en.htm> accessed 15 January 2016.

Table 3: Non-discrimination Hard Law and corresponding Soft Law instruments

Hard law instruments	Soft law instruments
Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006) [2000] OJ L 303/23.	European Commission Communication 'Non-discrimination and equal opportunities: A renewed commitment' COM (2008) 420 final. European Commission, Justice, 'Discrimination in the EU in 2012. Summary' (Directorate-General for Justice 2012).
Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L 045.	European Commission Communication 'A Strengthened Commitment to Equality between Women and Men: A Women's Charter' COM (2010) 78 final.
Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 039.	European Commission, 'Strategy for equality between women and men 2010-2015' COM (2010) 491 final. Commission, 'Actions to implement the Strategy for Equality between Women and Men 2010-2015 Accompanying the Strategy for Equality between Women and Men 2010-2015' (Staff Working Document) SEC (2010) 1079/2.
Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23.	European Commission, 'Accompanying the Strategy for Equality between Women and Men 2010-2015' (Staff Working Document) SEC (2010) 1080 final.
Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.	

The final Racial Directive has an exceptionally dense policy and soft law setting in relation to the area of Roma inclusion. There several soft law instruments have been adopted for the promotion of the inclusion of EU's largest ethnic minority. Roma policies were mostly a matter of external action for the EU. As the result of the accession of Eastern European countries, where significant number of Roma people live, Roma policies became internal actions.¹⁷⁸ On the Member States' side more and more non-compliance cases can be detected,¹⁷⁹ while the EU is trying to act. The Commission, especially DG JUST having the lead in Roma policy, adopts mainly soft law instruments. The policy documents emphasise

¹⁷⁸ FRAME Deliverable 12.1, op. cit. 145.

¹⁷⁹ For example: *D.H. and Others v. The Czech Republic* (2009) App no 57325/00 (ECHR, 7 February 2006).

both the protection and the participation of Roma in the policy making and the European societies at large.¹⁸⁰

- European Commission, Employment & social affairs, 'The Situation of Roma in an Enlarged European Union' (Office for Official Publications of the European Communities 2004).
- European Commission Communication 'The social and economic integration of the Roma in Europe' COM (2010) 133 final.
- European Commission, 'An EU Framework for National Roma Integration Strategies up to 2020' COM (2011) 173 final.
- European Commission, 'National Roma Integration Strategies: a first step in the implementation of the EU Framework' COM (2012) 226 final.
- European Commission, 'Steps Forward in Implementing National Roma Integration Strategies' COM/2013/0454 final.
- European Commission, DG Justice, 'What works for Roma inclusion in the EU: policies and model approaches' [2012].
- European Commission, 'Report on the implementation of the EU Framework for National Roma Integration Strategies' [2014] COM (2014) 209 final.
- European Commission, DG Justice, 'EU and Roma' [2014].

(b) Data protection

The EU's fundamental rights architecture addresses data protection in an innovative manner building on a separate legal basis is provided both in the CFR and the TFEU. The right to privacy is part of the EU Charter of Fundamental Rights and Freedoms (Article 7 and 8). The right to privacy protects the integrity of the individual and his or her home, family, and correspondence, and is frequently expressed as a precondition for a free and open society, including for the right to freedom of expression. In the following focus is given to informational privacy and related protection measures such as data protection laws and agencies. The EU is often claimed to have one of the strongest data protection regimes worldwide.

In the area of data protection, it is almost impossible to maintain the traditional division between the EU's internal and external policies – as data flows across borders and violations may occur from internal and external sources. In the course of FRAME, two reports are of particular relevance of data protection. One is Deliverable 11.1, where it relates to SIS I, SIS II, and VIS; and Deliverable 2.1, where it relates to cloud computing, big data, extra-territorial data protection, and cyber security. The EU data protection regime, however, has been under revision since 2010, and several controversies remain.¹⁸¹

Based on FRAME research, the following tools can be listed:

¹⁸⁰ FRAME Deliverable 12.1, op. cit. 149.

¹⁸¹ FRAME Deliverable 2.1, op. cit. 156.

- Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, 23.11.1995, p. 31–50.
- Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (amended by Directives 2006/24/EC and Directive 2009/136/EC).
- Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community Institutions and bodies and on the free movement of such data OJ L 8, 12.1.2001.
- Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350, 30.12.2008, p. 60–71.
- European Parliament (2012), Resolution on a Digital Freedom Strategy in EU Foreign Policy.
- European Parliament (2013), Resolution on the US National Security Agency surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' privacy.
- European Parliament (2014), Resolution on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights.
- Council of the European Union, EU Human Rights Guidelines on Freedom of Expression Online and Offline' [2014].
- European Commission (2010), Digital Agenda. Brussels: European Commission.
- European Commission (2011), Compact for the Internet. Brussels: European Commission.
- European Commission (2011), Draft Recommendations for Public Private Cooperation to Counter the Dissemination of Illegal Content within the European Union.
- European Commission (2011), No-disconnect strategy. Brussels: European Commission.
- European Commission (2011), Partnership for Democracy and Shared Prosperity with the Southern Mediterranean. Com (2011) 200 final.
- European Commission (2012), Code of EU Online Rights. Brussels: European Commission.
- European Commission (2012), Unleashing the Potential of Cloud Computing in Europe. Brussels: European Commission.
- European Commission (2013), Cybersecurity Strategy. Brussels: European Commission.
- European Commission: Proposal for a directive concerning a high common level of network and information security across the Union [2013] COM (2013) 48 final.
- European Commission (2013), Regulation laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent. COM (2013) 627.

The Directive on Data Protection is a relatively old instrument (1995).¹⁸² Since its acceptance, dynamic changes have happened in this policy field. Therefore, it is not an accident that the accompanying soft

¹⁸² Council and the European Parliament Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

law instruments as listed above focus on recent developments in the data protection field, such as digital freedom, surveillance, cyber-security etc.

In 2014, within the key challenges related to human rights issues, the Commission has listed also data protection and privacy among border management, consumer protection, citizen's rights, and labour rights.¹⁸³ Concrete policy formulation steps have been made as a general data protection regulation was submitted on 25 January 2012 to the Parliament. The first reading took place in March 2013. Since 1 September 2014, it has been subject to inter-institutional negotiation procedures resulting with a partial general understanding being reached on the content. The future instrument and areas still need to be elaborated. The last debate in the Council took place on 4 December 2014.¹⁸⁴

(c) The right to fair trial

The right to a fair and impartial administration of justice is enshrined in the Charter of Fundamental Rights of the EU. Chapter IV relating to justice issues contains the right to an effective remedy and to a fair trial (Art 47), presumption of innocence and right of defence (Art 48), principles of legality and proportionality in criminal offences and penalties (Art 49), and the right not to be tried or punished twice in criminal proceedings for the same criminal offence (Art 50).

The Treaty on the Functioning of the EU states that the European Parliament and the Council may establish minimum standards in order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension by mean of directives.¹⁸⁵

Recent years have seen several developments aimed at overcoming gaps in criminal procedure standards across the EU, with several policy and legal measures undertaken towards strengthening (and harmonising) these standards.

In 2009, a roadmap on procedural rights was adopted by the Council of the EU:

- Council of the European Union, 'Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings' 15434/09 [2009].

The roadmap set out six priority areas to be developed by the Commission through legislative initiatives, namely directives:

- Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1.

¹⁸³ Commission, 'Work Programme 2014' COM(2013) 739 final.

¹⁸⁴ European Parliament, Legislative Observatory, Personal data protection: processing and free movement of data (General Data Protection Regulation), 2012/0011(COD) <<http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0011%28COD%29&l=en>> accessed 29 January 2016.

¹⁸⁵ Article 82(2) TFEU.

- Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.
- Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1.
- Directive on the presumption of innocence and the right to be present at trial in criminal proceedings.¹⁸⁶
- Directive on special safeguards for children.¹⁸⁷
- Directive on the right to provisional legal aid.¹⁸⁸

These legislative proposals were complemented by two Commission Recommendations to Member States on procedural safeguards for vulnerable people and on the right to legal aid.¹⁸⁹

The prioritisation of support for the right to a fair trial is also reflected in its inclusion in the Strategic Framework and Action Plan on Human Rights and Democracy as a priority.¹⁹⁰

(d) Other areas¹⁹¹

Non-discrimination, data protection and the right to fair trial are examples of human rights areas where the EU Institutions and other bodies formulate the biggest number of human rights specific policy tools. Clearly, there are further human rights concerns addressed through the EU tools very often connecting more human rights. For example, freedom of expression in the context of racism and xenophobia:

- Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.
- Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law – COM (2014) 27 final.

Freedom of religion or belief in connection to discrimination and equality:

¹⁸⁶ The proposal was approved with amendments during the first reading in the European Parliament on 20 January 2016.

¹⁸⁷ "The text is currently being examined by legal-linguists. Subsequently to this examination and the vote in the European Parliament, the Committee will again be invited for confirmation so as to allow the Council and the European Parliament to formally adopt the Directive." Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM (2013) 822, discussion within the Council (11 January 2016), ST 5096 2016 INIT.

¹⁸⁸ The last discussion within the Council took place on 13 March 2015.

¹⁸⁹ The Right to... - a Fair Trial! Commission wants more safeguards for citizens in criminal proceedings (Press release) [2013].

¹⁹⁰ FRAME Deliverable 12.1, op. cit. 114.

¹⁹¹ FRAME Deliverable 12.1, op. cit.

- Council Conclusions on freedom of religion or belief, 2973rd General Affairs Council meeting, Brussels, 16 November 2009.
- Council Conclusions on intolerance, discrimination and violence on the basis of religion or belief, 3069th Foreign Affairs Council meeting, Brussels, 21 February 2011.

Protecting vulnerable groups such as LGBTI, children, persons with disabilities:

- Council of the European Union, 'Guidelines to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons' [2013].
- Council of the European Union, 'EU Guidelines for the Promotion and the Protection of the Rights of the Child' [2007].
- European Commission, 'Towards an EU Strategy for the Rights of the Child' COM (2006) 367 final.
- European Commission, 'Staff working document accompanying the European Disability Strategy 2010-2020: A Renewed Commitment to Barrier-Free Europe' SEC (2010) 1323 final COM (2010) 636 final.

Clearly, recalling lack of specific competence provisions of the Treaties relating to particular fundamental rights, it is no wonder that few instruments have been adopted focusing on other rights than the ones described earlier. In these areas the EU Institutions operate mostly through soft law instruments.

(2) Non-human rights specific tools

Tools of this category were adopted in one of the other policy areas without having an exact focus on the promotion or protection of human rights, thus owing to the nature of the policy area or the application of the policy tool, human rights are indirectly affected.

Regarding internal policies, the AFSJ is the most advanced policy area, where a high number of policy tools were adopted in relation to 'Border checks, asylum and immigration', 'Judicial cooperation in criminal law matters and police cooperation', and 'Judicial cooperation in civil law matters'. Beyond these topics, the AFSJ also disposes general overarching governing rules adopted by the EU Institutions:

- European Council Conclusions of 26-27 June 2014, which contain 'Strategic Guidelines' for the next AFSJ cycle.
- European Commission Communication, 'An Open and Secure Europe: Making it Happen'.
- European Commission Communication, 'The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union'.
- European Commission Communication 'A New EU Framework to Strengthen Rule of Law'; the European Parliament's 'Report on the Mid-Term Review of the Stockholm Programme'.

(a) Border checks, asylum and immigration:

EU policies relating to the area of human mobility and migration, i.e., migration, border control, visa systems, return and readmission, asylum, are among the more visible in terms of their impact on human

rights and, in the last years, have attracted growing criticism to the EU's normative narrative as a global actor.¹⁹²

The EU cooperation in relation to border controls, visas, immigration and asylum may affect many different fundamental rights guaranteed by the Fundamental Rights Charter, such as the right to seek asylum (Article 18), the right to protection against torture and inhuman or degrading treatment (Article 4), the right to protection in the event of removal, expulsion or extradition (Article 19), and the right to respect for family life (Article 7, including the right to family reunion and to visit family members). Furthermore, the TFEU explicitly provides that third-country nationals must be treated fairly if they reside legally in Member States (Article 79 TFEU) and that the common policy on asylum, immigration and external border control shall be fair towards third-country nationals (Article 67(2) TFEU).

In the EU's own policy documents/reports and in academic literature the following fundamental/human rights issues in particular have been identified within the field of border controls, migration and asylum: access to the EU; human-rights friendly border checks; data protection/right to privacy and large-scale databases; human-rights friendly treatment of non-EU-citizens who have entered the Union; human-rights friendly treatment of irregular migrants; Human-rights friendly treatment of potential irregular migrants and former irregular migrants in States with which the EU cooperates; outsourcing of State functions to private actors; the principle of mutual trust.¹⁹³

A big number of policy tools formulate general principles, methods and procedures that Member States shall consider when dealing with border checks, asylum and immigration:

- Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12.
- Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals [2002] OJ L157/1, as amended by Council Regulation (EC) No 380/2008, OJ L115/1.
- Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1-50/10.
- Council Directive 2003/9(CE) of 27 January 2003 laying down minimum standards for the reception of asylum seekers.
- European Commission, 'Report of 26 November 2007 on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers'.
- European Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of

¹⁹² FRAME Deliverable 12.2, op. cit. 102.

¹⁹³ FRAME Deliverable 11.1, op. cit. 98-106.

Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

- Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.
- Council Directive 2005/85 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13..
- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status of refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).
- European Commission, 'Communication on enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust' COM (2011) 835 final.
- European Commission, 'Proposal for a regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund' COM/2011/0751 final - 2011/0366 (COD).
- European Parliament (2012), Resolution on enhanced intra-EU solidarity in the field of asylum (2012/2032(INI)).
- Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31.

Table 4: Border checks, asylum and immigration Hard Law and corresponding Soft Law instruments

Hard law instruments	Soft law instruments
Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12.	
Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals [2002] OJ L157/1, as amended by Council Regulation (EC) No 380/2008, OJ L115/1.	
Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member	European Commission, 'Report of 26 November 2007 on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers'.

<p>States by a third-country national [2003] OJ L 50/1-50/10.</p> <p>Council Directive 2003/9(EC) of 27 January 2003 laying down minimum standards for the reception of asylum seekers.</p>	<p>European Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.</p> <p>European Commission, 'Communication on enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust' COM (2011) 835 final.</p> <p>European Commission, 'Proposal for a regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund' COM/2011/0751 final - 2011/0366 (COD).</p> <p>European Parliament resolution of 11 September 2012 on enhanced intra-EU solidarity in the field of asylum (2012/2032(INI)).</p>
<p>Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.</p>	
<p>Council Directive 2005/85 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.</p>	
<p>Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status of refugees or for persons eligible for subsidiary protection, and for the content of</p>	

the protection granted (recast).	
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With some policy tools, the EU Institutions established systems, agencies and other bodies for the management of border checks, asylum and immigration:

- Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L316/1.
- Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1, as amended by Regulation (EC) No 863/2007 OJ L 199/30.
- Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2010] OJ L111/20.
- Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [2010] OJ L132/11.
- Regulation (EU) No 1077/2011 of the European Parliament and of the Council of 25 October 2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2011] OJ L286/1.
- Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur) [2013] OJ L295/11.

Other policy tools focus on the status of people arriving from third countries and provides for their treatment accordingly:

- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12.
- Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.
- Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44.
- Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L375/12.
- Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research [2005] OJ L289/15.
- Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17.

- Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

(b) Judicial cooperation in criminal law matters and police cooperation:

Measures related to criminal procedure may affect first and foremost the realisation of the right to a fair trial (Article 47 CFR). The protection of the right to fair trial was introduced in the EU's fundamental rights body owing to the consequences of the application of the European Arrest Warrant (EAW) that triggered several constitutional cases in the Member States.¹⁹⁴ The EAW is an instrument of judicial cooperation within the EU, which allows for the transfer of a suspect or a sentenced person from one EU Member State to another, subject to several standards and procedures outlined in relevant EU law, and in domestic law which implements the EU legislation. Therefore, the EAW relies strictly upon procedural rules and practices of domestic criminal law, and does not protect the individual from the violation of his or her procedural rights.¹⁹⁵ While the Framework Decision on the EAW introduces several human rights safeguards, it does not enshrine protection of procedural rights.¹⁹⁶

In relation to substantive criminal law cooperation, the principle of legality, the principles of proportionality and *ultima ratio* are generally seen as central human rights principles when criminal law is adopted. In EU documents and academic scholarship the following key problems in relation to fundamental rights have been identified: problems relating to mutual recognition; data protection/right to privacy and large-scale databases; fight against terrorism; problems to ensure that victims of crimes have effective remedies; insufficient protection for vulnerable groups, such as children, minority groups, and victims of trafficking.¹⁹⁷

In order to come over these challenges general principles have been formulated, as well as specialised bodies and procedures have been established by means of primary law instruments:

- Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L63/1.
- Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2006] OJ L386/89.
- Council Decision 2008/617/JHA of 23 June 2008 on the improvement of cooperation between the special intervention units of the Member States of the European Union in crisis situations [2008] OJ L210/73.

