



# Human Rights Indicators in the Context of the European Union

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## **Human Rights Indicators in the Context of the European Union**

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## Executive Summary

Human rights indicators are an essential instrument for planning, monitoring and evaluating the effectiveness of human rights protection and promotion. On the international, regional, national and local levels, numerous mechanisms for measuring human rights have been developed; some of them were already applied in practice with varying degrees of success, while others remained theoretical attempts. Such mechanisms usually resort to qualitative and/or quantitative indicators to measure the current state and/or progress of particular human rights or assess the impacts of policies/measures in a defined geographical area within a given time-frame.

The aim of this study is to critically assess and analyse existing human rights indicators systems, and identify their objectives, target audience and methodology. This is done in order to formulate objectives for human rights indicators to be used in the European Union's human rights (internal and external) policies. Up until now, several EU institutions have taken initiatives to measure human rights or have at least underlined the necessity to do so. Human rights measurements may indeed be utilised by the EU to ground its policies on a solid base of evidence and further help backing EU actions with increased legitimacy. When identifying meaningful and applicable mechanisms to measure human rights, the EU may well build on the existing work on human rights indicators. However, a comparison of the EU's attempts to develop human rights indicators reveals considerable discrepancies in the approaches taken. These differences are often closely linked with the specific purposes and objectives of the producers and users of human rights indicators.

This study starts with an analysis of the current application of human rights indicators in the European Union's internal and external action, their legal and political framework, as well as their rationale. It further assesses, through qualitative fieldwork research, the needs of key European stakeholders towards a human rights indicator system.

An extensive mapping of various mechanisms for measuring human rights was done. The mapping results encompass instruments produced by a variety of actors, based on different rationales, data sources and with different areas of application. The focus has been put on those mechanisms which are developed and applied by the organisations mentioned in respective EU documents, i.e. the UN institutions and the Council of Europe.

In order to find out if those mechanisms are suitable for further adaption and use by the EU, their intrinsic quality has been evaluated first. This was then finally matched with the requirements of EU bodies. The selection criteria do primarily reflect relevance, appropriateness and reliability. Therefore, established quality criteria for the identification of human rights indicators are key for the selection. Additionally, pragmatic criteria such as being already used in practice, taking into account data availability and user-friendliness are considered. Due to the variety of purposes of human rights measurement, the range of requirements that should be measured demand a comparative, but also differentiated analysis. The methodology needs to be consistent and broadly accepted. Flexible frequency of application must be ensured. The instruments need to enable the proof of causality between measure and impact.

The report concludes with the selection of the structure-process-outcome model by the OHCHR. This model is designed to measure the extent to which human rights dimensions respect, protect, fulfil and

promote human rights standards in any given environment. As a human rights indicator model it does fulfil all of the mentioned criteria. In order to give EU stakeholders a pragmatic tool at hand for their daily work, it is proposed that an easy to access 'instant information tool', i.e. an information database on compliance including a compilation of existing indicators and related data sets, should be developed.

## List of abbreviations

ACP – African, Caribbean and Pacific group of States

CEPEJ – European Commission for the Efficiency of Justice of the Council of Europe

CFR – Charter of Fundamental Rights

CJEU – Court of Justice of the European Union

CoE – Council of Europe

COREPER – Committee of Permanent Representatives

CSP – Country Strategy Paper

COHOM – Human Rights Working Group of the Council of the European Union

COREPER – Council of the European Union Permanent Representatives Committee

CSDP – Common Security and Defence Policy

CVM – Cooperation and Verification Mechanism

DCI – Development Cooperation Instrument

DG DEVCO – European Commission’s Directorate General for Development and Cooperation

DG EMPL – European Commission’s Directorate General for Employment, Social Affairs and Inclusion

DG ENLARG – European Commission’s Directorate General for Enlargement

DG HOME – European Commission’s Directorate General for Home Affairs

DG JUST – European Commission’s Directorate General for Justice

DROI – European Parliament Subcommittee on Human Rights

ECJ – Court of Justice of the European Union

EDF – European Development Fund

EEAS – European External Action Service

EHRC – Equality and Human Rights Commission

EIDHR – European Instrument for Human Rights and Democracy

EIGE – European Institute for Gender Equality

EMCO – European Commission’s Employment Committee

ENI – European Neighbourhood Instrument

ENP – European Neighbourhood Policy

EPM – Employment Performance Monitor

EPSCO – Council of the European Union’s Employment, Social Policy, Health and Consumer Affairs Council

ESN – European Services Network

EU – European Union

EU-LFS – European Union Labour Force Survey

EUROSTAT – Statistical Office of the Commission of the European Union

EU-SILC – European Union Statistics on Income and Living Conditions

FEMME – European Parliament’s Committee on Women’s Rights and Gender Equality

FRA – European Union Agency for Fundamental Rights

FREMP – Working Party on Fundamental Rights, Citizens’ Rights and Free Movement of Persons of the Council of the European Union

FTA – Free Trade Agreement

GGDC – Good Governance and Development Contract

GRECO – Group of States against Corruption

GSP – Generalised Scheme of Preferences

HR – Human Rights

IA – Impact Assessment

IcSP – Instrument contributing to Stability and Peace

IGO – Intergovernmental Organisation

INTA – European Parliament Committee on International Trade

IPA – Instrument for Pre-Accession Assistance

ISPA – Instrument for Structural Policies for Pre-Accession

JAF – Joint Assessment Framework

LGBT(I) – Lesbian, Gay, Bisexual, Transsexual (and Intersexual)

LIBE – European Parliament Committee on Civil Liberties, Justice and Home Affairs