¹⁹⁴ See a sample of cases at: Defending the Human Right to a Fair Trial (June 7, 2011), 'European Arrest Warrant – Cases of Injustice' <<https://www.fairtrials.org/publications/european-arrest-warrant-cases-of-injustice>> accessed 22 December 2015.

¹⁹⁵ Council, Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

¹⁹⁶ FRAME Deliverable 4.2, op. cit. 127.

¹⁹⁷ FRAME Deliverable 11.1, op. cit. 115-118.

- Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/1.
- Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters [2008] OJ L350/60.
- Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54.
- Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1.
- Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.
- Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57.
- Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1.
- Council of the European Union, 'EU Guidelines on Death Penalty [2013].
- European Commission Recommendation C(2013) 8178 of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings [2013] OJ C 378/8.
- European Commission Recommendation C(2013) 8179 of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings [2013] OJ C 378/11.
- Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings [2009] OJ L328/42.
- Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2009] OJ L138/14.
- Council Framework Decision 2002/465/JHA on joint investigation teams [2002] OJ L162/1.
- Council Decision (EU) 2009/371/JHA establishing the European Police Office (Europol) [2009] OJ L 121/37.
- Council Decision 2009/902/JHA of 30 November 2009 setting up a European Crime Prevention Network (EUCPN) and repealing Decision 2001/427/JHA [2009] OJ L321/44.

(c) Judicial cooperation in civil law matters:

As the EU cooperation in this field of civil law addresses matters like property and inheritance, divorce, and family maintenance in cross-border situations, it may negatively affect human rights such as the

respect for private and family life (Article 7 CFR) and the rights of the child (Article 24 CFR). Also, the lack of common norms may have negative effects, such as in the case of same-sex partnerships/marriages.¹⁹⁸

- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.
- Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L 174/1.
- Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes [2003] OJ L26/41.
- Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1.
- European Commission, Report on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2014] COM(2014) 225 final.
- Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15.
- Commission Regulation (EC) No 1869/2005 of 16 November 2005 replacing the Annexes to Regulation (EC) No 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims [2005] OJ L300/6.
- Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure [2006] OJ L 399/1.
- Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199/1.
- Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.
- Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 [2007] OJ L 324/79.
- Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3.
- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.
- Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.

¹⁹⁸ FRAME Deliverable 11.1, op. cit. 122.

- Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10 (not applicable in all EU States).
- Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.
- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.
- Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters [2013] OJ L181/4.
- Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L189/59.

(d) Structural and other funds

Internally, the financial instruments encompass the whole catalogue of the instruments connected with the structural funding. With the recent 2013 reform of the funding system, these instruments have become also one of the types of measures used to enforce fundamental rights.¹⁹⁹ Within the large groups of the EU funds, we should distinguish:

1. European Structural and Investment Funds (the 'ESI Funds')²⁰⁰ which represent the largest budget portfolio implemented by Member States together with the Commission.²⁰¹ They support the goal of economic social and territorial cohesion as provided by the treaties as well as other structural

¹⁹⁹ The analysis of EU internal funding encompasses the European structural funds and the ones functioning within the Area of Freedom, Security and Justice. For the former, see: the 2014-2020 ESI Funds' framework which comprises five ESI Funds: the European Regional Development Fund (ERDF), European Social Fund (ESF), the European Agricultural Fund for Rural Development (EAFRD), the European Cohesion Fund and the European Maritime Fisheries Fund (EMFF), see Council and the European Parliament Regulation (EU) No 1303/2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L 347; for the latter, see: Council and the European Parliament (EU) The Asylum, Migration and Integration Fund (AMIF) Regulation (EU) 516/2014 [2015] OJ L 150; EU Internal Security Fund Instruments, namely the Instrument for financial support for external borders and visa, Council and European Parliament Regulation (EU) No 515/2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders police cooperation, preventing and visa combating crime, and repealing Decision crisis management Regulation (EU) No 574/2007/EC 515/2014, [2015] OJ L 150/143.

²⁰⁰ See, Regulation (EU) 1303/2013 [2012] OJ L 347.

²⁰¹ The total commitment appropriations for ESI Funds in 2014-2020 constitute 325 145 694 739 euro, representing the largest budget portfolio of the Multiannual Financial Framework. See, Council Regulation (EU, EURATOM) No 1311/2013 laying down the multiannual financial framework for the years 2014-2020 [2013] OJ 347, Annex I.

policy objectives related to agriculture and fisheries policies. Within the 2014-2020 ESI Funds' framework, there are five ESI Funds: the European Regional Development Fund (ERDF), European Social Fund (ESF), the European Agricultural Fund for Rural Development (EAFRD), the European Cohesion Fund and the European Maritime Fisheries Fund (EMFF),

2. The EU funds available in the area of Common Agricultural Policy (CAP - first pillar Funds)²⁰²
3. Funds supporting the EU Area of Freedom Security and Justice.²⁰³

So far, within the FRAME research the financial instruments appear in the analysis of the Area of Freedom, Security and Justice, and there with relation to them acting as instruments for the advancement of the policy objectives defined by the policy field.²⁰⁴

Internal financial instruments of the EU give rise to two fundamental rights specific problems which should be addressed in the course of the subsequent research under FRAME:

- (i) The extent to which they pursue EU fundamental rights specific objectives.

This issue covers relates to specific objectives that can be realised through the use of the EU financial regulations.

- (ii) The extent to which their disbursement creates fundamental rights specific problems.

The second of the problems posed relates to the manner through which the disbursement of the funds ensues. The funds are disbursed under the so-called shared management administrative proceedings. The decisions in the course of these processes are taken both by the European Commission and the Member States. The two administrations continuously interact and the results cannot be deemed to belong to one or other jurisdiction. In this context there appears a question as to the extent to which the Member States are bound by the provisions of the Charter of Fundamental Rights in line with the provision of Article 51 CFR.

This section will briefly signal the two aspects pointing to the analysis to be still conducted:

²⁰² See, for the CAP financial legal framework: Regulation (EU) No 1306/2013 on the financing, management and monitoring of the common agricultural policy; Regulation (EU) No 1307/2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy; Regulation (EU) No 1308/2013 establishing a common organization of the markets in agricultural products, all published in [2012] OJ L 347.

²⁰³ These include: The Asylum, Migration and Integration Fund (AMIF) Regulation (EU) 516/2014 [2015] OJ L 150; EU Internal Security Fund Instruments, namely the Instrument for financial support for external borders and visa, Regulation (EU) No 515/2014 [2015] OJ L 150 and the Instrument for financial support for police cooperation, preventing and combating crime, and crisis management Regulation (EU) No 515/2014 [2015] OJ L 150.

²⁰⁴ See: FRAME Deliverable 11.1, op. cit.

(i) *Reaching fundamental rights specific objectives through the use of EU funds*

The EU funds are to contribute to the EU fundamental rights priorities. It must be recalled, that in particular, ESI Funds under their Common Provisions Regulation 1303/2013 have as a general aim to promote the social cohesion and reduce social disparities based on Article 174 TFEU. In line with Article 9 of the Common Provisions Regulation the ESI funds shall promote “sustainable and quality employment” and social inclusion.²⁰⁵ The Social Fund specific Regulation stipulates that Member States are to facilitate access to employment, active inclusion and employability.²⁰⁶ These general objectives are clearly insufficient to advocate that they EU Funds (or at least some of them) are to be used to advance fundamental rights objectives. In fact in its earlier case law, the Court held that in EU Funds setting Member States are bound by the EU flagship principles of equal treatment between women and men,²⁰⁷ non-discrimination and effective judicial protection.²⁰⁸ In addition to the above, the Member States must comply with the *ex ante* conditionalities which have been introduced in the recent round of programming. There are three fundamental rights conditionalities covering non-discrimination, disability and gender. In line with them, a prior fulfilment of fundamental rights criteria as assessed by the European Commission is necessary for the Member States to gain access to funds.

Conditionalities formulated in such a manner attach the general human rights conditionality to the internal EU fundamental rights policy setting. Further research is needed to understand their impact on the EU Member States.²⁰⁹

(ii) *Applicability of the Charter of Fundamental Rights to the disbursement activities*

The management of the EU funds is conducted under the shared management administration. It starts with the actual adoption of the measures within the EU internal structures. There the Member States representatives acting within the Council will agree on financial portfolio attached to each fund. What will be created is the EU wide list of objectives, which are to be addressed with the help of the funds. The rules on funds disbursement shall be agreed upon as well pointing to the common standards on the position of the Charter of Fundamental Rights in the process.²¹⁰ Once the Regulations are adopted, the

²⁰⁵ Regulation 1303/2013, op. cit., article 9.

²⁰⁶ Regulation 1304/2013, op. cit. article 3.

²⁰⁷ Case C-401/11 *Soukupová*, ECLI:EU:C:2013:223.

²⁰⁸ Case C-562/12 *Liivimaa Lihaveis*, ECLI:EU:C:2014:2229; Case C-93/12 *Agrokonsulting*, ECLI:EU:C:2013:432.

²⁰⁹ Vita, Viorica, *Ex ante fundamental rights conditionalities – a novel fundamental rights tool in the European Structural and Investment Funds architecture : locating it in the broader EU fundamental rights conditionality landscape*, EUI LLM Thesis, Florence 2014.

²¹⁰ As opposed to the ESI Funds and CAP Funds frameworks, the funds dedicated to the Area of Freedom Security and Justice all mention expressly that all action implementing the EU financial resources shall comply with the Charter, see: Regulation (EU) 513/2014, Article 3, para 5; Regulation (EU) 515/2014, Article 3, para 4.; Regulation (EU) 516/2014, Article 19, para 2.

EU Funds multiannual cycle is executed and designed around two stages: programming and implementation.

The Member States initiate the programming stage and draft multiannual strategic documents for the EU Funds disbursement – the so-called programming documents.²¹¹ They define Member States' areas of investment from amongst those financed under the objectives of each funding regulation.²¹² It must be noted, however, that in this regard the discretion of the Member States is limited. Firstly, they must focus on explicit investment priorities set under the Fund-specific Regulations. On top of this the actual preparation of the documents is conducted in close and permanent dialogue with the European Commission. It is also the Commission that gives the final consent to the essential elements of the programming documents for each Member State.²¹³ As one can imagine, distinguishing elements that are essential from non-essential ones is not easy as is delineation between the actual Member State or the European Commission action in this context. In fact, the Court sees the Operational Programmes as national acts implementing EU Funding Regulations.²¹⁴ In this context the approval by the Commission may in no way support the claim that such an act becomes a Union act.²¹⁵

In the implementation stage Member States take the lead, yet it is the Commission that continues to monitor the process closely in line with its primary responsibility for the budget. As the result of its action it may suspend payments or financial corrections where irregularities or serious failures to achieve the proposed results are detected. Finally, both the Commission and the Member States are involved closely in the process of evaluation of the funds disbursement.

Against this background, the applicability of the Charter of Fundamental Rights to the entire process becomes a riddle. Article 6 of Regulation (EU) No 1303/2013 foresees that the ESI funds supported initiatives are to comply with the EU and national law. Thus, in theory, the European Commission can monitor compliance with the CFR and suspend payments or even start infringements proceedings under

²¹¹ In the 2014-2020 ESI Funds framework the programming documents are called Partnership Agreements (PAs) and Operational Programmes (OPs). The PAs provide for each Member State ESI Funds investment strategy for the programming period. The OPs include specific implementation details.

²¹² For example, the ESI Funds for 2014-2020 financial period cover the following investment priorities: "(1) strengthening research, technological development and innovation; (2) enhancing access to, and use and quality of, ICT; (3) enhancing the competitiveness of SMEs, of the agricultural sector (for the EAFRD) and of the fishery and aquaculture sector (for the EMFF); (4) supporting the shift towards a low-carbon economy in all sectors; (5) promoting climate change adaptation, risk prevention and management; (6) preserving and protecting the environment and promoting resource efficiency; (7) promoting sustainable transport and removing bottlenecks in key network infrastructures; (8) promoting sustainable and quality employment and supporting labour mobility; (9) promoting social inclusion, combating poverty and any discrimination; (10) investing in education, training and vocational training for skills and lifelong learning; (11) enhancing institutional capacity of public authorities and stakeholders and efficient public administration".

²¹³ See, for instance: Regulation (EU) 1303/2013, Articles 15 and 16 for PAs and Article 96 for OPs.

²¹⁴ Case C-562/12 *Liivimaa Lihaveis*, op. cit.

²¹⁵ See for example: Case C- 241/07 *JK Otsa Talu OÜ v Põllumajanduse Registrite ja Informatsiooni Amet (PRIA)*, ECLI:EU:C:2009:337, para 37: '[...]Those programmes are to be submitted to the Commission which must appraise the plans to determine whether they are consistent with the regulation, although that approval does not confer on them the nature of an act of Community law'.

Article 258 TFEU. Amongst the EU funds, only the ones dedicated to the Area of Freedom, Security and Justice indicate that all the activities must be in compliance with the Charter of Fundamental Rights.²¹⁶ With regard to the remaining instruments, it is up to the Court of Justice to establish the necessary rules. In this vein, the Court held in *Nisttahuz Poclava* case²¹⁷ that the mere fact of funding activities by the European Union does fall within the scope of the Charter's Article 51(1) and does not constitute in itself an act of implementing EU law. One must note that in parallel case concerning cohesion funds the European Ombudsman did not share the opinion of the Court and held that 'most, if not all, Member State actions which arise in the context of programmes funded under the EU's cohesion policy involve the implementation of EU law'.²¹⁸ Furthermore, the European Ombudsman advocated that "[t]he fact that the Commission is not directly responsible for managing ESI Funds should never be used as a reason for not acting if fundamental rights have been, or risk being, violated."²¹⁹

It is beyond the scope of this study to advocate alternative approaches to the Charter's applicability to EU funds. Suffices to say that this illustrates and tests the internal to the EU fundamental rights mainstreaming attempts. Further research is needed to point to the desirable practices and improved outcomes in this area.

3. Open Method of Coordination

Open method of coordination is presented here as a specific implementation instrument characteristic for internal fundamental rights policy. It is treated separately, as it does not fall within the classical distinctions discussed in previous sections and above. In fact rather than being a one solid legal instrument, it provides more of modalities of cooperation. It is based on the inter-governmental form of cooperation that involves a pre-defined process or rule creation and implementation based on collective monitoring, learning and evaluation of involved states. The evaluation is conducted by the fellow Member States under the supervision of the European Commission. As an executive means of action serving purposes of implementation of the policy, the Open Method of Coordination does not foresee the involvement of the European Parliament or the Court of Justice.

Within the FRAME research, the Open Method of Coordination is tackled briefly in FRAME Deliverable No. 2.2 entitled 'Report on in-depth studies of selected factors which enable or hinder the protection of human rights in the context of globalisation' which contains a study of the EU non-discrimination policy. In terms of tools the authors refer to 'the principles of anti-discrimination and equality in EU primary and secondary law'²²⁰ and 'soft law and specific action programmes'²²¹. In this context, reference is made to De Búrca's²²² description of the particular features of non-discrimination law:

²¹⁶ See: Regulation (EU) 513/2014, Article 3, para 5; Regulation (EU) 515/2014, Article 3, para 4.; Regulation (EU) 516/2014, Article 19, para 2.

²¹⁷ Case C- 117/14 *Nisttahuz Poclava*, ECLI:EU:C:2015:60, para 42.

²¹⁸ European Ombudsman, Respect of fundamental rights in the implementation of the EU cohesion policy, Case: OI/8/2014/AN of 19 May 2014, <<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/59836/html>> accessed 20 May 2014, para.30.

²¹⁹ *Idem*, para 37.

²²⁰ FRAME Deliverable 2.2, op. cit. 6.