MAF – European Union Agency for Fundamental Rights’ Multiannual Framework

MDG – Millennium Development Goal

MFF – Multiannual Financial Framework

MIP – Multi-Annual Indicative Programme

MPG – Migration Policy Group

MS – Member State

NEET – Not in Education, Employment or Training

NSR – National Strategy Report

NGO – Non-governmental Organisation

NHRI – National Human Rights Institution

NIP – National Indicative Programme

NPM – National Preventive Mechanism

OCT – Overseas Countries and Territories

OECD – Organisation for Economic Co-operation and Development

OHCHR – United Nations Office of the High Commissioner for Human Rights

OMC – Open Method of Coordination for Social Protection and Social Inclusion

PEFA – Public Expenditure and Financial Accountability

PHARE – Poland and Hungary: Assistance for Restructuring their Economies

PI – Partnership Instrument

PSC – Political and Security Committee

RIP – Regional Indicative Programme

RBA – Rights Based Approach

SAPARD – Special Accession Programme for Agriculture and Rural Development

SHRC – Scottish Human Rights Commission

SPC – Social Protection Committee

SPPM – Social Protection Performance Monitor

SSF – Single Support Framework

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

UN – United Nations

UNDP – United Nations Development Programme

UPR – Universal Periodic Review

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## I. Introduction

### A. General introductory remarks

The FRAME work package on human rights indicators, which this report forms part of, is embedded and closely interlinked with the other FRAME research topics. Human rights challenges, conceptions of human rights in relation to the rule of law and democracy, the engagement and cooperation with international governmental, as well as private actors, the issue of internal and external, vertical and horizontal coherence, human rights in violent conflicts or human rights in European Union's (EU) democratisation policies are all highly relevant to the topic of measuring human rights dimensions. The research findings conceptually feed into the present report and indicate priorities and urgencies. Most importantly, they give guidance on and clarification of the actual object which should be measured, why it should be measured and at what levels.

This report starts from the assumption that the EU pursues a reliable human rights policy in all of its policy fields. For different purposes though, the various EU bodies and actors need information on the human rights situation and performance in their own sphere and about actors, countries and regions the EU is cooperating with, no matter whether within explicit human rights policies or within any other field, because human rights shall play a role in any case. Evidence on human rights can appear in different forms. Within the policy context, decisions will be triggered by this evidence. Thus, models of information provision which use indicators are deemed most appropriate. Therefore, the baseline study neither questions, whether there are other forms of information which could lead to the same effects, nor does it address the challenge of policies that tend to be designed to satisfy indicators rather than the rights-bearers.

The overall objective of this report is to map and critically assess existing human rights indicator schemes, as well as attempts to develop human rights indicators in relation to EU actions and policies. The report aims at analysing the state of the EU's application of respective instruments on the one hand and the state of the availability of appropriate human rights indicator schemes which are deemed to give relevant information to measure the respect, protection and fulfilment of human rights by referring to human rights standards on the other hand.

The report is thought to go beyond a baseline study. Besides mapping existing techniques and mapping the rationales and respective requirements of EU stakeholders concerning human rights information, the report aims at providing arguments for a selection of appropriate indicator systems by matching the requirements with the features of human rights information systems. Rather than reiterating the academic discussion on human rights indicators and their underlying methodologies, the present report should contribute to the usability of human rights information and therefore takes a users' perspective.

Consequently, the overall conclusion of this report is an informed proposal of human rights-centred methodologies under highly pragmatic conditions for use, gained by asking the current and potential future users thereof. In this way, the report aims at providing a basis for deciding on appropriate techniques for EU-specific purposes.

The report is about measuring human rights dimensions. Hence, it neither critically discusses the content of legal and policy documents dealing with human rights policies, nor does the report discuss exhaustively academic literature on indicators, human rights indicators or their underlying methodologies. It pragmatically goes only that far that a selection and a reliable proposal is possible concerning the right instruments, based on the insight into the needs of the EU. These needs are derived from the legal documents enshrining human rights as core values and from the other documents stating that human rights measurement should be done with respective indicators and for what reason.

The report also reveals some possible gaps concerning the availability of instruments on the one hand and the use of instruments on the other hand. Although this is beyond the scope of the report and therefore not addressed explicitly, these gaps concern the usability of instruments, i.e. there are not many methodologies or instruments focusing on human rights, being either too specific in scope or not appropriate for the purposes due to their underlying methodologies. There are large-scale information systems including indicators for major UN programmes in the field of development, health, education and others. They are human rights-relevant, but are not human rights measurements in the narrow sense, as they provide data on human rights-relevant facts, but do not measure human rights dimensions. Another important finding is the lacking linkage between qualitative information provided by treaty-bodies, monitoring bodies or other reports, which were declared as most relevant by the interviewed EU officials, and quantitative information systems, mostly based on statistical data. The gaps on the user-side are manifold and can be summarised as awareness gaps, knowledge gaps, resource gaps, efficiency gaps and cooperation gaps.

## **B. Guiding questions, goals and structure**

The present report follows a pragmatic approach. It aims at coming to a conclusion of who needs what, and for what reason. Human rights are a core value of the EU. The Union further aims at evidence-based policy making. Thus, is there a legal basis for measuring human rights? Is there a political commitment to do so? Is this the case in all policy areas or only in some? What can we find out about the implementation of human rights measurement? Is the assessment of human rights an end in itself or a means to achieve other goals? What human rights and in which of their dimensions should be measured? What measurement systems are available and in use by EU bodies? Considering the users and their requirements, what system can be recommended? And finally, how should an adequate set of measuring mechanisms be elaborated and installed in order to provide the various actors with relevant, reliable, accurate and timely information on human rights?

The report follows an inductive approach: Parts II.A and II.B scrutinise the legal obligations and political commitments of measuring human rights. The report analyses the legal and policy background of existing instruments, which are deemed to give information on the human rights situation in the EU, the objectives and purposes of such policies and instruments and it discusses practical matters of measuring human rights in the EU. In order to facilitate a more analytical approach, which further promotes the reaching of meaningful and well-structured conclusions, rather than a mainly descriptive approach, we agreed upon

an analysis structured along policy areas. These policy areas are the EU internal area, the EU enlargement area and the area of external action. A subdivision was then conducted regarding the different stages of policies, namely policy planning and formulation, implementation and evaluation in order to allow for a meaningful differentiation between the requirements for those different stages of policy cycles. For Chapter II.B, it will be shown that the structure of planning tasks, implementation of policies and evaluation thereof is most appropriate in order to conclude what measurements will be appropriate for what purpose.

Part II.C subsequently analyses what the requirements are in practice, what systems are already applied and what should be done in the future in order to enable EU officials to fulfil their tasks on an evidence-base. This part relies on interviews with several EU officials.

Part III then analyses the overall issue of this report from a different angle. It looks at which systems are available in the field. It starts with a discussion on the necessary features of a human rights measurement system, satisfying human rights-relevant criteria. Part III.B matches the requirements of the EU bodies with the quality criteria of human rights measurement schemes in order to select appropriate models for recommendation. Finally, the conclusions and the proposed way forward are presented in parts III.C and III.D.

The focus throughout the report is the measurement of human rights. The legal and policy basis as well as the interviews and the mapping of the instruments were all conducted with the ulterior motive of presenting the status quo and future perspectives on measuring human rights in all EU policy areas, interior, enlargement procedures and external policies.

Annex I lists a large selection of human rights and human rights related indicator models including aggregated human rights (-related) indices. The priority is given to models that are more comprehensive in scope, which are in use and published by international organisations, such as the Council of Europe, the World Bank and UN organisations.

The report is complemented by a case study in Annex II. In this case study, the researchers scrutinise the application of human rights information in the enlargement procedures along three examples, namely Bulgaria, Croatia and Montenegro. It is focused on the rule of law as the central interest of the EU in its enlargement strategy. The case study analyses the development of the information requirements in the Commission's assessment process. The case study gives important hints on the use of human rights information in EU's practical use of such information and is therefore an important part of this report, complementing the formal reasons, technical requirements and availability of information systems.

Annex III provides an overview of the interviews that have been conducted for the present report.

## C. Methods

Differing methodological approaches were taken for the different parts of this report. The first two parts on the legal basis and political commitments are based on desk research, attempting to cover the wide picture of the EU's action and the *status quo* of measuring human rights.

Also based on desk research, a mapping of existing systems, concepts and mechanisms for human rights or human rights related measurements has been carried out in parallel. About 130 such schemes were identified and described along parameters which indicate their relevance, meaningfulness and appropriateness to give information on human rights in a wider sense. The main mapping criteria are the type of author, the thematic context, their rationales, their users, the types of indicators and the underlying methodologies, data sources and quality of suppliers and processors, as well as the actual application and frequency of publication. In Annex I of the report, 50 human rights information schemes are listed and described in detail.

In section II.C.1 the research team looked into existing EU mechanisms and instruments, where human rights were taken into account. The most relevant instruments for this research were chosen and analysed. The attempts to monitor and/or measure human rights were especially underlined and presented. The list of instruments is not exhaustive, but is framed according to the purposes of this paper to come to valuable conclusions on the *status quo*. The findings of this mapping were then linked to the findings of interviews conducted with EU officials.

19 structured interviews were conducted with EU officials by researchers of the ETC and the Danish Institute for Human Rights. The qualitative interviews complement the desk research findings on measuring human rights with the perspective of stakeholders.

The interview guidelines were already based on the mapping of existing human rights measurement schemes. The guidelines encompass upstream questions on future mechanisms as well as a description and an assessment of currently applied mechanisms. For both, future and currently applied mechanisms, the following criteria had been addressed in the guidelines: the human rights topics covered, the geographical area of application, the question on the provision and processing of available and reliable data, the (non-)comparability of the results across various countries/regions, the frequency of application and the strengths and weaknesses of currently applied mechanisms as perceived by the users.

The main criterion for the selection of interviewees was to find officials in key positions, who apply or need human rights measurement. They were identified through organisation charts. Although the readiness of officials to participate in the survey and to support the project was high, not all of them specifically conduct human rights measurement. At the European Commission, interviews were conducted with members of the following Directorates-General (DGs): Employment, Social Affairs and Inclusion (EMPL); Enlargement (ENLARG); EuropeAid Development & Cooperation (DEVCO); Home Affairs (HOME); Justice (JUST). Members of the Social Protection Committee (SPC) were interviewed too. At the Council of the EU, interviews were conducted with members of the European External Action Service

(EEAS), the Human Rights Working Group (COHOM) and the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP). At the European Parliament, interviews were conducted at the Committee on Civil Liberties, Justice and Home Affairs (LIBE), Committee on International Trade (INTA), Women's Rights and Gender Equality (FEMME) and Subcommittee on Human Rights (DROI) (mostly civil servants rather than members of Parliament). In each interview, one to six persons participated; one person was interviewed twice.

The interviews were carried out either face-to-face or by telephone. Upon request, interviewees received the guidelines in advance. The interviews followed the guidelines closely. In certain cases where the interviewees' time was lacking, the focus was set on the requirements and purposes of future measurements. The interviews lasted between half an hour and an hour. The summaries of the interviews were sent to the interviewees for approval where requested. Since the majority of the interviewees wanted to remain anonymous, only the institutions will be cited in this report. However, it has to be mentioned that the information provided by the interviewees represent their professional opinions and not necessarily the official line of the EU bodies by which they are employed.

Again, for the case study presented in Annex II desk research has been applied and pieces of information stemming from a few relevant interviews conducted for part II were used.

Part III brings together the findings of all previous parts and applies a conclusion based on inductive reasoning. The requirements of EU bodies are identified from formal and normative documents, from guidelines to be applied in the different fields of activities and the information gained from the mentioned interviews. These findings are further corroborated by the case study in the area of enlargement. The EU requirements on human rights information are then tested against the technical features of the information schemes identified through the mapping. This is done with a view to define relevant selection criteria. These criteria are applied to describe the appropriate model for measuring human rights dimensions for EU use. Finally, an informed selection of an appropriate human rights information tool is presented.

## **D. Brief introductory remarks on human rights indicators**

This report aims to identify what are the needs of the EU institutions, if any, regarding human rights indicators and suggest appropriate human rights measurement tools, drawing on an extensive body of literature and experience in developing and applying human rights indicators. This section offers brief remarks on the concept and purposes of human rights indicators as well as a very brief description of main human rights indicators related terms.