Firstly, it designates particular roles for non-state actors, where ‘transnational advocacy groups and networks worked over the years to lobby for the enforcement, expansion and development of EU anti-discrimination law’. The second important feature is the creation and financing of transnational networks by the European Commission, such as the European Network of Equality Bodies. The third characteristic is the importance of informational approaches and mechanisms, alternative remedies, and alternative dispute-resolution processes. Fourthly, the EU has gradually widened its initially narrow focus on equal pay and has continually broadened its anti-discrimination concepts and introduced a growing number of diverse instruments. Finally, the EU anti-discrimination regime can be distinguished by shifting ‘from a focused negative obligation to broad set of positive requirements including the general requirement of ‘mainstreaming’ (i.e. the systematic incorporation of equality goals into all public policies), as well as more specific requirements which trigger broader positive obligations²²³

These features amount to the whole range of instruments that belong to the realm of ‘discretionary’ measures initially elaborated by the Commission as implementation measures and with time incorporated into legal acts. It must be noted that the features described above are an end product of numerous historical initiatives. Only recently has the special role of NGOs become a constant feature of EU law-making activity²²⁴. The financing of transnational networks is based on relevant legislative acts similar to alternative dispute resolutions. The vast majority of these initiatives had experimental character and to this day bear the mark of a willingness of the European Commission to involve the stakeholders who act on local level, to learn, and to constantly evaluate and improve its policies. Importantly, many of these initiatives will escape review by the judicial authorities.

The particular type of European Commission’s activities undertaken in the realm of its executive power has become to be known as a ‘new governance’ type,²²⁵ and recurs in the analysis of EU internal policies. The Open Method of Coordination as a flagship initiative developed as a follow up to 2000 Lisbon strategy²²⁶ in relation to social policies. The commitment was renewed in 2008 in the Communication from the Commission entitled ‘A renewed commitment to social Europe: Reinforcing the Open Method

²²¹ Ibid. 7.

²²² Gráinne De Búrca, ‘Stumbling into Experimentalism: the EU Anti-Discrimination Regime’, in Chares F. Sabel and Jonathan, Zeitlin (eds.) *Experimentalist Governance in the European Union: Towards a New Architecture*. (Oxford:, Oxford University Press 2010) 221-225.

²²³ FRAME Deliverable 2.2, op. cit.,. 8.

²²⁴ See: Commission, ‘Better Regulation Guidelines and Toolbox’, SWD (2015)111.

²²⁵ See for example: Mark Dawson, ‘Three waves of new governance in the European Union’ [2011] 36 *European Law Review* 208; Gráinne G. De Búrca and Joanne Scott, ‘Introduction: New Governance, Law and Constitutionalism’ in Gráinne G. De Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart 2006); Neil Walker, ‘EU Constitutionalism and New Governance’ in Gráinne G. De Búrca and Joanne Scott (eds.); *Law and New Governance in the EU and the US* (Hart 2006). Udo (lead coordinator) Diedrichs, ‘Overview Paper on Classification and Mapping of Governance Modes’ [2005] NewGov New Modes of Governance Project, 1/08.

²²⁶ European Council, ‘Towards a Europe of Innovation and Knowledge’ (March 2000 Lisbon).

of Coordination for Social Protection and Social Inclusion'.²²⁷ The coordination process, though frequently criticised as time consuming and cost-ineffective, has since then been used in a variety of other than original contexts.²²⁸

It involves three stage procedure: In the first place the Council identifies objectives, then the Member States together with the Commission establish monitoring and learning schemes as well as benchmarks. From then on the Commission monitors the Member States' performance and organises feedback sessions with participation of the Member States involved.

4. The Judicial and other Remedies – the EU Fundamental Rights Protection System

After setting political priorities for the post-Stockholm Programme, the Commission indicated that there is a need to further develop and deepen integration and cooperation in the fields of migration and internal security.²²⁹ Any such development requires that effective accountability mechanisms be in place. From an internal fundamental rights perspective, the most central EU actors – beyond the EU political institutions – are the Court of the Justice of the European Union (CJEU), the European Data Protection Supervisor (EDPS), the European Ombudsman, the European Anti-Fraud Office (OLAF), and the EU Agency for Fundamental Rights (FRA).²³⁰ The overview of mechanisms of the EU fundamental rights protection system would not be complete without taking into account the European Court of Human Rights. The below presentation of the system of remedies will start with the courts and unfold in relation to other institutional settings. It must be noted that the presentation provides only information on the possibility to seek remedy before the listed institutions. It is beyond the scope of this analysis to offer a detailed description of the remedies.

1. Before the European Court of Human Rights

Despite the fact that the TEU establishes an obligation for the Union to accede to the ECHR,²³¹ and the final draft Agreement on the Accession of the EU to the ECHR was accepted and submitted for comments on 5 April 2013,²³² the accession has not happened yet. The CJEU's opinion on the draft agreement resulted in stalling the process identifying a number of incompatibilities between the accession treaty and the European Union legal system.²³³ This means that the relationship between the European Convention of Human Rights and the EU human rights protection system will remain as it is now. Should their human rights be infringed through the action undertaken by the Member States as a result of implementation of the EU measures, the individuals will be able to seek remedy at the

²²⁷ Commission, 'A renewed commitment to social Europe: Reinforcing the Open Method of Coordination for Social Protection and Social Inclusion' (Communication) COM(2008) 418 final.

²²⁸ Especially those related to environmental protection, such as water and waste management. See: EU Council Directive 91/271/EEC concerning urban waste-water treatment [1991] OJ L 135/40.

²²⁹ European Commission Communication 'An open and secure Europe: making it happen' [2014] op. cit.

²³⁰ FRAME Deliverable 11.1, op. cit. 50.

²³¹ Article 6 (2) TEU.

²³² 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 to the CDDH [2013].

²³³ Opinion 2/13 on the Accession of the EU to the ECHR, ECLI:EU:C:2014:2454.

European Court of Human Rights once they will have exhausted the domestic remedies. Then, simplifying, the ECtHR will review the EU and Member States measures following the conditions of two doctrines:

If the measure permits certain level of discretion to the Member States, the doctrine developed in *Matthews* case law will apply whereby the ECtHR will review a MS measure against its compatibility with the ECHR.²³⁴

If the EU measure does not leave the leeway to the Member States in terms of the measures relating to human rights they may adopt, the *Bosphorus* doctrine will apply. There the ECtHR has recognised the independent legal order of the EU's fundamental rights system as 'at least equivalent' to the protection system provided by the ECHR.²³⁵ The ECtHR usually follows this doctrine, unless detects the manifest lack of equivalence. This was, for instance the case in the M.S.S. judgment²³⁶ where the ECtHR point out the deficit of the EU fundamental rights protection system, in relation to the principle of mutual trust in holding that the Dublin principle of state of first entry does not free a state that is sending back an asylum seeker from assessing whether that state of first entry complies with its fundamental rights obligations.²³⁷

In addition, the two courts mutually consider each other's case law. The CJEU cited ECtHR case law on many occasions when confronted with the interpretation of fundamental rights.²³⁸ In addition, the Charter of Fundamental Rights in Article 52(3) explicitly states that '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

2. Before the Court of the Justice of the European Union (CJEU)

The Court of Justice of the European Union shall 'ensure that in the interpretation and application of the Treaties the law is observed'.²³⁹ Among other activities, the CJEU reviews 'the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties'. It does so also in the case of acts of other bodies, offices or agencies of the EU.²⁴⁰

The jurisdiction of the CJEU was limited for a transitional period of five years with regard to acts of the Union in the field of police and judicial co-operation in criminal matters, which have been adopted

²³⁴ *Matthews v United Kingdom* App No 24833/94 (1999) 28 EHRR 361.

²³⁵ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* App no 45036/98 (ECHR, 30 June 2005).

²³⁶ *M.S.S. v. Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011).

²³⁷ Detailed analysis on the case can be found in FRAME Deliverable 4.2, op. cit. 50.

²³⁸ Bratza, N. 'The European Convention on Human Rights and the Charter of Fundamental Rights of the European Union: A Process of Mutual Enrichment', in Rosas, A., Levits, E. & Bot, Y. (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (Springer 2012) 167-181.

²³⁹ Article 19(1) TEU.

²⁴⁰ Article 263 TFEU.

before the entry into force of the Lisbon Treaty.²⁴¹ This period ended on 1 December 2014. The CJEU also has no jurisdiction “to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”.²⁴²

The preliminary reference procedure remains the most important measure through which the individuals may seek the evaluation of the EU or national measure against its compliance with the European fundamental rights standards. In fact, if used wisely it is a potent instrument the use of which can be induced by the individuals, their lawyers or the courts themselves.²⁴³

3. Before the European Data Protection Supervisor (EDPS)

As it is discussed in FRAME Deliverable 11.1, the EDPS is an independent supervisory authority devoted to protecting personal data and privacy and promoting good practice in EU Institutions. The EDPS was established by Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L 8/1. The EDPS’s general objective is to ensure that the EU Institutions and bodies respect the right to privacy when they process personal data and develop new policies. The EDPS monitors the application of the regulation in institutions and bodies and offers advice for institutions on all matters concerning the processing of personal data.²⁴⁴ It publishes three different types of tools: position papers, background papers and policy papers.²⁴⁵

One of the main duties of the EDPS is to hear and investigate complaints and to conduct inquiries (either on its own initiative or on the basis of a complaint). While individuals can only file complaints about an alleged violation of the processing of personal information, EU staff can file complaints about any alleged violation of data protection rules.²⁴⁶

²⁴¹ Protocol (No 36) on Transitional Provisions [2010] OJ C 83/322, Article 10.

²⁴² Article 276 TFEU.

²⁴³ For the methodology, see: Fabrizio Cafaggi, Federica Casarosa, Filippo Fontanelli, Nicole Lazzerini, Mislav Mataija, Giuseppe Martinico, Karolina Podstawa, Cesare Pites, Aida Torres Perez, *Judicial Interaction Techniques - Their Potential And Use In European Fundamental Rights Adjudication* (JUDCOOP Project Final Handbook 2014) <<http://www.eui.eu/Projects/CentreForJudicialCooperation/Documents/JUDCOOPdeliverables/FinalHandbookUseofJudicialInteractionTechniquesinthefieldofEFRs.pdf>> accessed 29 January 2016.

²⁴⁴ Council and the European Parliament Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L 8/1, Article 41.

²⁴⁵ European Data Protection Supervisor, ‘Publications’, ‘Papers’, <<https://secure.edps.europa.eu/EDPSWEB/edps/site/mySite/Papers>> accessed 29 January 2016.

²⁴⁶ Council and the European Parliament Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L 8/1, Article 46.

4. Before the European Ombudsman

In addition to petition to the European Parliament, every citizen of the Union has the right of complaint before the Ombudsman.²⁴⁷ According to Article 228 TFEU and Article 41 in connection with Article 43 CFR, the European Ombudsman is empowered to receive complaints from citizens of the Union concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies. The Ombudsman make recommendations for ending mal-administrative practices.²⁴⁸ It must be noted that the Ombudsman's decisions are not legally binding and do not produce enforceable rights for the complainant. Furthermore, in comparison with the right to petition the European Parliament, the Ombudsman's scope of action is more restricted since complaints to the Ombudsman need to refer to particular instances of maladministration in the activities of EU Institutions.²⁴⁹

5. Before the European Anti-Fraud Office (OLAF)

OLAF is an independent EU body responsible for combating illegal (financial) activities, such as fraud.²⁵⁰ OLAF's tasks are to combat fraud, corruption and other illegal activities which harm the EU's financial interests and to investigate the management and financing of all EU Institutions and bodies. From a policy formulation point of view it is important to note that OLAF also engages in the preparation of legislative and regulatory provisions which fall under Title V TFEU and has the competence to perform administrative investigations. As established by one of the FRAME researchers, the performance of the functions of OLAF (such as performance and control of investigative acts) gave rise to fundamental rights concerns²⁵¹ and the amendment of the OLAF founding decision can be seen as a response to such criticism.²⁵²

Beyond having independent and effective institutions, there is a need to adopt measures to prevent and settle conflicts of jurisdiction between Member States, support the training of the judiciary and judicial staff, and facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.²⁵³ This encompasses

²⁴⁷ Article 24 TFEU.

²⁴⁸ European Parliament Decision on the regulations and general conditions governing the performance of the Statute of the European Ombudsman, Draft Decision of the European Parliament amending its Decision [2008] 94/262/ECSC EC, Euratom of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (2006/2223(INI)); European Parliament Decision amending Decision 94/262/ECSC, EC, Euratom of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties [2009] OJ C 259E , Article 2.

²⁴⁹ Article 43 CFR.

²⁵⁰ Commission Decision amending Decision 1999/352/EC, ECSC, Euratom establishing the European Anti-fraud Office 2013/478/EU [2013] OJ L257/19.

²⁵¹ European Court of Auditors, 'Follow-up of Special Report No 1/2005 Concerning the Management of the European Anti-Fraud Office' [2011] Special Report 2/2011.

²⁵² Commission, 'Improving OLAF's governance and reinforcing procedural safeguards in investigations: A step-by-step approach to accompany the establishment of the European Public Prosecutor's Office' (Communication) COM(2013) 533 final; Council and the European Parliament Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) [2013] OJ L 248/1.

²⁵³ Article 82(1) TFEU.

principles such as mutual recognition, exchange of information in relation to law enforcement, to ensure that victims of crimes have effective remedies.²⁵⁴

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.²⁵⁵

5. Tools used to evaluate/measure progress on human rights

To-date two FRAME reports describe in depth these three types of instruments providing detailed analysis of origins and the modalities of the use of each of these tools. The FRAME Deliverable 13.1 'Baseline study on Human Rights Indicators in the context of the European Union'²⁵⁶ deals with the three areas of the human rights measurement activities also from the point of view of actors involved. It builds on the description of ca. 50 systems of human rights measurement described in detail in Annex 1²⁵⁷. FRAME Deliverable 9.2 'Assessing the impact of EU trade and development policies on human rights'²⁵⁸ focuses on the impact assessments developed for the purposes of the EU external policies and trade and development instruments in particular.

The following three types of tools are used for the purposes of measurement of progress on human rights:

1. Qualitative reports,
2. Impact assessments which can be conducted at the policy planning stage (*ex ante*) and at the evaluation stage (*ex post*),
3. Indicators.

This brief presentation of the three types of tools will build on the two reports depicting first the background, then, a given instrument in the EU general and fundamental rights policy context and then provide an overview of challenges identified by FRAME researchers. For the purposes of addressing used for the purposes of evaluating/measuring the progress on human rights in the EU internal policy setting, Deliverable 13.1 'Baseline Study on Human Rights Indicators in the Context of the European Union' is of particular relevance. There the authors refer to tools as instruments of measurement of human rights in the European Union policies. The measurement, in their view, takes place throughout the three stages of policy process: planning, implementation and finally evaluation. It tends to involve the combination of different methods. Human rights – which are very much about telling stories, empathy and human experience at large – require as much simple qualitative descriptive data as hard methodologically and scientifically collected evidence. Frequently, especially in the work of expert bodies such as the

²⁵⁴ FRAME Deliverable 11.1, op. cit. 107-109.

²⁵⁵ FRAME Deliverable 8.1, op. cit. 69.

²⁵⁶ FRAME Deliverable 13.1, op. cit.

²⁵⁷ FRAME Deliverable 13.1, op. cit., Annex I.

²⁵⁸ FRAME Deliverable 9.2, op. cit.

Fundamental Rights Agency or the European Institute for Gender Equality the methodologies used to evaluate or measure human rights are mixed.²⁵⁹

It must be noted that the EU has approached the notion of how it delivers on its human rights commitments and produced a number of instruments indicating the technicalities of its approach. The following deserve a mention:

European Union Agency for Fundamental Rights, 'Using Indicators to measure Fundamental Rights in the EU: Challenges and Solutions' (2011) FRA Symposium Report, <http://fra.europa.eu/sites/default/files/fra_uploads/1697-FRASymp2011-outcome-report.pdf> accessed 12 January 2016.

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

European Commission, 'Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessment' (Commission Staff Working Paper) SEC(2011) 567 final.

European Union Agency for Fundamental Rights, 'Conference Edition, Developing Indicators for the Protection, Respect and Promotion of the Rights of the Child in the European Union' of November 2010.

European Union Agency for Fundamental Rights, *The Right to Political Participation for Persons with Disabilities: Human Rights Indicators* (Publications Office of the European Union 2014).