### **1. What are human rights indicators?**

Indicators can generally be defined as informational tools, or as Abbot and Gujit say 'pieces of information that provide insight into matters of larger significance and make perceptible trends that are not

immediately detectable.<sup>1</sup> The most salient trait of indicators is thus that they 'simplify' reality in order to make assertions about (social) phenomena. Engle Merry observes that 'a key dimension of the power of indicators is their capacity to convert complicated contextually variable phenomena into unambiguous, clear, and impersonal measures. [...] They depend on the construction of categories of measurement such as ethnicity, gender, income, and more elaborated concepts such as national income.'<sup>2</sup> This process of abstraction is extremely valuable for processing information and allows comparing situation across time and space, but, as Kaufmann and Kraay observe, 'there is a good deal of subjective judgment involved'<sup>3</sup> in developing indicators and in the process something is always left behind. Talking about statistical indicators, for example, Engle Merry states that:

The essence of an indicator is that it is simple and easy to understand. Embedded theories, decisions about measures, and interpretations of the data are replaced by the certainty and lack of ambiguity of a number. [...] But what information is lost? Does the number bury the messiness of difference and allow equivalence?<sup>4</sup>

Problems arising by this process of 'simplification' can be observed also in the field of human rights. One of the most basic features of human rights is that they are universal in nature: they are rights that every human being, irrespective of where one lives should be entitled to.<sup>5</sup> Human rights could therefore be understood as a topic that can be easily measured across societies and cultures. When transforming these universal rights into measurable indicators, however, the conceptual complexity of human rights becomes apparent.<sup>6</sup> In a study on the development of child's rights indicators in Tanzania, Engle Merry for example

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<sup>1</sup> Joanne Abbot and Irene Gujit, 'Changing Views on Change: Participatory Approaches to monitoring the Environment' (1998) SARL Discussion Papers 254, p. 40.

In the same line the UNDP defines them as 'device for providing specific information on the state or condition of something'. United Nations Development Programme (UNDP), 'Indicators for Human Rights Based Approaches to Development in UNDP Programming: A User's Guide' (UNDP 2006), p. 21, <[http://www.undg.org/docs/11652/HRBA-Indicators-\(2006\).pdf](http://www.undg.org/docs/11652/HRBA-Indicators-(2006).pdf)> accessed 4 November 2014.

<sup>2</sup> Sally Engle Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance' (2011) 52 (Supplement to Number 3) *Current Anthropology* 83, p. 84.

<sup>3</sup> Daniel Kaufmann and Aart Kraay, 'Governance Indicators: Where are We? Where should We be going?' (2007) World Bank Policy Research Working Paper 4370, p. 8.

<sup>4</sup> Sally Engle Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance' (2011) 52 (Supplement to Number 3) *Current Anthropology* 83, p. 86.

In the same line see also: Russel L. Barsh, 'Measuring Human Rights: Problems of Methodology and Purpose' (1993) 15 *Human Rights Quarterly* 87.

<sup>5</sup> On the issue of universal human rights see Alexandra Timmer, 'Report State of the Art Literature Review Human Rights, Democracy and the Rule of Law' (2014) *Frame Deliverables*, pp. 7-9, <<http://www.fp7-frame.eu/reports>> accessed 6 October 2014.

<sup>6</sup> Russel Lawrence Barsh, 'Measuring Human Rights: Problems of Methodology and Purpose' (1993) 15 *Human Rights Quarterly* 87, pp. 92-93; Carr Center for Human Rights Policy at Harvard University, 'Measurement and Human Rights: Tracking Progress, Assessing Impact' Report on the Carr Centre Conference Measurement and Human Rights: Tracking Progress, Assessing Impact of 5-7 May 2005, p. 3, <http://www.hks.harvard.edu/cchrp/mhr/publications/documents/MeasurementReport2005.pdf> accessed 13 April 2014.

observes how even the wording 'rights' becomes problematic, since it is commonly translated and understood in Kiswahili as moral obligations instead of person's entitlements.<sup>7</sup> Similarly, Coppedge and Gerring discuss how defining democracy can lead to different measurement results on the example of the Polity 2 index, that does not take into account the composition of the electorate in the USA (from which women and African Americans were for a long time excluded) and therefore assesses the country as fully democratic throughout the twentieth century and much of the nineteenth century.<sup>8</sup>

When discussing about human rights indicators, therefore, how should they best be defined? In line with the definition offered by Abbott and Gujit, Maria Green defines a human rights indicator as 'a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation'.<sup>9</sup> This definition qualifies as human rights indicators those indicators that measure the application of human rights norms. It further highlights that human rights indicators are not limited to measuring the actions of the duty-bearers, but are also meant to evaluate the outcome of those actions, namely how human rights are enjoyed by the right-holders.

Paul Hunt, in his 2003 Interim Report as UN Special Rapporteur on the right of everyone to enjoy the highest attainable standard of physical and mental health, clarifies that in his opinion 'what tends to distinguish a right to health indicator from a health indicator is less its substance than (i) its explicit derivation from specific right to health norms; and (ii) the purpose to which it is put, namely right to health monitoring with a view to holding duty-bearers to account.'<sup>10</sup> Hunt thus classifies as human rights indicators only those indicators that explicitly, namely in a 'reasonably close and precise'<sup>11</sup> way, relate to human rights norms. Furthermore, '[j]ust as the right to health has to be seen in this broader normative context, so do right to health indicators. Accordingly, right to health indicators should not only reflect specific right to health norms, but also related human rights provisions, including non-discrimination and equality.'<sup>12</sup> On the methodological side, for example, this implies disaggregating data 'in relation to as

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<sup>7</sup> Sally Engle Merry, 'Quantification and the Paradox of Measurement' (2014 AHRI Conference, Copenhagen, September 2014).

<sup>8</sup> Michael Coppedge and others, 'Conceptualizing and measuring Democracy: A New Approach' (2011) 9 Perspectives on Politics 247

Similarly Spierer discusses how different definitions of the concept of political prisoner can affect the outcome of human rights measurements. Herbert Spierer, 'Violations of Human Rights. How Many?' (1990) 49 American Journal of Economics and Sociology 199.