1. Qualitative Reports

Every year the European Union produces a number of reports concerning the situation of fundamental rights in Europe. In the light of the research conducted for the purposes of FRAME Deliverable 13.1:

These reports are primarily based on secondary analysis of existing data and reports. The discussion of these instruments starts with those, which develop and use indicator schemes for measuring certain human rights development of indicators in its work programme for the years 2013-2017.²⁶⁰ It is planned that indicators and benchmarks will be developed and applied for the identification of trends in fundamental rights over time²⁶¹ as well as to evaluate the FRA's work and its impact.²⁶²

In particular, the following reports are produced:

²⁵⁹ FRAME Deliverable 13.1, op. cit. 50

²⁶⁰ FRA Multiannual Work Programme 2015, <http://fra.europa.eu/sites/default/files/annual_work_programme_2015.pdf> accessed 25 September 2014 as quoted in FRAME Deliverable 13.1, op. cit. 51.

²⁶¹ European Union Agency for Fundamental Rights, 'Annual Work Programme' <http://fra.europa.eu/sites/default/files/annual_work_programme_2015.pdf> accessed 25 September 2014, 7 as quoted in FRAME Deliverable 13.1, op. cit. 51.

²⁶² FRAME Deliverable 13.1, op. cit. 51.

1. The European Commission's Annual Report on the Application of the Charter – in the light of FRAME Deliverable 13.1 it was first published in 2010, contains an overview of how the Charter is taken into consideration by the EU bodies when making decisions, promoting legislation or in the case law of the Court of Justice of the EU. [...] The reports do not offer an evaluation on the status of fundamental rights in the EU, but provides an overview of recent developments on how the Charter was considered within the EU bodies.²⁶³
2. The European Parliament's Annual Report on the Situation of Fundamental Rights in the EU (drafted by a Rapporteur within the LIBE Committee and adopted as a resolution).
3. FRA Reports on the situation in EU 27 'focusing on those issues mentioned in its multiannual framework, covering for example the topics of asylum and integration, equality and non-discrimination, racism and xenophobia, data protection, or rights of the child'²⁶⁴.
4. European Commission's Anti-corruption report²⁶⁵ established in 2011 to be published biannually - for the first time in 2014.²⁶⁶ Relies on indicators as a part of an analysis.

2. Indicators

In general terms the human rights indicators are internationally, regionally or nationally agreed set of benchmarks allowing for the collection of objective, comparable and reliable data used to monitor and evaluate a state's human rights progress. In the words of Abbot and Gujit they are 'pieces of information that provide insight into matters of larger significance and make perceptible trends that are not immediately detectable.'²⁶⁷ When doing so, indicators 'simplify' reality by transforming complex phenomena into abstract categories.²⁶⁸ This process proved fairly problematic for the area of human right or democracy as the very content of these notions remains contested.²⁶⁹

The UN Office of the High Commissioner for Human Rights has been the leading actor in the field, developing a conceptual and methodological framework of human rights indicators. According to the definition developed by them HRs indicators are 'specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that

²⁶³ Op. cit. 57.

²⁶⁴ FRAME Deliverable 13.1, op. cit. 57.

²⁶⁵ Commission, 'Commission Decision establishing an EU Anti-Corruption Reporting Mechanism for Periodic Assessment ("EU Anti-Corruption Report")' COM(2011) 3673 final; European Commission, 'EU Anti-Corruption Report' COM(2014) 38 final.

²⁶⁶ FRAME Deliverable 13.1, op. cit., 54.

²⁶⁷ Joanne Abbot and Irene Gujit, 'Changing Views on Change: Participatory Approaches to monitoring the Environment' (1998) SARL Discussion Papers 254, 40, as cited in FRAME Deliverable 13.1 14.

²⁶⁸ See the discussion of the contributions by: Sally Engle Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance' (2011) 52 (Supplement to Number 3) *Current Anthropology* 83, p. 84 and Daniel Kaufmann and Aart Kraay, 'Governance Indicators: Where are We? Where should We be going?' (2007) World Bank Policy Research Working Paper 4370, 8 in FRAME Deliverable 13.1 14-15.

²⁶⁹ See, on the issue of universality FRAME Deliverable 3.1 as cited in FRAME Deliverable 13.1, op. cit. 14.

addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights²⁷⁰.

Within the European Union, the need for the development of indicators with reference to human rights has become particularly visible as a consequence of the EU's expansion of human rights policy and the need to report on its progress. In addition, the adoption of a MS disciplining procedure in case of breach of core values of the EU (Article 7 TEU) and the 2014 Rule of Law Framework which is to precede the application of Article 7 TEU.²⁷¹

So far, no uniform, to be used across the European Union initiatives indicators scheme has been developed. In fact, since 2010 FRA has been working towards the development of indicators that would be of use to measure the progress on fundamental rights across the EU policies.²⁷²

The authors of FRAME Deliverable 13.1²⁷³ report on the following indicators based initiatives within the European Union:

1. Gender Equality Index²⁷⁴ (composite indicators on six core domains :work, money, knowledge, time, power and health and two satellite domains: intersecting inequalities and violence);
2. European Justice Scoreboard²⁷⁵ (comparative tool seeking to provide data on the efficiency of non-criminal justice systems in the Member States)²⁷⁶
3. Joint Assessment Framework for tracking progress and monitoring the Employment Guidelines under Europe 2020 ('indicator based monitoring system, which acts primarily as an analytical tool with the aim to identify key employment challenges and to track progress of the Member States').²⁷⁷
4. Social Protection Performance Monitor²⁷⁸ (monitoring social dimension target of Europe 2020) prepared by Social Protection Committee. The list of indicators is reviewed on regular basis.²⁷⁹
5. Migrant Integration Indicators which may be developed as the result of the Zaragoza

²⁷⁰ United Nations Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (United Nations 2012), 16 as cited idem 15.

²⁷¹ Idem 22.

²⁷² See: FRA Website 'Fundamental Rights Indicators' < <http://fra.europa.eu/en/project/2011/fundamental-rights-indicators>> accessed 26 January 2016.

²⁷³ FRAME Deliverable 13.1: Klaus Starl, Veronika Apostolovski, Isabella Meier, Markus Möstl, Maddalena Vivona and Alexandra Kulmer, in collaboration with Hans-Otto Sano and Erik André Andersen, 'Baseline Study on Human Rights Indicators in the Context of the European Union' (2014).

²⁷⁴ Idem 52.

²⁷⁵ Commission, 'The EU Justice Scoreboard: A Tool to Promote Effective Justice and Growth' COM(2013) 160 final, 2; European Commission, 'The 2014 EU Justice Scoreboard' COM(2014) 155 final.

²⁷⁶ FRAME Deliverable 13.1, op. cit. 53.

²⁷⁷ FRAME Deliverable 13.1, op. cit. 54-55.

²⁷⁸ Social Protection Committee 'Social Protection Performance Monitor (SPPM) – Methodological Report by the Indicators Sub-group of the Social Protection Committee' (2012) <<http://ec.europa.eu/social/main.jsp?catId=758>> accessed 3 November 2014.

²⁷⁹ FRAME Deliverable 13.1, op. cit., 56.

Declaratoin²⁸⁰ and the subsequent 2012-2013 study on common integration indicators^{281, 282}.

3. Impact assessments

Impact assessments, according to authors of FRAME Deliverable 9.2 are defined as a policy tool designed ‘to systematically identify and measure the potential and real effects of policies, programmes, projects, legislation or any other intervention on policy bodies on human rights’.²⁸³ Impact assessments may take place before the measure is adopted or implemented (*ex ante* impact assessments) and once it has been put in place (*ex post* impact assessments). This typology can be combined with the distinction between human rights specific and human rights non-specific measures.

As evaluative type of instruments impact assessments belong to the realm of internal and accountability measures elaborated by the EU institutions, bodies and organs. Internationally, they appeared initially in 1990s, they were appropriated by the EU in the course of the governance reform that started with the 2001 ‘White Paper on Governance’²⁸⁴ and subsequent 2009 Smart Regulation initiative²⁸⁵.

More recently the two initiatives evolved in 2015 into a Better Regulation package²⁸⁶. All of the above internal initiatives of the European Union were to lead to designing a better legislative and executive policy toolbox, which was to feature a number of characteristics referring frequently to impact assessments as crucial elements of the whole policy toolbox.²⁸⁷

In line with this approach instruments adopted by the European Union are supposed to be:

1. embedded in the planning and policy cycle. Therefore, the instruments should take into account of the preparatory work and in particular learn from the previous experiences. The ‘evaluate first’ approach was advocated which means that ‘[p]ossible implementation challenges should always be considered in impact assessments needs also to be sketched out’;
2. of high quality meaning in particular that public consultations are to be conducted according to clear criteria, and impact assessments, fitness checks should be in conformity with appropriate guidelines subject to appraisal by the Regulatory Scrutiny Board;
3. evidence-based, whereby evidence provided should be scientific. In its absence explanation must be provided as to why acting is necessary;

²⁸⁰ Council of the European Union, ‘Zaragoza Declaration of the European Ministerial Conference on Integration’ of 16 April 2010.

²⁸¹ EUROSTAT, *Indicators of Immigrant Integration: A Pilot Study* (Publications Office of the European Union 2011), Thomas Huddleston and others, *Using EU Indicators of Immigrants Integration* (Publications Office of the European Union 2013).

²⁸² FRAME Deliverable 13.1, 56.

²⁸³ FRAME Deliverable 9.2, op. cit., 24.

²⁸⁴ European Governance, A White Paper COM(2001) 428 final.

²⁸⁵ European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions ‘Smart Regulation in the European Union’*.

²⁸⁶ European Commission, Better Regulation Guidelines and Toolbox, SWD (2015)111.

²⁸⁷ European Commission, Better Regulation Guidelines and Toolbox, SWD (2015)111, 7-8.

4. participatory/open to stakeholders views. Any public consultations strategy should be associated with evaluation or impact assessment;
5. respective of principles of proportionality and solidarity;
6. the instruments should be comprehensive considering relevant 'economic, social and environmental impacts of alternative policy solutions';
7. coherent and prepared collectively by inter-service group working on all the relevant policy fields – this applies to all preparatory and drafting work conducted by relevant DGs within the European Commission
8. transparent – this means that results of evaluations, studies and impact assessments should be widely disseminated;
9. unbiased – as a response to obtaining evidence prior to making an instrument proposal;
10. appropriately resourced and organised – so that each evaluation and impact assessment may take place.

As one can see, Better Regulation Guidelines and Toolbox attribute a great value to impact assessments which are key to the type of informed, objective and planned policy making as advocated by the V-ce President of the European Commission Frans Timmermans responsible for the package. In general terms, the mode of conducting impact assessments within the European Union is already specified and included in the Better Regulation Guidelines drafted as the result of the wide consultation process conducted between 2013 and 2014.²⁸⁸ The guidelines consist of detailed steps and attribute clear responsibilities to those who should undertake impact assessments. They also foresee a more transparent adoption of the report procedure both on the level of the Inter-service Group and the College of Commissioners.²⁸⁹

Clearly, it will take time before the impact assessments start playing such an important role as is attributed to them in the ten principles of better instrument making within the EU. However, so far first such initiatives have been taken precisely within the area of internal fundamental rights and external human rights policies.

²⁸⁸ See: Better Regulation Guidelines < http://ec.europa.eu/smart-regulation/guidelines/index_en.htm > 10 January 2016.

²⁸⁹ TOOL #4:WHAT STEPS SHOULD I FOLLOW FOR AN IA? Website <http://ec.europa.eu/smart-regulation/guidelines/tool_4_en.htm> 10 January 2016.

C. External Human Rights Tools

1. Policy Documents – Conclusions of the European Council and the Council of the European Union

1. General Comments

Unlike in the internal policy realm, in the external human rights policy, and taken into consideration formal aspects, conclusions will frequently be the chief means of action (especially in the CFSP area). In order to maintain consistency with the analysis presented in Section B, in this initial section the focus will be placed on the programmatic, strategic documents that are adopted for the EU external human rights policy purposes. It must be recalled at the later stage that many instruments taken for the fulfilment of EU objectives externally will be taken through the means of conclusions. This is how the EU Human Rights Guidelines are adopted, and the policy foundations as well as the concretisation of the policy solutions are laid.

From the institutional point of view, it is the European Council that starts the process together with the High Representative for Foreign and Security Policy (HRFP), followed by the Council (Art. 26(1) and (3) respectively). The Council may provide for the basis of thematic or geographic cooperation (Art. 29 TEU)²⁹⁰.

2. The EU Strategic Framework and Action Plan for Human Rights and Democracy

FRAME researchers have devoted ample space to the EU Strategic Framework and Action Plan for Human Rights and Democracy. This strategic document adopted in 2012 was the first one in the history of the EU to address the priorities relating to fostering human rights in external relations.²⁹¹ As summarised by the authors of FRAME Deliverable 8.1:

‘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. 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. The Action Plan will end in December 2014. Progress on meeting objectives is laid out in the annual report on human rights and democracy in the world.’²⁹²

As it can be imagined, the Strategic Framework and Action Plan did not come out of nowhere. It builds on the Joint Communication entitled 'Human rights and democracy at the heart of EU external action –

²⁹⁰ In fact, on the basis of such strategies may public draw conclusions as to the EU's approach to concrete countries of the region given that human rights country strategies are not available to the public. See: the FRAME Deliverable 2.2, op. cit., for an example of such analysis.

²⁹¹ The Council, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' (11855/12).

²⁹² FRAME Deliverable 8.1.

Towards a more effective approach'.²⁹³ Again, in the words of the authors of the FRAME Deliverable 12.1:

'The objective of this Joint Communication was to open a dialogue between the European institutions in order to make the EU's external policy on human rights and democracy more active, coherent and effective and it should be considered as a fundamental step in the development of an EU human rights strategy for its external action. It proposes further action in four areas:

(i) delivery mechanisms, through the development of tailor-made approaches to maximise the impact on the ground; the identification of cross-cutting themes; the promotion of the new approach towards neighbours based on mutual accountability and commitment to the universal values of human rights, democracy and the rule of law; and the reinforcement of the partnership with civil society;

(ii) integrating policies, by means of the development of a joined-up approach to policy in order to ensure that all EU external policies relevant to human rights and democracy and the actions developed in its framework continue to be fully compatible with the respect, protection and promotion of human rights;

(iii) building partnerships, through the reinforcement of multilateral and regional cooperation; the promotion of International Justice; the improvement of the effectiveness of human rights dialogues and consultations; and responding to serious human rights violations through the adoption of targeted restrictive measures and, finally;

(iv) speaking with one voice, in order to harness Europe's collective weight in the way that it deals with human rights and democracy in its external action.^{294,295}

Furthermore, in the words of the authors of FRAME Deliverable 12.1 the purpose of the earlier Communication and the subsequent action plan was to set out 'a vision of how the EU's external policy on human rights and democracy could be more active, more coherent and more effective, and [for that purpose it] describes necessary actions in four areas (delivery mechanisms, integrating policies, building partnerships, and speaking with one voice).^{296,297} Since the focus was placed on human rights and

²⁹³ It built itself on an earlier document: Commission, 'The European Union's role in promoting human rights and democratisation in third countries' (Communication) COM (2001) 252 final.

²⁹⁴ Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 'Human Rights and Democracy at the heart of EU external Action - Towards a more effective approach' (Joint Communication) COM (2011) 886 final 7-18.

²⁹⁵ FRAME Deliverable 12.1, op. cit. 13.

²⁹⁶ Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 'Rights and Democracy at the heart of EU external Action - Towards a more effective approach' op. cit.

²⁹⁷ FRAME Deliverable 12.1, op. cit. 6.

democracy, the two were considered as chief values with rule of law treated as their inseparable component.²⁹⁸

Subsequently the Strategic Framework and Action Plan was reviewed and on 20 July 2015 the Council adopted conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019²⁹⁹. The new action plan was supposed to build on the previous Strategic Framework and prioritize the EU action for human rights. In the end it focuses on the following areas encompassing 34 types of action:

1. Boosting the ownership of the local actors
2. Addressing human rights challenges
3. Ensuring a comprehensive human rights approach to conflicts and crisis
4. Fostering better coherence and consistency
5. A more effective human rights and democracy support policy.

Again, as its predecessor, the Action Plan will initiate specific activities to be undertaken by the European Union with the view of achieving its human rights objectives in external realm.

2. Sources of Law

In external realm of the EU human rights policy, the sources of law are these which permit the EU act *Sensu stricte* the legal binding multilateral/bilateral measures employed by the Union for the purposes multilaterally – in cooperation with the third countries and such that are of unilateral character.

The former ones will take a form of international agreements, whilst the latter ones the usual regulations as such legal acts of the EU which are of general binding character and capable of creating direct effects in all settings.