<sup>9</sup> Maria Green, 'What we talk about when we talk about Indicators: Current Approaches to Human Rights Measurement' (2001) 23 Human Rights Quarterly 1062, p. 1065.

<sup>10</sup> United Nations Special Rapporteur of the Commission on Human Rights on the Right of Everyone to enjoy the Highest Attainable Standard of Physical and Mental Health, 'Interim Report on the Right of Everyone to enjoy the Highest Attainable Standard of Physical and Mental Health' 28 August 2003, A/58/427, para 10.

<sup>11</sup> United Nations Special Rapporteur of the Commission on Human Rights on the Right of Everyone to enjoy the Highest Attainable Standard of Physical and Mental Health, 'Interim Report on the Right of Everyone to enjoy the Highest Attainable Standard of Physical and Mental Health' 28 August 2003, A/58/427, para. 11.

<sup>12</sup> United Nations Special Rapporteur of the Commission on Human Rights on the Right of Everyone to enjoy the Highest Attainable Standard of Physical and Mental Health, 'Interim Report on the Right of Everyone to enjoy the Highest Attainable Standard of Physical and Mental Health' 28 August 2003, A/58/427, para. 12.

many of the internationally prohibited grounds of discrimination as possible'<sup>13</sup> in order to be able to detect possible disparities in the enjoyment of human rights.

The Office of the High Commissioner for Human Rights (OHCHR) took up many of the definitional elements proposed by Hunt and Green, by qualifying human rights indicators as '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 addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights'.<sup>14</sup> This definition qualifies as human rights indicators those indicators that can be related to human rights norms and standards. The OHCHR further specifies qualities of human rights indicators, namely that they also need to reflect the principles of human rights (e.g. non-discrimination and equality, empowerment, participation and effective measures) and their purpose, namely to assess and monitor the promotion and implementation of human rights.<sup>15</sup>

## 2. Why are human rights indicators important?

There are many ways in which indicators can be helpful as informational tools. Landman and Carvalho highlight six purposes of human rights measurement: contextual description and documentation, classification, monitoring and pattern recognition, secondary analysis and policy prescription, and advocacy and political dialogue.<sup>16</sup> Besides the more general scopes of indicators, such as providing evidence to gauge the magnitude of a certain situation or provide evidence to understand the root causes of a problem, in the human rights field two purposes are worth mentioning: strengthening accountability and evidence-based policy making.

Human rights indicators can be used to hold duty-bearers accountable for their actions.<sup>17</sup> Already in the 1990s the human rights monitoring bodies of the United Nations (UN) asked states to present more evidence to their human rights reports in order to better judge the efforts of states in complying with and promoting human rights.<sup>18</sup> In 1995, for example, the Committee on the Rights of the Child stated that:

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<sup>13</sup> United Nations Special Rapporteur of the Commission on Human Rights on the Right of Everyone to enjoy the Highest Attainable Standard of Physical and Mental Health, 'Interim Report on the Right of Everyone to enjoy the Highest Attainable Standard of Physical and Mental Health' 28 August 2003, A/58/427, para. 13.

<sup>14</sup> United Nations Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (United Nations 2012), p. 16.

<sup>15</sup> United Nations Special Rapporteur of the Commission on Human Rights on the Right of Everyone to enjoy the Highest Attainable Standard of Physical and Mental Health, 'Interim Report on the Right of Everyone to enjoy the Highest Attainable Standard of Physical and Mental Health' 28 August 2003, A/58/427, para. 12.

<sup>16</sup> Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Routledge 2010), pp. 4-6.

<sup>17</sup> United Nations Development Programme, *Human Development Report 2000* (UNDP 2000), p. 89; AnnJanette Rosga and Margaret L. Satterthwaie, 'The Trust in Indicators: Measuring Human Rights', (2009) 27 *Berkeley Journal of International Law* 253.

<sup>18</sup> Organisation for Economic Co-operation and Development (OECD), 'Measuring Human Rights and Democratic Governance: Experiences and Lessons from Metagora' (2008) 9 *OECD Journal on Development* 2, pp. 23-24.

[...] there is a need for a comprehensive network for the collection of data covering all areas of the Convention and taking into account all groups of children within Italy, which is essential for the implementation of targeted programmes on the rights of the child and the evaluation of the effectiveness of legislative and administrative measures.<sup>19</sup>

The 2000 United Nations Development Programme (UNDP) Report, looking at how human rights can contribute to human development, highlighted the importance of human rights indicators in identifying and holding 'important actors' accountable for their action. As was pointed out by Andersen and Sano the report discusses 'accountability of actors of human rights advocacy (not just the State)'.<sup>20</sup> Human rights indicators are in fact an essential tool for auditing not only States, but also non-governmental organisations (NGOs) and other actors, especially in the field of development aid as it will be discussed also later in this report.<sup>21</sup>

If the issue of accountability is important for advocating and monitoring compliance with human rights, policy makers are 'taking ownership' of human rights indicators through what is called evidence-based policy making: human rights indicators are used for identifying problems or issues in need of political attention, for highlighting priorities or analysing root causes.<sup>22</sup> Human rights indicators also support policy makers in fine-tuning and evaluating policies.

### 3. Human rights indicators related terminology

#### a) *Monitoring vs. measurement*

Human rights monitoring and human rights measurement are often used interchangeably when discussing issues related to human rights indicators. Indeed, human rights measurement can be used for monitoring the implementation of human rights. However monitoring human rights means evaluating the gap between the current and desired situation, often defined by human rights standards. Measuring human rights is descriptive in nature: it aims to describe and analyse a certain situation and answer questions such as 'How many elderly persons experience violence by a member of their family?' or 'Are lesbian, gay and bisexual persons afraid to hold hands in public?'. While the outcome of monitoring is a judgement, the outcome of measurement is not.

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<sup>19</sup> UN Committee on the Rights of the Child, 'Concluding observations of the Committee on the Rights of the Child: Italy' CRC/C/15/Add.41 of 27 November 1995, para.6; on this topic see also: Judith V. Welling, 'International Indicators and Economic, Social, and Cultural Rights' (2008) 30 Human Rights Quarterly 933.

<sup>20</sup> Bard Anders Andreassen and Hans-Otto Sano, 'What's the Goal? What's the Purpose? Observations on Human Rights Impact Assessment', The Norwegian Centre for Human Rights Research Note 2004/2, p. 8.

<sup>21</sup> Erik André Andersen and Hans-Otto Sano, *Human Rights Indicators at Program and Project Level: Guidelines for Defining Indicators, Monitoring and Evaluation* (Danish Institute for Human Rights 2006); Siobhán McInerney-Lankford and Hans-Otto Sano, *Human Rights Indicators in Development* (World Bank 2010).

<sup>22</sup> See Chapter II.B of this report on purposes of human rights measurement.

### **b) Quantitative and qualitative indicators**

There is not always clarity within the human rights community in understanding what human rights indicators are. As a consequence, human rights indicators are often reductively understood as statistical indicators.<sup>23</sup> Human rights indicators, however, can be both: they can be quantitative and qualitative. It is important in this respect to highlight that the distinction between qualitative and quantitative indicators does not correspond to a distinction between judgment-based and fact-based indicators: both quantitative and qualitative indicators can be judgement-based or fact-based.

A quantitative indicator is ‘any kind of indicator that is expressed primarily in quantitative form, such as numbers, percentages or indices’.<sup>24</sup> Thus, a quantitative indicator is suitable to measure everything that is countable in a way. Qualitative indicators ‘gather data that is best expressed and recorded in a non-numerical manner’<sup>25</sup> and allow for contextual analysis and measurement (most commonly qualitative indicators address questions of behaviour, views and attitudes). Human rights specific examples of qualitative indicators are the status of ratification of a human rights treaty or if lesbian, gay, bisexual, transexual and intersexual (LGBTI) associations feel obliged to conceal their true vocations.<sup>26</sup>

### **c) Benchmarks**

In a study for the European Parliament on the use of benchmarks for the EU external policy, Mihr defines benchmarks as ‘points of references against which the EU’s external policy can be measured by means of regular, timely and systematically applied human rights indicators.’<sup>27</sup> Benchmarks are targets to be achieved<sup>28</sup> and are extremely valuable for measuring performance. Classical benchmarks are for example contained in the Millennium Development Goals (MDGs): within the general goal of reducing child mortality, for example, the MDGs define the target of reducing under-five mortality by two thirds by 2015.<sup>29</sup>

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<sup>23</sup> Maria Green, ‘What we talk about when we talk about Indicators: Current Approaches to Human Rights Measurement’ (2001) 23 Human Rights Quarterly 1062; Organisation for Economic Co-operation and Development (OECD), ‘Measuring Human Rights and Democratic Governance: Experiences and Lessons from Metagora’ (2008) 9 OECD Journal on Development 2, p. 33.

<sup>24</sup> United Nations Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (United Nations 2012), p. 17.

<sup>25</sup> United Nations Development Programme (UNDP), *Report to UNDP Philippines: Human Rights Programme Review*, HURIST, May 2004, p. 44.

<sup>26</sup> 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’ of 24 June 2013.

<sup>27</sup> Anja Mihr, *Human Rights Benchmarks for EU’s External Policy* (Publications Office of the European Union 2011), p. 7.

<sup>28</sup> United Nations Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (United Nations 2012), p. 20.

<sup>29</sup> United Nations General Assembly, ‘United Nations Millennium Declaration’ of 18 September 2000, A/RES/55/2, para. 19.

#### *d) Indices*

Indices (commonly referred to as composite indicators or aggregated indicators) are a weighted aggregation of individual indicators that usually summarise different dimensions of a multidimensional issue (e.g. education, health, etc.), which cannot be adequately represented through individual indicators. To give an example, the Human Development Index offers a summary measure of average achievement in key dimensions of human development for each country (a long and healthy life, being knowledgeable and have a decent standard of living). Obviously, decisions about how to weight indicators in the index can lead to different results.<sup>30</sup>

#### *e) Disaggregation*

For the purpose of measuring the equal enjoyment of human rights within a given population, disaggregation allows to break down the data collected for each indicator, for instance, into possible grounds for discriminatory actions, such as sex, age, or ethnicity.

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<sup>30</sup> Michael Coppedge and others, 'Conceptualizing and measuring Democracy: A New Approach' (2011) 9 Perspectives on Politics 247, p. 250-251.

## II. Human rights measurements by the European Union

### A. Legal bases and political commitments for measuring human rights

This study starts with an analysis of the level of formal commitment of the European Union to measure human rights.

The first sub-section analyses whether there is any obligation to measure human rights in the EU primary and secondary law. In order to do so the basic provisions on fundamental rights within the EU legal framework will be presented and analysed, focusing in particular on their implications for human rights measurement.

The legal analysis will be then complemented by the analysis of the political commitment of the EU to measure human rights and in particular, if there are concrete policies in place to measure human rights as well as what is being advocated in the various policy areas of the EU.