Within both categories, just as in case of the EU internal fundamental rights policies, one can distinguish the human rights specific and human rights non-specific instruments, where human rights appear as a value added to the chief purposes of the cooperation. In the below section we shall discuss in the first place international agreements – of both the human rights specific and non specific type. Then we shall move to the discussion of EU unilateral measures adopted in pursuit of human rights and other purposes.

Importantly, similarly as in the case of EU internal fundamental rights policy setting play an important role (if not a more important one) - they shall be addressed as a part of this

²⁹⁸ For the extensive discussion of the Strategic Framework, see, *inter alia*: FRAME Deliverable 12.1, op. cit. 5-12.

²⁹⁹ Council of the European Union, 'Conclusions on the Action Plan on Human Rights and Democracy 2015- – 2019', 10897/15.

1. *Bilateral/Multilateral International Agreements*

(1) General Comments

International agreements are made in accordance with the procedure provided for by Article 218 TFEU as well as specific treaty articles referring to association agreements, partnership and cooperation agreements or sectoral agreements. The distinction is important for human rights obligations as in line with the recommendation by the Parliament³⁰⁰

To remind the typology it suffices to say that association agreements foresee the highest level of an all-embracing cooperation initiated for trade purposes (hence progressively they will entail either creation of the free trade area, or customs union). To make an association agreement in line with Article 217 TFEU unanimity in the Council and the consent of the Parliament is required. These are agreements that 1) contain reciprocal rights and obligations (access to EU market in return for ie voluntary harmonisation of laws); 2) foresee common action and special procedure; 3) provide for privileged links between the EU and a third country; 4) are made from the perspective of the participation of a third country in the EU system. To provide a few examples of such agreements, one may mention the European Economic Area agreement between the EU and Norway, Iceland and Liechtenstein, the former Europe Agreements between the EU and Central & East European countries, the Stabilization and Association Agreements between the EU and Western Balkan countries as well as currently negotiated Association Agreements with the ENP countries to create 'deep and comprehensive free trade area'.

Partnership and Cooperation Agreements entail a much lower level of cooperation. According to Article 212 TFEU they pursue the objectives of economic, financial and technical co-operation measures, including assistance, in particular financial assistance, with third countries other than developing countries, are consistent with the developing policy of the Union and are to be carried out within the framework of the principles and objectives of its external action.

Finally, the last form of international agreements made by the EU are sectoral ones pertaining to particular issues. The most famous example of these agreements involve 16 sectoral ones made with Switzerland.

From the procedural point of view, the EU is to follow Article 218 TFEU according to which the primary responsibility for the negotiations rests on the Commission or the EU High Representative for Foreign and Security Policy should the agreement concern Common Foreign and Security Policy. The procedure involves participation of the Parliament in situations determined by Article 216 TFEU, in relation to:

(i) association agreements;

³⁰⁰ Earlier on also expressed by the Council with reference to South East Europe: Council conclusions on the principle of conditionality governing the development of the European Union's relations with certain countries of south-east Europe, 29 April 1997. European Parliament, 'European Parliament resolution on the human rights and democracy clause in European Union agreements' 2005/2057 (INI).

(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(iii) agreements establishing a specific institutional framework by organising cooperation procedures;

*(iv) agreements with **important budgetary implications** for the Union;*

*(v) agreements covering fields to which either **the ordinary legislative procedure** applies, or the special legislative procedure where consent by the European Parliament is required.*

The overview of the above measures permits for a conclusion that transparency was clearly an objective when the Lisbon Treaty was adopted. Still there remain some doubts as to whether, when and how the human rights concern enter the realm of international agreement making especially in relation to negotiations process.

(2) Human Rights Specific International Agreements

As authors of FRAME Deliverable 2.2 observe:³⁰¹

the EU is, with one recent exception, not party to any international human rights treaties. The EU ratified the UN Convention on the Rights of People with Disabilities in 2011. It was the first comprehensive human rights treaty to be ratified by the EU as a whole.

The fact that human rights conventions are not routinely made by the European Union may be explained by three facts. Firstly, as outlined above in Section II.C.1 in relation to competence, for the EU to be able to make an international agreement focused only on human rights, it would need to be equipped with relevant competence. As it was indicated already, the UN Convention on the Rights of Persons with Disabilities was made on the basis of Article 114 TFEU (ex Art. 95 TEC) which provides for the possibility to ‘adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market’.

In addition, the making of human rights conventions is opposed by the Member States as they fear losing control over the human rights measures binding upon them:

The EU ratification of the UN Disability Convention can illustrate the fear raised by certain Member States, namely that international human rights conventions and protocols they have chosen not to ratify – maybe deliberately for good reasons – would become applicable in their national legal order by means of EU law. Obligations can be said to be entering ‘through the backdoor’.³⁰²

Finally, as it was seen in the recent CJEU’s Opinion 2/2013 on the EU accession to the ECHR, there always remains the problem of safeguarding the EU legal order from interference from external judicial authority. In the opinion amongst others, the Court demanded that all the dispute arising on the basis of

³⁰¹ FRAME Deliverable 2.2, op. cit. 136.

³⁰² FRAME Deliverable 2.1, op. cit.

the ECHR are adjudicated before the CJEU³⁰³ reiterating its *Kompetenz-Kompetenz* approach toward other international tribunals, that was elaborated in amongst others *Mox Plant* case³⁰⁴. This means that wherever an international treaty provides for an enforcement mechanism (such as the European Court of Human Rights), the making of such a convention may be difficult also because of the monopoly the CJEU reserves to itself inasmuch as adjudication on matters relating to EU law are concerned.

To sum up, in the light of the above observations, it is highly unlikely that the EU attempts to make international agreements which focus on human rights solely. It seems rather more likely that in external relations it will continue to pursue its human rights objectives together alongside with others non specific ones.

(3) Human Rights Non-Specific International Agreements

The EU started incorporating human rights considerations into its international agreements as a result of critique it was subject to after the crisis with Ugandan dictator Idi Amin. The European Union decided to incorporate *expressis verbis* the fundamental change of circumstances clause (*rebus sic stantibus clause*) provided for in Article 62 of the Vienna Convention on the Law of Treaties.

The 'Human Rights Clause'³⁰⁵ has become a constant essential element of the EU international trade and cooperation agreements of the 1990s, allowing both parties to terminate or suspend the agreement in case of human rights violations. The clause consists of two parts – the first one named '**essential elements clause**' declares respect for human rights an essential element of a given agreement, and a second one named '**non-execution clause**' allowing for termination or suspension of the agreement in case of human rights violations. The European Union has developed a range of human rights clauses, as detailed in the 1995 Commission Communication (COM (95) 216 final). The most advanced one is envisaged by Article 96 of the Cotonou Agreement, revised in 2010, in force until 2020.³⁰⁶

³⁰³ Opinion 2/2013, op. cit., para 2013.

³⁰⁴ Case C-459/03 *Commission v Ireland (Mox Plant)*, ECR 2006 I-4635, ECLI:EU:C:2006:345.

³⁰⁵ FRAME Deliverable 4.1, op. cit. 54-60; FRAME Deliverable 4.1: Monika Mayrhofer, Carmela Chavez, Venkatachala Hegde, Magnus Killander, Joris Larik, Bright Nkrumah, Elizabeth Salmón, Kristine Yigen, 'Report on the mapping study on relevant actors in human rights protection' (2014) 54-60, FRAME Deliverable 8.1: Tamara Lewis, University College Dublin, with contributions from Wolfgang Benedek, University of Graz and Anna Müller-Funk, Ludwig Boltzmann Institute, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies' (2014) 35; FRAME Deliverable 9.1.: Laura Beke, David D'Hollander, Nicolas Hachez, Beatriz Pérez de las Heras, 'Report on the integration of human rights in EU development and trade policies' (2014) 59 and the following; FRAME Deliverable 12.1, op. cit. 35-38.

³⁰⁶ For a systematic analysis of the EU agreements, see especially: Lorand Bartels, *Human rights conditionality in the EU's international agreements* (Oxford University Press 2005); Lorand Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements* (2012) University of Cambridge Faculty of Law Legal Studies Research Paper Series No. 24; Fierro Sedano, Albi Paivi Leino, 'European Universalism? -The EU and Human Rights Conditionality' [2005] 24 *Yearbook of European Law* 329; Jan Erik Wetzel, *The EU as a "global player" in human rights?* (Routledge 2011). For an account of EU trade policy and its link with human rights, see: FRAME Deliverable 9.1, op. cit., and Annex II containing the overview of all the Essential Elements Clauses of included in the EU international agreements.

As Lorand Bartels notes, though a number of standard formulations now seem to have emerged in regard of the various phrases of the essential elements clauses,³⁰⁷ proper drafting ensuring the legal options described above was possibly never achieved. The intention of the parties is however well known at this stage, and the end result is therefore undeniable, even if we have seldom seen these clauses in action (see below).³⁰⁸ The aim of securing a way out for the EU is all the more attained as, alongside the essential elements clause, the EU has also progressively adopted the practice of including ‘non-execution’ clauses expressly delineating the consequences to be attached to a violation of the ‘essential elements’ of the treaties.

Non-execution clauses have historically taken two forms: the ‘Baltic’ clause, which was notably included in agreements with Baltic states prior to their accession, and which authorised a party to suspend the application of the agreement with immediate effect in case of a serious breach of essential provisions. Given the lack of flexibility afforded by this formulation, the Baltic clause was progressively abandoned, and the concurrent measure, the ‘Bulgarian’ clause, became the standard; allowing either party to ‘take appropriate measures’ in case of breach by the other party, after proper consultation of that party and/or referral to a committee established by the treaty. Most non-execution clauses now dispense with this last condition ‘in cases of special urgency,’ which are said to correspond (either in the clause itself, or in an interpretative declaration of the parties) to correspond to grave violations of the essential elements of the agreements. This means that, in cases of grave human rights violations by one party, the other is allowed to immediately take measures in response. In this regard it is almost always specified that the measures chosen must be those which ‘least disturb’ the normal operation of the agreement and, on occasion, in addition that those measures must be ‘proportional’, making suspension of the whole agreement an unlikely outcome.³⁰⁹

So far, the so-called Cotonou Agreement between the EU and the ACP countries,³¹⁰ which is described more in-depth below, can be said to have the most complex set of clauses ensuring human rights conditionality. Not only does it have the longest ever ‘essential element’ clause,³¹¹ it also sets up a detailed process of political dialogue around the essential elements,³¹² explicitly in order to pre-empt situations in which a party might deem it justified to activate the non-execution clause.³¹³ As discussed in more detail below, in this case the essential elements clause and the overall conditionality mechanism goes well beyond the reactive purpose of ensuring a way out for the EU in case of human rights

³⁰⁷ Lorand Bartels, ‘A Model Human Rights Clause for the EU’s International Trade Agreements’ (German Institute for Human Rights and Misereor, 2012), available online <http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf> accessed 30 November 2015 10.

³⁰⁸ Ibid 13.

³⁰⁹ See in respect of Euro-Mediterranean Countries: Lorand Bartels, ‘A Legal Analysis of The Human Rights dimension of the Euro-Mediterranean Agreements’ [2012] 1 GREAT Insights 7.

³¹⁰ Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part, signed in Cotonou, 22 June 2000.

³¹¹ Ibid. Art 9 (2).

³¹² Ibid. Annex VII.

³¹³ Ibid., Art 96.

violations. It is a genuine tool for proactively promoting human rights and other values in partner countries, and is meant to be applied on an ongoing basis outside of and before any situation of human rights violations, combining ‘strong elements of both coercion and persuasion’.³¹⁴ In the same vein, a number of Association Agreements (notably adopted in the framework of the Eastern Neighbourhood Policy and with Southern Asia countries) also take this more proactive stance towards linking trade agreements with human rights issues by having a chapter on ‘Cooperation on matters relating to democracy and human rights’ (see Annex II).

Since 1995 and the inception of the policy on the systematic inclusion of respect for democratic principles and human rights in agreements between the Union and third countries, the EU has included such clauses as an almost absolute rule in its international agreements.³¹⁵ In this regard an increasingly followed method to place respect for human rights at the centre of all treaty relations between the EU and particular partners is to conclude ‘Framework Agreements’ which contain a comprehensive essential elements clause, a non-execution clause, and possibly a dispute settlement mechanism.³¹⁶ Thematic agreements are then subsequently concluded and ‘latched onto the framework agreement, making the human rights apparatus included therein also applicable to treaty relations in the thematic fields. A recent example is that of the 2010 EU-Korea Framework Agreement.³¹⁷ However, the most early and prominent example of this practice is the Cotonou Agreement. As a response to the planned expiry of the trade preferences granted directly to ACP countries by the Cotonou Agreement in December 2007,³¹⁸ Art. 35 thereof mandates the parties to conclude ‘Economic Partnership Agreements’ on a regional basis to regulate their trade relations. The (interim) EPAs in force so far, namely with Cariforum States, with Central African countries (to date only applicable to Cameroon),³¹⁹ with Eastern and Southern African countries,³²⁰ and with Pacific States (to date only applicable to Papua New Guinea and Fiji)³²¹ all specify that nothing in the Agreement shall be construed so as to prevent the adoption by the

³¹⁴ Hafner-Burton, *op. cit.*, 607.

³¹⁵ In the early nineties, a number of agreements were concluded which contained an essential elements clause, but no non-execution clause: see Argentina, Brazil, Andean Community Framework Agreement, Vietnam.

³¹⁶ The Council would have made this a policy preference. See Bartels, *op. cit.* 6-7.

³¹⁷ See: *idem.*

³¹⁸ See: World Trade Organization, Ministerial Conference, ‘European Communities – The ACP-EC Partnership Agreement’, Doha, 14 November 2001, WT/MIN(01)/15, 2, by which Art. I (1) of the GATT 1947 (MFN) clause, is waived until 31 December 2007. See also Bonapas Onguglo and Taisuke Ito, ‘How to make EPAs WTO compatible? Reforming the rules on regional trade agreements’ [2003] ECDPM Discussion Paper No. 40, <www.ecdpm.org/wp-content/uploads/2013/11/DP-40-Make-EPAs-WTO-Compatible-Reforming-Rules-Regional-Trade-Agreements1.pdf>, accessed 30 November 2015.

³¹⁹ Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part, signed 15/01/2009.

³²⁰ Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, on the other part, signed 29/08/2009.

³²¹ Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part, signed 30/07/2009.

EU of any measure under, notably, Art. 96 of the Cotonou Agreement (the non-execution clause).³²² One (the Cariforum agreement) even specifies expressly that this includes trade sanctions, and two (the CARIFORUM and the Pacific States Agreement) additionally restate that the EPA is based on the same essential elements as the Cotonou Agreement by referencing its Art. 9. Outside of the Cotonou ambit, the 2001 EU-Korea Framework Agreement' essential elements and non-execution clauses are made expressly applicable to the subsequent EU-Korea Free Trade Agreement.³²³ The new 2010 EU-Korea Framework Agreement, yet to enter into force, further reinforces that link.³²⁴

2. *Unilateral Measures*

(1) Unilateral Measures

The fullest account of unilateral measures adopted by the European Union was given by the authors of FRAME Deliverable 9.1. 'Report on integration of human rights in EU development and trade policies'. In a little more than 50 pages they provide the overview of the instruments the EU uses in its trade policy with third countries.³²⁵ In order to avoid repetitions, for the purposes of this report a brief overview of all instruments is presented according to the categorisation borrowed from the mentioned study. The authors distinguish there in the first place between bilateral (reciprocal) instruments and these that are unilateral (non-reciprocal) ones. The latter ones are further analysed following the following key: (1) the Generalised System of Preferences, (2) Specific measures, (3) Country specific measures, (4) Issue specific measures. To this list (5) External financial instruments will be added.

(i) *Generalised System of Preferences (GSP)*

The Generalised System of Preferences is considered to be the oldest of the trade instruments adopted by the European Union for the sole purpose of promoting human rights.³²⁶ The system permits for preferential access to the EU market conditional upon a third country's compliance with human rights and environmental standards. The Generalised System of Preferences is adopted in the form of a regulation thus not permitting third countries negotiate neither the extent of the preferential treatment

³²² It would have been even clearer to include again in each EPA a clear reference to the essential elements and to the consequences of their breach, but apparently this was a contentious point, whereas the EU was in favor of inclusion the clause was dropped in some cases. Whether or not this allows or excludes the possibility of trade sanctions is debatable. See, in the case of the EPA with West Africa: Economic Partnership Agreements (EPA), Bridges, Volume 18 - Number 5, , 'West Africa, EU Reach Trade Deal', 13 February 2014, <www.ictsd.org/bridges-news/bridges/news/west-africa-eu-reach-trade-deal> 30 November 2015.