#### 1. Legal bases

Although the EU was created as a peace project after the Second World War, fundamental rights have not always been a core value of the European Union. At the time when the Council of Europe (CoE) was founded in 1949 and when the European Convention on Human Rights entered into force in 1953, the ownership for the protection, promotion and the monitoring of human rights lay mainly with the CoE. The three European Communities (the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community) initially aimed at establishing a common European economic landscape, where human rights did not play a prominent role and therefore were not foreseen in the founding treaties (Treaty of Paris 1951 and Treaty of Rome 1957). However, some provisions on equal pay for male and female workers, the prohibition of discrimination on grounds of nationality, as well as the freedom of movement of workers were foreseen in these European treaties. Back then, the European Court of Justice (ECJ) also refused to rule on human rights in the case 1/58, *Stork*. Ten years later (case 29/69: *Stauder*), the ECJ changed its case law and started reviewing human rights cases.<sup>31</sup>

The importance and value of fundamental rights further grew over the years with the transformation of the European Communities into the EU. In 1977 the European Parliament (hereinafter the Parliament), the Council of the European Union and the European Commission (hereinafter the Commission) issued a joint declaration stressing

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<sup>31</sup> Case 1/58, *Stork vs. ECSC High Authority* [1959] ECR 1959; Case 29/69, *Erich Stauder v City of Ulm* [1969] ECR 419; Jürgen Kühling, 'Fundamental Rights' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2011).

the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights.<sup>32</sup>

In 1986 the preamble of the Single European Act contained a reference to democracy and human rights and in 1989 the Parliament adopted the Declaration on the Fundamental Rights and Freedoms.<sup>33</sup> In 1992 the Treaty of Maastricht contained a reference on human rights in its preamble, 'confirming [the Member States'] attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'.<sup>34</sup> With the Treaty of Amsterdam of 1997 fundamental rights were finally anchored in primary law, stating in the amended Art. F that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. In December 2000 the EU Charter of Fundamental Rights (CFR) was finally proclaimed by the Nice European Council. The entry into force of the Treaty of Lisbon further strengthened the European Union's human rights protection: the Charter of Fundamental Rights acquired the same legal value as the treaties establishing the EU<sup>35</sup> and now constitutes 'a legally binding reference point for the meaning and the content of fundamental rights in the European legal system' as stated in Art. 6 Treaty on European Union (TEU).<sup>36</sup>

Fundamental rights nowadays constitute 'a hard core of defining features in which every Union citizen can recognize himself, irrespective of the political or cultural differences linked to national identity'.<sup>37</sup> They represent thus the very foundation on which the EU is built. Human rights, as founding values enshrined in Art. 2 TEU, are not subject to limitations of competence between the EU and its Member States.<sup>38</sup> The Charter defines in closer detail those fundamental rights that are mentioned in Art. 2 TEU, but the Charter is limited by the division of competence between the EU and the Member States. Art. 51 of the Charter of Fundamental Rights, in accordance with Art. 4 and 5 TEU, limits its scope of application

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<sup>32</sup> European Parliament, the Council and the Commission, 'The Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms' (Joint Declaration) [1977] OJ C103/1.

<sup>33</sup> European Parliament, 'Declaration on the Fundamental Rights and Freedoms' [1989] OJ C120/51.

<sup>34</sup> Treaty on European Union [1992] OJ C191.

<sup>35</sup> Consolidated Version of the Treaty on European Union (2012) OJ C 326/13, Art. 6.

<sup>36</sup> Sergio Carrera and others, *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism* (Centre for European Policy Studies 2013), p. 1.

<sup>37</sup> European Commission, 'Article 7 of the Treaty on European Union. Respect for and Promotion of the Values on which the Union is based' (Communication) COM(2003) 606 final, p. 3.

<sup>38</sup> European Union Agency for Fundamental Rights, *The European Union as a Community of Values: Safeguarding Fundamental Rights in Times of Crisis* (Publications Office of the European Union 2013), p. 7; Armin von Bogdandy and others, 'Reverse Solange - Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 Common Market Law Review 489.

Consolidated Version of the Treaty on European Union (2012) OJ C 326/13, Art. 2.

to EU institutions (irrespective of whether their action is internal or external) and the Member States when applying EU law.

Given this ever-growing relevance of human rights in the legal foundations of the EU, the question arises as to what extent the legal bases also envisage mechanisms or tools to measure human rights. This question is relevant for Member States and third states alike. With regard to the Member States the procedure foreseen in Art. 7 TEU is the only mechanism that can be regarded as a post-accession 'supervisory tool' which equips EU institutions with the means to guarantee that the principles of Art. 2 TEU are respected by the Member States.<sup>39</sup> The introduction of this procedure by the Treaty of Amsterdam was on the one hand a reaction to the then upcoming wave of EU enlargement and on the other hand 'an attempt to tackle the discrepancy between the democratic model promoted by the EU in its external relations and its modest capacity to intervene whenever democratic values are at risk of being violated within one of its Member States'.<sup>40</sup> The procedure of Art. 7 can be triggered in case of a 'serious and persistent breach'<sup>41</sup> of the core values of the EU by a Member State, but also when there is 'a clear risk'<sup>42</sup> that this might happen. As clarified by the European Commission, Art. 7 TEU is not limited to areas covered by EU law, but can be triggered also by breaches in areas where the Member States are competent.<sup>43</sup> As there is no threshold set to identify situations when a state is at risk of, or in breach of Art. 2, monitoring of Member States' compliance with fundamental rights is left to the political discretion of the EU bodies entitled to initiate an Art. 7 procedure. The mechanism of Art. 7 TEU was described as a 'nuclear option'<sup>44</sup> by the former President of the Commission Barroso and has in fact never been applied so far. Recalling that respecting the rule of law is a prerequisite for the protection of fundamental rights, the European Commission recently proposed a new framework to deal with systemic threats to the rule of law. The new framework is supposed to take effect in cases where it is not considered opportune to start an Art. 7 procedure.<sup>45</sup> The new procedure thus precedes and complements the procedure of Art. 7 TEU.

Over the years, two bodies have been enshrined in the Treaty on the Functioning of the EU (TFEU), with the explicit mandate to monitor employment and social protection, areas that have been of main interest to the European Communities and now the Union since their establishment. Although this cannot be considered human rights monitoring, it is still highly relevant to it. More specifically, the Employment

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<sup>39</sup> Olivier De Schutter, 'A New Direction for the Fundamental Rights Policy of the EU' (2010) *Reflexive Governance in the Public Interest Working Papers* 33, p. 5, <<http://refgov.cpd.ucl.ac.be/?go=publications>> accessed 8 April 2014.

<sup>40</sup> European Parliamentary Research Service, 'Article 7 TEU: A Mechanism to Protect EU Values', <<http://epthinktank.eu/2013/10/07/article-7-teu-a-mechanism-to-protect-eu-values/>> accessed 27 October 2014.