³²³ See the free trade agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, signed 06/10/2010, Art. 15.14.

³²⁴ Above Art. 43 (3).

³²⁵ See: FRAME Deliverable 9.1, op. cit. 30-87.

³²⁶ Its origins go back to 1968 United Nations Conference on Trade and Development ('UNCTAD') in New Delhi. It was contested under the WTO/GATT regime but eventually granted the exception from the MFN principle, FRAME Deliverable 9.1, op. cit. 31.

nor concessions for a lesser compliance with human rights standards. Since the reform of 2005³²⁷, the US's GSP has consisted of three arrangements³²⁸:

³²⁷ Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences.

³²⁸ Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No. 732/2008.

- the general GSP open to developing countries,
- special incentive arrangements open to 'vulnerable countries who have ratified and implemented 27 international conventions on human and labour rights and sustainable development (listed in Annex II to the Regulation)
- Everything but Arms initiative providing for duty free access for all exports coming from countries listed as 'least developed countries' by the UNDP.

The conditionality of the system lies in the possibility to suspend the arrangement as a result of a serious and systematic violation of principles laid down in the conventions at stake. Both joining the GSP plus or being expelled from it rests in the hands of the GSP Committee. The Treaty of Lisbon also introduced the possibility to legislate on GSP-related issues through delegated acts.³²⁹ At the same time a new monitoring scheme has been introduced with the first 2014-2015 report on the Generalised System of Preferences published on 28 January 2016.³³⁰

(ii) Specific measures

This category, in the words of the authors of FRAME Deliverable 9.1 encompasses the following measures that may be adopted within the realm of the exclusive competence of the EU under the CCP or within the CFSP:

In addition to employing non-reciprocal GSP measures, the EU also adopts unilateral Regulations by which it imposes import and export limitations on the trade in certain goods, either due to their harmful nature or to their country of origin. Concretely, this means that the EU may either place restrictions on (i) the trade in goods with specific countries that have been subject to wider sanctions under the Common Foreign and Security Policy (CFSP) framework, the so-called 'country-specific measures'; or on (ii) the trade in specific goods that have clear human rights-related implications, also known as 'issue-specific measures'.³³¹

(iii) Country specific measures

The EU may employ a number of sanctions instruments against a third country. This can take form of implementing of a UN Security Council binding resolutions or adopting its own sanctions. The procedure behind the latter has been thoroughly revised after the entry into force of the Treaty of Lisbon.³³²

³²⁹ FRAME Deliverable 9.1, op. cit. 35.

³³⁰ Commission (EU) Report on the Generalised Scheme of Preferences covering the period 2014-2015 (SWD(2016) 8 final) <<http://trade.ec.europa.eu/doclib/html/154180.htm>> accessed 29 January 2016.

³³¹ FRAME Deliverable 9.1, op. cit. 35.

³³² FRAME Deliverable 9.1, op. cit. 36. See also: Council of the European Union, 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy', 15 December 2009, 17464/09.

(iv) Issue specific measures

These measures under the Common Commercial Policy usually fall within the realm of the EU exclusive competence. Here the Commission attempts to diminish the impact of trade in broadly understood harmful goods despite of the tensions this may caused with other obligations.³³³ Below the list of the instruments is provided with reference to original documents as well as the section devoted to their discussion in the FRAME Deliverable 9.1.:

- Council of the European Union, 'Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment', 30 July 2005.³³⁴
- Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.³³⁵
- Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2203/30/EC.³³⁶
- Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.³³⁷
- European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, 'Responsible sourcing of minerals originating in conflict-affected and high-risk areas. Towards an integrated EU approach', 5 March 2014, JOIN(2014) 8 final.³³⁸
- Council Regulation (EC) No 2368/2002 of 20 December 2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds.³³⁹
- Extractive Industries Transparency Initiative (EITI) and the resulting instruments: Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC and Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market; Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of

³³³ FRAME Deliverable 9.1, op. cit. 38-39.

³³⁴ Idem.

³³⁵ FRAME Deliverable 9.1, op. cit. 40-41.

³³⁶ FRAME Deliverable 9.1, op. cit. 42.

³³⁷ FRAME Deliverable 9.1, op. cit. 43.

³³⁸ FRAME Deliverable 9.1, op. cit. 44-45.

³³⁹ FRAME Deliverable 9.1, op. cit. 45-46.

Directive 2004/109/EC.³⁴⁰

- Initiatives combating illegal logging and protesting forests: EU Timber Regulation and participation in the international UN lead initiatives.³⁴¹
- Forest Law Enforcement, Governance and Trade (FLEGT): Commission, 'Forest Law Enforcement, Governance and Trade (FLEGT) - Proposal for an EU Action Plan', Communication from the Commission to the Council and the European Parliament, 21 May 2003, (COM)2003 251 final; Commission Regulation (EC) No 1024/2008 of 17 October 2008 laying down detailed measures for the implementation of Council Regulation (EC) No 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community.³⁴²
- Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.³⁴³

(v) *Financial Instruments*

The financial instruments in the external sphere have received much more attention in the course of the FRAME project than these relating to the internal one. In particular, the analysis of the European Instrument of Human Rights and Democracy has been performed in an extensive manner.³⁴⁴ It was presented both as the means of addressing in a direct manner human rights concerns in third countries as well as operational mode of financing activities of international institutions.

The FRAME research has so far addressed financial instruments that in an indirect manner affect human rights in the context of development cooperation.³⁴⁵ The instruments at stake are the following ones:

- Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace, OJ 2014 L 77/1;
- Regulation (EU) No 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an Instrument for Pre-Accession Assistance (IPA II), OJ 2014 L 77/11;
- Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing an European Neighbourhood Instrument (ENPI), OJ 2014 L 77/27;
- Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument for development cooperation for the period 2014-2020, OJ 2014 L 77/44;
- Regulation (EU) No 234/2014 of the European Parliament and of the Council of 11 March 2014 establishing a Partnership Instrument for cooperation with third countries, OJ 2014 L 77/77.

³⁴⁰ FRAME Deliverable 9.1, op. cit. 46-48.

³⁴¹ FRAME Deliverable 9.1, op. cit. 48-50, also: European Commission, 'EU Timber Regulation applicable from 3 March 2013', <<http://ec.europa.eu/environment/forests/finternational.htm>>.

³⁴² FRAME Deliverable 9.1, op. cit. 50-52. See in particular, the experimentalist governance resulting in numerous voluntary agreements signed between the EU and third countries.

³⁴³ FRAME Deliverable 9.1, op. cit. 53.

³⁴⁴ See: for example: FRAME Deliverable 12.1, FRAME Deliverable 5.1, op. cit.

³⁴⁵ FRAME Deliverable 9.1, op. cit. 116 – 130.

Soft law frameworks similar to these discussed in relation to the EU internal financial instruments accompany the listed instruments. Again, common rules for the disbursement of funding are laid down a separate Regulation for the implementation of the Union's instruments for financing external action.³⁴⁶ The funding is disbursed through specialised initiatives such as the European Instrument for Human Rights and Democracy or according to the geographic key. FRAME Deliverable 9.1 includes an extensive study on the actors, scope and the coverage of the aid, which is provided in this manner. It is noteworthy that amongst all the instruments only Peace and Stability Instrument (Art. 4 of Regulation)³⁴⁷ and the EIDHR (Art. 11.2 Horizontal Implementing Regulation)³⁴⁸ address the civil society organisations.

On top of the unilateral financial instruments of the EU financing specific policy fields, there are also initiatives of the European financial institutions – in particular of the European Investment Bank. This aspect has been investigated under the FRAME Work Package 7³⁴⁹. Further results of this research will shed more light on the implementation practices of the EU in this area.

3. Other Measures – European Neighbourhood Policy setting

So far the European Neighbourhood Policy³⁵⁰ has not been analysed in depth within the FRAME research. Small remarks on its content have been made in relation to the policy when discussing the Area of Freedom, Security and Justice within the FRAME Work Package 11³⁵¹ and EU-Egypt relations and the concept of the 'deep democracy' within Work Package 3³⁵². From the toolbox point of view, the European Neighbourhood Policy uses as instruments the ENP Action Plans known also as Association Agendas for Eastern partner countries. These documents are of non-binding character and set out agendas for the partner countries as to the reforms they need to undergo before the further step of association with the EU can be reached. The logic behind the Action Plans is similar to the accession conditionality used in the enlargement policy. The difference is comprised of the stick and the carrot being thinner. The interesting part of the Action Plans is that they arguably induce compliance.

³⁴⁶ Below referred to as "Horizontal Implementing Regulation": Regulation (EU) No 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Unions instruments for financing external action [2014] OJ L 77/95.

³⁴⁷ Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace [2014] OJ L 77/1.

³⁴⁸ Regulation (EU) No 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Unions instruments for financing external action [2014] OJ L 77/95.

³⁴⁹ See, in particular, FRAME Deliverable 7.1.

³⁵⁰ For the analysis of the ENP, see: Christophe Hillion, 'The EU's Neighbourhood Policy towards Eastern Europe' in Alan Dashwood and Marc Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press 2008) Marise Cremona, 'The European Neighbourhood Policy More than a Partnership?' in Marise Cremona (ed.), *Developments in EU External Relations Law* (Oxford University Press 2008), or Andreas Marchetti and Rheinische Friedrich-Wilhelms-Universität Bonn Zentrum für Europäische Integrationsforschung, *The European neighbourhood policy foreign policy at the EUs periphery* (Rheinische Friedrich-Wilhelms-Universität Bonn 2006).

³⁵¹ FRAME Deliverable, 11.1, 13.

³⁵² FRAME Deliverable 3.2.

The procedure for adoption of Action Plans is much less rigid, however, given their soft character very advanced. Action Plans are 'to be agreed jointly with the neighbouring countries concerned. They should have a minimum duration of three years and be subject to renewal by mutual consent. Such action plans should be based on common principles but be differentiated, as appropriate, taking into account the specificities of each neighbour, its national reform processes and its relations with the EU. Action plans should be comprehensive but at the same time identify clearly a limited number of key priorities and offer real incentives for reform. Action plans should also contribute where possible to regional cooperation.³⁵³ The procedure of elaboration of an Action Plan requires that the Commission puts forward the proposal – on the basis of the 2004 ENP Strategy Paper and country reports. Once the Council welcomed the proposal, the Commission completed the first set of draft Action Plans addressed at the neighbours with whom the EU had association or partnership agreements. The Commission sent the draft Action Plans to the European Parliament, as well as to the European Economic and Social Committee, and the Committee of the Regions for information.³⁵⁴ Once Council approved Actions, they were to be endorsed by Association/Cooperation Council with each of the partners concerned having as their legal basis the existent agreements with the partners.

The adoption of an Action Plan is therefore, a negotiated process with the Commission and requires an extensive dialogue reminding of negotiations of international agreements. As such it is not transparent, but it permits long-term commitment which can be fairly easily adjusted to the requirements of the altered situation of attainment of pre-set objectives. It needs to be noted that as it was the case of the accession process, it is to large degree not the choice of instruments that will provide us with the information about rule of law but the frameworks within which they work.

Still, the process of creating a circle of friends around the European Union has been halted first by the Arab Spring and subsequently the civil war in Ukraine. It remains to be seen whether and how can the EU bring the European Neighbourhood Policy on track. The FRAME research results in this respect are awaited with curiosity.

3. Diplomatic tools as examples of other implementing measures

1. Tools available for use in multilateral forums

In general the EU's action in multilateral forums is undertaken with the use of tools characteristic for these forums.

³⁵³ GAER Councils of 16 June 2003 and of 14 June 2004.

³⁵⁴ Commission of the European Communities., *Communication from the Commission to the Council 'On the Commission Proposals for Action Plans under the European Neighbourhood Policy (ENP) (COM(2004) 795 final)*, at 3.

a. The United Nations

Within the UN the EU has at its disposal 'a wide array of tools and methods (...) including, *inter alia* delivering statements, drafting, supporting and tabling resolution initiatives, support of side events and major UN conferences, funding of UN work, and various aspects of human rights diplomacy.'³⁵⁵

The authors of the FRAME Deliverable 5.1 chose to focus their attention on the three of these initiatives and analysed in great detail resolution initiatives in the Human Rights Council (HRC), the Universal Periodic Review (UPR) and financing by the EU of the Office for the High Commissioner of Human Rights (OHCHR). The remaining initiatives are the classical diplomacy methods.

Within other forums the collaboration of the EU usually takes form of the inter-institutional agreements³⁵⁶ or financing manifested through programming as in the case of the Council of Europe.³⁵⁷

The first observation can be illustrated by the way through which the EU engages with the UN and regional human rights regimes. There it is obliged to act in line with the established framework as described in a number of FRAME Deliverables³⁵⁸.

Many FRAME reports raise two sets of problems in terms of the instruments that can be used in the particular contexts. The first one refers to the EU setting its agenda for the purposes of either acting within the premises of these instruments, or collaborating with such an organisation. The second set of problems refers to the EU's capacity to implement this agenda both using the instruments accessible to it within a specific context and engaging in collaboration with a specific organisation. The latter set of considerations will resonate in the EU's coordinating capacity towards its Member States to be analysed below.

Setting the EU agenda is a rather straightforward exercise. It requires a certain level of understanding between the Member States, which mandate the EU's external action. This will be expressed frequently, either in the Council's Conclusions, or the classical Strategic Framework and Action Plan for Human Rights and Democracy. FRAME Deliverable 5.1 'Report on the analysis and critical assessment of EU engagement in UN bodies' describes in very clear terms the various stages through which the policy is being developed internally prior to being taken to the UN. The four stages involve Drafting and

³⁵⁵ FRAME Deliverable 5.1, op. cit.,. 120.

³⁵⁶ As with the African Union, see: FRAME Deliverable 5.4, op. cit.

³⁵⁷ For instance, the Memorandum of Understanding between the EU and the Council of Europe (2007) <http://www.coe.int/t/der/docs/MoU_EN.pdf> accessed 4 January 2016.

³⁵⁸ FRAME Deliverable 4.1: Monika Mayrhofer, Carmela Chavez, Venkatachala Hegde, Magnus Killander, Joris Larik, Bright Nkrumah, Elizabeth Salmón, Kristine Yigen, 'Report on the mapping study on relevant actors in human rights protection' (2014);, op. cit., FRAME Deliverable 4.2: Monika Mayrhofer, Katharina Häusler, Renata Bregaglio, Carmela Chavez, Tingting Dai, Felipe Gómez Isa, Venkatachala Hegde, Jakub Jaraczewski, Magnus Killander, Karin Lukas, María Nagore, Bright Nkrumah, Lingying Yin, 'Report on the global human rights protection governance system' (2015);, op. cit., FRAME Deliverable 5.1 op. cit.;, FRAME Deliverable 5.4, op. cit.;, FRAME Deliverable 5.6, op. cit.

Consultations, Discussion and Endorsement, Inclusion into the Council Agenda, and Adoption by the Council.³⁵⁹

The agenda setting with relation to the EU's dealings with other international organisations dealing with human rights is closely connected with other EU's activities. As such it does not pose further specific problems for our analysis.

One observation can be made with reference to the EU's action agenda setting exercise for the UN and other multilateral forums. Namely, is that it is a rather circular type of activity where the EU could be considered as not only being an implementing actor, but also as a norm exporter.

Figure 5: The EU - UN Agenda Setting Exercise

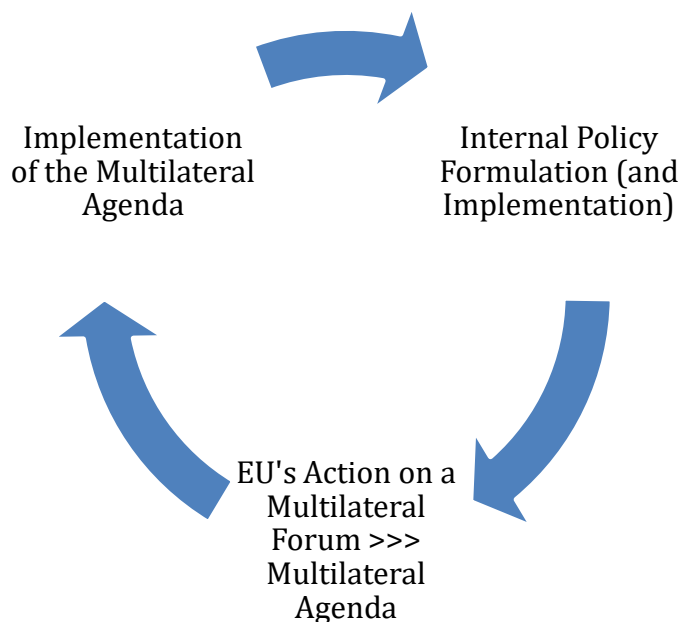


Figure 5 illustrates a rough process of cross-fertilisation between the EU and the international organisation, whereby each of the stages affects the next one; the agendas need not be identical but reflect each other's settings. The presentation of agenda setting in this context presents a doubt in relation to the EU action on the multilateral forums. The authors of our guiding FRAME Deliverable No. 12.1 position such actions by the EU within the category of policy implementation. However, a single-lined consideration seems too simplistic. In the UN context, the relationship between agenda setting and subsequent implementation thereof has much more circularity in it stemming from the largely diplomatic long-term character of its relations. At the same time it is subject to a different type of evaluation than the classical implementation tools.

³⁵⁹ FRAME Deliverable 5.1, op. cit, at 115- – 120.

Out of the two sets of issues presented above, possibly the more problematic one is that which refers to the use of the instruments available as far as acting within a realm of a specific institution is concerned (clearly the only one which offers such a possibility being the UN) and inasmuch as collaboration with international organisations is concerned. There, the instruments available to the EU are of a different type – leading sometimes to a criticism that certain types of activities ‘are outsourced’ by the Union to such an organisation. Regardless of such counter-opportunistic reproaches, the tools available at the multilateral forums and in collaboration with international organisations forge opportunities the EU eagerly pursues. Within the context of the UN, the toolbox available and used by the EU comprises three types of instruments, the particular features of the use of each of the instruments have been discussed extensively in the FRAME Deliverable 5.1³⁶⁰.

- Resolutions³⁶¹,
- Universal Periodic Review³⁶², and
- Financing³⁶³.

Citing the main conclusions from this analysis will permit us either to include each of these instruments in their own right in the map of policy tools or treat them as one category belonging to the area of implementation and referred to as the ‘EU action on the multilateral forums’.

Possibly the most important section of recommendations deals with the obvious fact that at the level of UN, the EU acts through the hands of its Member States. This brings to the general picture of the EU toolbox, the Member States’ instruments. For instance, the authors of FRAME Deliverable No. 5.1 distinguish between Resolution initiatives of the EU – namely, those chiefly sponsored by the EU; resolution initiatives of EU Member States, and Resolutions co-sponsored by the EU Member States. The role of the Member States-driven initiatives is of high value: ‘EU Member States have partially been able to fill the gaps left by the EU in the area of economic, social and cultural rights and in those areas where its internal human rights record is vulnerable to criticism, notably the rights of refugees and minorities and the fight against racism. These individual EU Member States’ initiatives can however not be presented as a EU proposal, in the sense that they do not represent a collective diplomatic effort of the Union. Through the tool of co-sponsoring the EU can nevertheless express its strong support of a Member State resolution in a prominent way. EU Member States employ this tool widely, not only with regard to proposals tabled by another EU Member State, but also with regard to initiatives of non-EU Member States whenever they correspond to the aims of the Union.’³⁶⁴

Similar observations can be made in relation to the Universal Periodic Review (UPR), which is conceived as ‘a cooperative mechanism, based on an interactive dialogue aiming at reviewing of the fulfilment by

³⁶⁰ FRAME Deliverable 5.1, op. cit.

³⁶¹ FRAME Deliverable 5.1, op. cit., 120-147.

³⁶² FRAME Deliverable 5.1, op. cit., 148-160.

³⁶³ FRAME Deliverable 5.1, op. cit., 160-169.

³⁶⁴ FRAME Deliverable 5.1, op. cit., 147.

each state of its human rights obligations and commitments.³⁶⁵ There, the EU's chief preoccupation was to avoid the perception that all the Member States act as a bloc. This would have left an impression not of the Member States acting, but the EU as a pressure group. Hence the mechanism of 'light coordination' has been devised to ensure that nevertheless the political priorities continue being promoted through the Member States' diplomacy.

As the last instrument used in this context the European Instrument of Human Rights and Democracy should be mentioned and the manner in which it contributes to the financing of the Office of the High Commissioner of Human Rights (OHCHR).³⁶⁶

b. Other International Organisations

Based on the two FRAME Deliverables: No. 5.4 'Report on the EU's engagement with regional multilateral organisations: Case study: African perspective'³⁶⁷ and No. 5.6 'Report on the EU's engagement with regional multilateral organisations: Case study: the Inter-American perspective'³⁶⁸ we can bring in a number of observations to the picture. In the first place, there is the EU's commitment to multilateralism, which concerns the EU exporting norms and its own modes of dealing with matters. However, the engagement of the EU both in relation to the African international organisations³⁶⁹ and the American³⁷⁰ institutions takes the usual forms of political dialogue and financing. What remains out of the picture however, is the role of the both Member States in their donor capacity as well as the very organisations at stake. This raises concerns about the efficiency and coherence of EU – Member States actions.³⁷¹

Finally, the last consideration with reference to the EU acting alongside other international organisations is that of the problematic issue of coordination of activities predominantly within the Europe (but also beyond). There, the EU is reproached for 'outsourcing' actions in specific areas to other international organisations. Under the spotlight there are the initiatives undertaken with the Council of Europe (CoE) or the Organisation for Economic Cooperation in Europe (OECD) and the Organisation for Security and Cooperation in Europe.³⁷²

³⁶⁵ UNGA Resolution 60/251, UN doc A/RES/60/251.

³⁶⁶ FRAME Deliverable 5.1, op. cit., 160-169.

³⁶⁷ FRAME Deliverable 5.4, op. cit.

³⁶⁸ FRAME Deliverable 5.6, op. cit.

³⁶⁹ The analysis takes into consideration: African Union (AU), Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Economic Community of West African States (ECOWAS), Inter-governmental Authority on Development (IGAD), Southern African Development Community (SADC). The human rights bodies at stake involve the African commission on Human and People's Rights, the African Court on Human and People's Rights, and the African Committee on the Rights and Welfare of the Child.

³⁷⁰ The focus in the analysis is placed on the Organization of American States and its human rights related bodies such as the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, as well as the number of subsidiary bodies of the Organisation of American States (see: FRAME Deliverable 5.6, op. cit. 19).

³⁷¹ FRAME Deliverable 5.4, 25.

³⁷² See, for example: the Memorandum of Understanding between the EU and the Council of Europe, op. cit. and the connected inter-institutional programming: 'Joint Programmes between the Council of Europe and The European Union < <http://www.jp.coe.int/>> accessed 4 January 2016.

The following three conclusions can be drawn from the context of the EU's collaboration on human rights with international and regional organisations. Firstly, one should consider the presence of such collaboration as part of the general implementation strategy of the EU's action. It should not be perceived as indispensable, yet its absence would raise questions as to the EU's commitment to the human rights cause. Similarly, multiplication of actions affecting a specific human rights concern simultaneously by the EU and other organisations acting within Europe can be considered as waste of resources. The EU should seek synergies with other international organisations to advance the human rights objectives and indeed it does so on regular basis.

Secondly, the outsourcing of specific activities to other organisations should be examined in greater detail not because it sheds unfavourable light on the EU, but because the format of this outsourcing may be evaluated in a positive manner as time-effective and cost-efficient. Finally, the EU's activity at the UN level seems to be a part of a policy formulation stage and as such could be considered as a parallel circle affecting the remaining ones even though only in part.

2. Decisions of the Council in the CFSP and the CSDP matters

The Treaty of the European Union determines the tools the EU has for the pursuit of its CFSP objectives. These are, in line with article 25 TEU: general guidelines; 'decisions defining (i) actions to be undertaken by the Union; (ii) positions to be taken by the Union; (iii) (operational) arrangements for the implementation of the decisions referred to in points (i) and (ii); (c) strengthening systematic cooperation between Member States in the conduct of policy'.

These tools take form of conclusions (dealt with in the previous section) and decisions of either the European Council determining the strategic direction of the EU action, or of the Council of the European Union. Strengthening of the systematic cooperation between Member States in the conduct of the policy takes place in the European Council or the Council forum in line with Article 32 TEU in a form of establishing common approaches. Importantly, the implementation of decisions taken within the CFSP realm 'shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union'³⁷³ and vice versa. This means that in formal terms the actions under the CFSP do not underlie the limits laid down in the Treaties on the one hand, yet they need to be in compliance with the values of the European Union in line with Article 6(3) TEU.

The references to the CFSP measures are made frequently in FRAME research³⁷⁴, yet a more focused study must be conducted for the purposes of Work Package 14.

3. Demarches and Declarations

Declarations or statements and demarches or formal diplomatic approaches are tools of classical diplomacy available to the institutions and bodies representing the EU in the external sphere. With reference to human rights, it is the HR/VP and the President of the European Council that use these

³⁷³ Art. 40 TEU.

³⁷⁴ See: FRAME Deliverable 12.1, 52-53,

tools to the largest extent. From the research point of view, the content of the tools is possibly not so relevant as they confirm the official EU position on specific matters. What is interesting, however, is the frequency of use of such tools, the time lapse between the implementation of the tool employed and often the lack of diplomatic reaction at all to the ongoing events. Démarches and declarations on the part of the EU diplomatic bodies will appear in the analysis of the majority of the EU external human rights policies.³⁷⁵

4. Human rights dialogues³⁷⁶

Human rights dialogues are regular or ad-hoc meetings dedicated to human rights promotion held in the ambit of the EU external policy between the EU on the one hand, and third countries or international organisations, on the other. The agenda of each dialogue is set according to specificity of the EU-third partner relationship including, insofar as possible EU's policy priorities as well as EU internal human rights issues. Human rights dialogues are programmed on a case-by-case basis in line with the EU guidelines on human rights dialogues with third countries. These are also instrumental for the fulfilment of obligations enshrined in EU's international agreements, such as Art. 8 of Cotonou Agreement concluded by EU and its member states with 79 African Caribbean and Pacific (ACP) countries.

Article 96 provides for an extensive consultation procedure involving political dialogue between the Parties. The procedure is restricted in time and should be completed in the course of 150 days³⁷⁷. It is to commence whenever a Party considers that 'other Party has failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in paragraph 2 of Article 9'. Should such situation occur, this Party is to supply the Council of Ministers with relevant information and invite the non-compliant Party to consultations 'that focus on the measures taken or to be taken by the party concerned to remedy the situation'.³⁷⁸ The initiated consultations and the measures thus taken must fulfil requirements set out in Annex VII, attached to the Cotonou Agreement as the result of first revision of the Agreement. Only if consultations fail or 'in case of special urgency'³⁷⁹ may the Parties resort to the "appropriate measures". Those measures are to be applied proportionally and in accordance with international law. Article 96(2c) states clearly:

'In selection of these measures priority must be given to those which least disrupt the application of this agreement. It is understood that suspension would be the a measure of last resort'.

³⁷⁵ See, for instance, the analysis of the trade policy as performed within Work Package 9.

³⁷⁶ FRAME Deliverable 3.2, op. cit. 76, FRAME Deliverable 12.1, op. cit. 38.

³⁷⁷ Article 96(2a), third sentence, amended in 2005 as the result of revision of the Agreement: *The consultations shall begin no later than 30 days after the invitation and shall continue for a period established by mutual agreement, depending on the nature and gravity of the violation. In no case shall the dialogue under the consultations procedure last longer than 120 days.*

³⁷⁸ Article 96(2a)

³⁷⁹ Defined by Article 96(2b) as *exceptional cases of serious and flagrant violation of one of the essential elements referred to in paragraph 2 of Article 9, that require and immediate reaction.*

Thus worded Non-Execution clause therefore echoes Article 62 VCLT lying at the foundation of human rights clauses as incorporated into trade agreements of the European Union including the most advanced sanction provided for by this provision – the suspension of the Agreement.

Yet, even if the procedure itself is fairly elaborate and permits to address the human rights flaws in a fairly transparent and equal manner, the solution is not perfect and has not permitted for elimination of this facet of coherence, as reported by Bartels.³⁸⁰ Yet, it created the basis for future practice aiming at attaining such objectives, even if by providing the basis of making clear decisions that will constitute the body of specific type of case law, which once systematised will permit for creating a constant practice.

Also in case of the Action Plans there are special sub-committees set up under these agreements for monitoring. These sub-committees consist of representatives of partner countries, MSs, European Commission, Council secretariat. Monitoring performed by them comes in hand with that performed by the Commission, which bases its recommendation as to the future contractual bonds on reports it produces. Since Action Plans set the objectives for the neighbouring countries, once such objectives are attained, Action Plans require adjustment. The alteration of scope and goals thereof is conducted on the basis of interim reports prepared by the European Commission. If a partner state does not agree with findings contained in the report or if it considers its progress to be greater (or smaller) than the Commission does, the only way it can alter an Action Plan proposed by the Commission is by negotiating. Yet, since negotiations are conducted on the basis of the proposal prepared by the Commission and approved by the Council³⁸¹, the Commission has a limited possibility of extending its proposal because of the Union's institutional constraints.

5. Human rights country strategies

Human rights country strategies are an instrument introduced as the result of the 2012 EU Strategic Framework and Action Plan for Human Rights and Democracy. Unfortunately, their 'secretive' character does not permit the thorough evaluation of their design and use. In fact, the authors of FRAME Deliverable No. 2.2³⁸² were forced to perform their research on the basis of other available policy documents (in particular geographic strategies) in order to learn about the EU's approach towards specific third countries. The EEAS officials repeatedly assert that human rights country strategies do not contain any measures that would be considered as unusual and correspond to the manner through which the EU reports on the human rights situation in third countries in its qualitative reports.³⁸³

4. Human Rights Guidelines

Another type of instrument that serves the EU human rights policy purposes are human rights guidelines. These are also adopted as council conclusions and are to provide the legal basis for mainstreaming of certain human rights concerns in all of the areas of the EU action. These human rights

³⁸⁰ Lorand Bartels, 'The Trade and Development Policy of the European Union' in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008)

³⁸¹ The Council by approving Commission's proposal grants to the Commission a quasi-mandate, not to be trespassed in the course of negotiations.

³⁸² FRAME Deliverable 2.2, op. cit.

³⁸³ Informal conversations with EEAS officials conducted in the period between October 2014 and December 2015.

specific instruments are considered to be the tool of mainstreaming human rights into other policy concerns. They place in the spotlight the EU's staff and institutions delivering on human rights removing the knowledge-gap obstacles as to how such mainstreaming should be conducted.

The authors of FRAME Deliverable 12.1 on the basis of the thus summarise the functions the Human Rights Guidelines play in the EU external policy:

'They are not legally binding but constitute a strong political expression of EU priorities on human rights and are practical tools to support EU representations in the field in order to advance human rights policy.³⁸⁴ They constitute a very pragmatic instrument, which provides the different EU actors with elements and operational tools to carry out actions in certain human rights key areas of concern.³⁸⁵ They also provide officials and staff with practical guidance on how to contribute to preventing violations of human rights and how to analyse concrete cases and to react effectively when violations occur.^{386,387}

Until the present moment the following guidelines have been adopted by the Council of the European Union:

1. Council of the European Union, EU Human Rights Guidelines on Freedom of Expression Online and Offline, Foreign Affairs Council meeting, Brussels, 12 May 2014. (Guidelines on freedom of expression online and offline).
2. Council of the European Union, EU Guidelines on the promotion and protection of freedom of religion or belief, Foreign Affairs Council meeting, Luxembourg, 24 June 2013. (Guidelines on the promotion and protection of freedom of religion or belief or FoRB Guidelines).
3. Council of the European Union, Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, Transgender and intersex (LGBTI) persons, Foreign Affairs Council meeting, Luxembourg, 24 June 2013.
4. Council of the European Union, Guidelines on Death Penalty, Common Guidelines, Brussels, 12 April 2013, 8416/13EU.
5. Council of the European Union, Guidelines to EU Policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment - An up-date of the Guidelines, Brussels, 20 March 2012, 6129/1/12 REV1. (Initially adopted in 2001, updated in 2008).
6. Council of the European Union, Update of the EU Guidelines on Children and Armed Conflict.

³⁸⁴ The Council of the European Union, 'Guidelines. Human Rights and International Humanitarian Law, 2009, <www.eeas.europa.eu/human_rights/docs/guidelines_en.pdf>, accessed 30 November 2015 3.

³⁸⁵ The Council of the European Union, 'EU Annual Report on Human Rights 2008' 14146/2/08 [2008], 6.

³⁸⁶ The Council of the European Union, 'EU Human Rights Guidelines on Freedom of Expression Online and Offline' [2014], 2.

³⁸⁷ FRAME Deliverable 12.1, op. cit., at 19; see also the Chart mapping the guidelines with particular priorities of the EU Strategic Framework and Action Plan for Human Rights and Democracy, op. cit.,idem, at 20.

Initially adopted in 2003, updated in 2008.

7. Council of the European Union, EU Guidelines for the Promotion and Protection of the Rights of the Child. Adopted in 2008.
8. Council of the European Union, EU guidelines on violence against women and girls and combating all forms of discrimination against them. Adopted in 2008.
9. Council of the European Union, Ensuring protection – European Union Guidelines on Human Rights Defenders. Initially adopted in 2004, updated in 2008
10. Council of the European Union, EU Guidelines on promoting compliance with International Humanitarian Law (IHL) - Technical update, Brussels, 1 December 2009, 16841/09. Initially adopted in 2005, updated in 2009.

The human rights guidelines, similarly to the Conclusions of the Council and the European Council of strategic value are the instruments aimed at ensuring the EU coherence. Even though they are operational in nature, they do not provide for accountability mechanisms for the EU staff and also possibly institutions. It remains to be seen in the course of the future research whether the Guidelines are actually to be used, or whether they remain in the sphere of the rhetorical commitment of the European Union.

4. The Enforcement Mechanisms

The consideration of enforcement mechanisms in the EU external relations is usually framed by the limited access to judicial enforcement mechanisms. Under the CFSP, there is only a very limited role attributed to the CJEU. In line with Article 275 TFEU 'The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.' These are only restrictive measures that are subject to the jurisdiction of the Court of Justice of the European Union. Apart from this, the Court may exert the control of the legality of a programmed negotiated Treaty under Art. 218(11) TFEU. It can also interpret the provisions of international agreements of the EU and decide on their effects in the EU legal order. But this is where its jurisdiction in external relations ends.

In other aspects the enforcement mechanisms in the EU external relations resonate to a large degree two further modes of categorising the tools that appear in FRAME Deliverable 6.1: the mandatory provisions as to which instruments the EU may or may not adopt, the possibility of using power leverage (the soft and hard power of the EU was already discussed above).

The first of the issues that come into question is if and to what extent the EU can actually adopt the coercive enforcement measures in its external relations. This brings in the distinction between discretionary, mandatory and prohibited instruments drawn according to the following lines:

Most instruments applied as part of EU foreign policy are based on discretionary decisions of the EU. Foreign policy instruments work within an existing legal framework that puts limits on the use of the various tools. There is a difference between instruments that are available to the actors and those that they are required or prohibited to use. While most instruments are discretionary, the UN Security Council can order mandatory sanctions, the EU or the WTO can limit the ability³⁸⁸ of states to apply economic sanctions (where hard law applies to Member States' decisions on trade), and human rights considerations of the states in question can dictate breaking off connections, to prevent assistance to violations, that could otherwise be considered a human rights violation by that state.

Mandatory measures can include no-fly lists, flight and visa bans (applied in the case of Serbia, South Africa, Haiti and Myanmar in the past), denial of admission, freezing financial assets, other financial restrictions, bans on export / import (trade embargo measures, boycott actions). The latter actions can include more specific embargoes targeting, e.g. arms trade. Sanctions can be more directly military too, with or without a Security Council resolution, with or without human rights violations in the background (threatening international peace and security). Foreign policy instruments can include support to opposition forces (seeking regime change), intervention to protect nationals, other military intervention, and crisis management, prevention, peace-keeping, and peace-enforcement (see the military instruments above).³⁸⁹

From the point of view of the EU internal legal setting, this is where the recent Opinion 2/2013 of the Court of Justice of the European Union³⁹⁰ comes to the fore, inasmuch as it establishes the capacity on the part of the EU to enter into international agreements.

This distinction brings the discussion to one further consideration in relation to what types of instruments can be created on the EU level. It can be argued that precisely because of the lack of sufficient judicial remedies, the European Commission has for a long time engaged in an increasingly reflexive experimentation which should be considered as a part of the creation and re-creation of the European legal space – an a kind of contribution to the Court of Justice-led dialogue. This is where the issue of conditionality and composite procedures comes in place and the second of Deliverable 6.1

³⁸⁸ FRAME Deliverable 6.1, op. cit. 85-88.

³⁸⁹ FRAME Deliverable 6.1, op. cit. 85.

³⁹⁰ Opinion 2/2013, op. cit.

relevant classifications of tools: that which divides the tools along the diplomatic-military-economic axis especially inasmuch as they exert negative influence.³⁹¹

With respect to economic instruments, to grant a country the ‘most-favoured nation treatment’ is an acknowledgement of positive relations, whereas a ban on export/import, or the suspension of development assistance is a clear sign of disapproval. Negative diplomatic instruments include the breaking off of diplomatic relations, the expulsion of diplomats, the cutting of diplomatic ties, the cancellation of official visits, while an invitation for a visit as the recognition of the human rights situation, or an invitation to membership or to an international conference will be an expression of appreciation.

The military instruments of the European Union generally do not appear as classic military coercive instruments, rather take the form of humanitarian, peacekeeping missions. Crisis management missions are functioning within the framework of the Common Security and Defence Policy.^{392, 393}

In this vein the EU’s enforcement mechanism in external relations take form of any negative measure which may compel the third country partners to act in accordance with their human rights commitments.

5. Tools used to evaluate/measure progress on human rights

Again as in case of EU internal tools, the in-depth study of the EU tools used to evaluate/measure progress on human rights have been conducted in FRAME Deliverables 13.1 and FRAME Deliverable 9.2. In fact, the focus on enlargement policy and the extensive discussion of external realm and the nascent impact assessments within the EU trade policy permits a cautious conclusion according to which these tools have gained a quicker momentum in external realm of the EU human rights policy. This section will provide again a very brief overview of which are the relevant instruments and the modalities of their use.

1. Qualitative Reports

As far as the qualitative evaluation of the EU external human rights policy is concerned, it has been performed since 1999 through the publication of the Annual Report on Human Rights and Democracy in the World. It is of descriptive character addressing specific issues or describes the situation of human rights using a country-by-country approach.³⁹⁴

³⁹¹ FRAME Deliverable 6.1, op. cit. 80-81.

³⁹² Cremona M, ‘The EU and Global Emergencies: Competence and Instruments’ in *Antoniadis A, Schütze R, Spaventa E, (eds), The European Union and Global Emergencies: A Law and Policy Analysis (Hart Publishing Limited 2011)* 16.

³⁹³ FRAME Deliverable 6.1, op. cit. 80.

³⁹⁴ FRAME Deliverable 13.1 op. cit. 75. See the reports under at the EEAS Website, ‘Human Rights Documents’ <http://eeas.europa.eu/human_rights/docs/index_en.htm> accessed 26 January 2016.

2. Indicators

Within the external realm, similarly to the internal ones, there exists no one commonly agreed format of resorting to indicators as the measurement instruments for human rights. The indicators are employed, however, on *ad hoc* basis and their use indicators is best visible in the context of financial instruments. FRAME Deliverable 13.1 reports on the indicators used under the Instrument of Pre-Accession Assistance³⁹⁵ whilst in the general realm, the indicators are used to monitor the disbursement of funding under the development aid financial instruments.³⁹⁶

3. Impact Assessments

Authors of FRAME Deliverable 9.2 conducted an in depth study of the functioning of human rights impact assessments in the EU external relations. They purported to analyse whether there was a sufficient willingness and 'equipment' to conduct systematic *ex ante* and *ex post* human rights impact assessments.³⁹⁷ These contain analysis of a wide range of activities undertaken by various actors including TNCs and NGOs. Importantly these studies do overlap with other types of impact assessments – in particular the Sustainability Impact Assessments (SIA) and may follow their methodology, but offer a more robust means to comprehend what the impact of the impact on human rights could be.

The authors of FRAME Deliverable 9.2 based their study on the available SIAs reports and found that the practice is not very consistent. As it seems, since 2012 the Commission started including specific human rights references to its *ex ante* impact assessments. At the same time, *ex post* impact assessments have are not routinely conducted.³⁹⁸

In FRAME Deliverable 9.2 offers an applied study of an impact of EU-Columbia trade agreement on labour rights.³⁹⁹

³⁹⁵ European Parliament and Council Regulation (EU) No. 231/2014 of 11 March 2014 establishing an Instrument for Pre-accession Assistance (IPA II) [2014] OJ L 77/14.

³⁹⁶ FRAME Deliverable 13.1, op. cit. 66 and the following.

³⁹⁷ FRAME Deliverable 9.2, op. cit. 21.

³⁹⁸ FRAME Deliverable 9.2, op. cit. 97.

³⁹⁹ FRAME Deliverable 9.2, op. cit. 126-164.

IV. Conclusions and the Way Ahead

A. Conclusions

This report constitutes an attempt to draft a comprehensive overview of the EU internal fundamental rights and external human rights toolbox. It purported to address two research questions: (i) ‘what are the categories offering useful insights for future research?’ and ‘what are the concrete tools that serve the EU to attain its fundamental and human rights policy objectives?’

The key to the inventory of the tools was based on the main distinction between internal and external policy tools. In addition, a functional approach was adopted based on a logical sequence of tools, which are used for conceptualisation, operationalization and evaluation of policy objectives. This was combined with the usual differentiation between hard and soft legal tools. The resulting presentation of tools was based on what was called here a ‘functional’ approach, whereby the distinction of tools was drafted around the intersection of the presented categories.

The overall exercise of inventarisation of the EU internal fundamental rights and external human rights policy toolbox turned out to be a challenging one. As discussed in the description of the inventory key, the identified categories, though providing substantive information on existing challenges, are blurry and many of the tools should be considered as interacting and feeding one another. The resulting map of all the tools is vast and complex, ranging from hard legal measures to soft forms of diplomacy. It was beyond the scope of this study to explore in depth the intricacies of the use of each of the tools and challenges they pose. Yet, the emerging picture already focuses on considerations related to the sequencing of actions and the manner in which specific tools affect one another.

The conclusions that can be drawn from the inventarisation exercise are the following:

The European Union has at its disposal a wide range of instruments that can be used for the attainment of the EU internal fundamental rights and external human rights objectives. The freedom of the EU to adopt specific measures is limited by the exigencies of the EU and international legal systems on the one hand and political will on the other. Yet, from the perspective of the existing measures – possibly with the exception of the measurement systems geared for monitoring and evaluation of human rights initiatives – everything seems to be in place. This includes the reflection as to what can ensure coherence in the whole policy field. At the same time, another question appears: can tools push the boundaries of the legal system?

The problem that remains unresolved is the one relating to the effectiveness of the policy instruments. On the one hand, the generalized lack of monitoring mechanisms renders it difficult to understand whether a specific instrument had a positive impact on human rights. It is also difficult to assess what in a given context would amount to an effective implementation of measures. Finally, the net results of the interaction or parallel functioning of instruments remain difficult to assess.

Since this report constitutes only the beginning of the reflection on the policy toolbox, its use and proposed improvements, one should consider as a final step in this exercise the elements that were omitted in the present report yet that could contribute to the future research.

B. Other Categories of Tools

FRAME reports have delivered a wealth of information on other modes of approaching policy tools. One should point to further categories, which shed some further light on the use of and interactions between the tools. For this purpose, one should reach again to FRAME Deliverable 6.1 which in the context of external relations identified numerous dichotomous categories through which the tools may be viewed.

In relation to the content of the instruments, the authors of FRAME Deliverable 6.1 point to positive as opposed to negative instruments⁴⁰⁰ where the former ones are used to induce compliance with human rights norms through encouragement of specific behaviour. Negative instruments sanction the lack of compliance. In the view of the authors of FRAME Deliverable 6.1, the EU predominantly uses the positive approach in its actions. Numerous questions can be posed in this context: Do the sanctions actually evoke the required behaviours on the part of third countries? How far can the EU support reach and whether it motivates state to take responsibility for and ownership of their own human rights standards? In relation to the latter, there has been an on-going discussion in the literature criticising the EU for the 'incoherent' use of conditional tools.⁴⁰¹ The matter is unresolved so far, and should be further explored and conceptualised in further subsequent research conducted within FRAME and beyond.

The notion of positive v. negative tools resonates with the paradigmatic categories of tools as identified above – in the subsequent research, the impact of one on the other shall be addressed.

As far as the form of the instruments is concerned, one distinction between what is open to the public and what is secretive comes to the forefront.⁴⁰² This distinction mirrors, but is not limited to, the division between tools of quiet and public diplomacy.

This division has severe implications for the use and study of specific tools. In the first instance, the secretive nature of instruments has an impact on the access to information on their mere existence but also on how they function. There, the findings of the analysis can be easily questioned: if it is based on generally attainable sources, then it will be considered as incomplete; whilst when based on sources available only partially (often such that they cannot be specified) available, the findings of a potential research can be very easily challenged. This formal problem forms only the tip of the iceberg. Both in relation to the internal and external EU human rights policy setting, there are substantial lacunae in knowledge of what the instruments are and how they function. In addition, frequently, the access to

⁴⁰⁰ FRAME Deliverable 6.1, op. cit. 81-85.

⁴⁰¹ See, in particular, the discussion of the use of human rights clauses in the EU international agreements and the development financing and programing: FRAME Deliverable 9.1, op. cit.

⁴⁰² FRAME Deliverable 6.1, op. cit., 91-94.

information as to decision-making processes is impaired, making it more difficult to hold the decision makers but also the executive accountable.

Similarly, in the external realm, even more of the decisions are made behind closed doors. The FRAME Deliverables offer numerous examples of research impaired by access to information where the secretive nature of country strategies⁴⁰³ or diplomatic methodology such as light coordination in relation to the UPR⁴⁰⁴ makes it highly problematic to offer a meaningful contribution to the field. Furthermore, a number of instruments operate in a localized, flexible manner⁴⁰⁵, which makes it increasingly difficult to gather and evaluate information in a systematic manner.

Similarly, as is the case for soft and hard power instruments, and the division between secret and transparent instruments, the real challenge is to establish the correct mix between the two. Clearly, sometimes it is necessary to take a decision related to the use of tools behind closed doors for their efficiency (be it in negotiation context, or a general strategic one) is at stake. Yet such choices should be made only in extreme cases.

The three additional categorisations of tools bring to the forefront further considerations, which may affect the means through which the tools are analysed. In particular, the notions of what can and cannot be done in combination with secretive as opposed to open approaches can be included in the subsequent study of the strategic use of tools.

C. A glimpse ahead: setting agenda for further research concerning the EU human and fundamental rights policy toolbox

In the course of the future research within Work Package 14 the map proposed in this report will be expanded to include above all the results of the currently conducted FRAME research. In addition, further work shall seek to uncover links and inter-relations between various instruments and their actual use. Hopefully, all the three elements: the mapped toolbox; the strategic use of tools as represented by past experiences, and the theoretical lenses will permit us to create a stable tool for the analysis of the totality of fundamental and human rights toolboxes and create a reliable basis for normative proposals.

As the second step in the analysis, it is our task to focus on the strategic use of the tools and compiling, at a later stage, a theoretical framework through which the toolbox is addressed.

Therefore, when programming for the future, we should strive to present a toolbox that fulfils the following requirements:

⁴⁰³ See: FRAME Deliverable 2.2., op. cit. In case of this deliverable the authors based their findings on the documents which are accessible for analysis in a specific country context.

⁴⁰⁴ See: FRAME Deliverable 5.1., op. cit. Here, the establishment of the existence of 'light coordination' methodology permitted to conduct subsequent research on results if its application.

⁴⁰⁵ See: the local programming under the EIHRD, ENPI and other financial instruments.

1. It should be **manageable**, thus enabling coordination by the institutions in order to avoid incoherent policies,
2. It should bring to the light the **advantages** and **disadvantages of the use of legal versus diplomatic/political tools** (and *vice versa*),
3. It should address the **possible means of enhancing effectiveness** of the EU human rights policy toolbox (as pointed to by the FRAME research),
4. Finally, it should identify **means through which the toolbox could be improved** – on the basis of the findings as to whether there exists strategy behind their use, and if so, what it implies.

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