<sup>41</sup> Consolidated Version of the Treaty on European Union (2012) OJ C 326/13, Art. 7 2.

<sup>42</sup> Consolidated Version of the Treaty on European Union (2012) OJ C 326/13, Art. 7 1.

<sup>43</sup> European Commission, 'Article 7 of the Treaty on European Union. Respect for and Promotion of the Values on which the Union is based' (Communication) COM(2003) 606 final, p. 5.

<sup>44</sup> José Manuel Barroso, 'State of the Union 2012 Address' (Press Release), SPEECH/12/596 of 12/09/2012 <[http://europa.eu/rapid/press-release\\_SPEECH-12-596\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm)> accessed 07.08.2014.

<sup>45</sup> European Commission, 'A New EU Framework to strengthen the Rule of Law' COM(2014) 158 final/2.

Committee (EMCO), introduced by the Treaty of Amsterdam, has the mandate to ‘monitor the employment situation and employment policies in the Member States and the Union’ (Art. 150 TFEU).<sup>46</sup> The Social Protection Committee, introduced by the Treaty of Nice, has the explicit mandate to ‘monitor the social situation and the development of social protection policies in the Member States and the Union’ (Art. 160 TFEU).<sup>47</sup> In the course of its mandate the SPC evaluates the status of poverty and social exclusion, health care, and pensions in the EU Member States. Although both – the EMCO and the SPC – do not have explicit mandates to ‘measure’ human rights, but the mandate to ‘monitor’ selected themes, they both began developing indicators in those areas of economic and social rights included in their mandate soon after their establishment.

In 2006 and 2007, the Council of the EU established two agencies with the mandate to ‘collect objective, reliable and comparable information.’<sup>48</sup> The European Union Agency for Fundamental Rights (FRA) was established to provide information on the development of the fundamental rights in the Member States. Regarding information on equality between women and men, the European Institute on Gender Equality (EIGE) was set up. EIGE and FRA share similar mandates, as they have been entrusted with the task of providing EU institutions and Member States with independent, evidence-based advice on fundamental rights and gender equality.<sup>49</sup> Both agencies also have the mandate to develop methods to improve the objectivity, comparability and reliability of data at the European level.<sup>50</sup> In practice, FRA and EIGE have both started to develop indicators for this purpose. EIGE has developed the Gender Equality Index – a composite indicator<sup>51</sup> on gender equality. FRA has so far developed indicators for the right to political participation of persons with disabilities and on the rights of the child.<sup>52</sup>

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<sup>46</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/49, Art. 150.

<sup>47</sup> Consolidated Version of the Treaty on the Functioning of the European Union (2012) OJ C326/49, Art. 160; Council Decision 2004/689/EC of 4 October 2004 establishing a Social Protection Committee and repealing Decision 2000/436/EC [2004] OJ L314/8.

<sup>48</sup> Council Regulation (EC) No.168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/1, Art. 4 para. 1a; European Parliament and Council Regulation (EC) No. 1922/2006 of 20 December 2006 establishing a European Institute for Gender Equality [2006] OJ L403/9, Art. 3 para. 1a.

<sup>49</sup> Council Regulation (EC) No.168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/1, Art. 2; European Parliament and Council Regulation (EC) No. 1922/2006 of 20 December 2006 establishing a European Institute for Gender Equality [2006] OJ L403/9, Art. 2.

<sup>50</sup> Council Regulation (EC) No.168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/1, Art. 4 para. 1b; European Parliament and Council Regulation (EC) No. 1922/2006 of 20 December 2006 establishing a European Institute for Gender Equality [2006] OJ L403/9, Art. 3 para. 1b.

<sup>51</sup> The OECD defines composite indicators as follows: ‘A composite indicator is formed when individual indicators are compiled into a single index on the basis of an underlying model. The composite indicator should ideally measure multidimensional concepts which cannot be captured by a single indicator.’ OECD, *Handbook on Constructing Composite Indicators: Methodology and User Guide* (OECD 2008), p. 13. See also: Jože Rován, ‘Composite Indicators’, in Miodrag Lovric (ed.), *International Encyclopedia of Statistical Science* (Springer 2011).

<sup>52</sup> 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); European Union Agency for Fundamental Rights, ‘Developing Indicators for the Protection, Respect and Promotion of the Rights of the Child in the European

While offering at the moment the most comprehensive analysis of fundamental rights developments in the Member States, the FRA is somewhat limited by its consulting function. The Council of the EU defines the thematic priorities for the FRA in the Multi-annual Framework (MAF).<sup>53</sup> The FRA cannot address by its own initiative matters that fall outside the MAF, as it is the case for issues relating to police and judicial cooperation in criminal matters. EIGE's mandate shares similar limitations, as this institute's work programme should be in line with the Union's priorities in the field of gender equality and the work programme of the European Commission.<sup>54</sup>

Looking into another area of EU's competence, namely in the framework of the European Union's external action, Art. 21 TEU extends the principles of Art. 2 TEU to its foreign policy by stating that:

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, [...] and respect for the principles of the United Nations Charter and international law.<sup>55</sup>

Since Art. 21 TEU extends the principles of Art. 2 TEU to the Union's external actions, the question about the legal foundation of an instrument designed to measure human rights gains relevance also in countries that are not member of the Union. The wording of Art. 21 TEU commits the EU to pursue the principles of democracy, the rule of law and human rights in its external actions, and to develop relations, build partnerships and define common policies and actions in order to support these principles. This provision makes the EU one of the most committed state-based actors in promoting these principles abroad. However there is no explicit obligation to measure human rights in the external area in the TEU or the TFEU.

Beside the general provision of Art. 21 – which is applicable to the entire external action area – human rights are explicitly mentioned in the field of trade policy and development and in the neighbourhood policy. The TFEU requires the common commercial policy (Art. 207 1) and development cooperation (Art. 208 1) to be conducted in the context of the principles and objectives of the Union's external action, among them, the principles of democracy, the rule of law, and the universality and indivisibility of human rights and fundamental freedoms as laid down in Article 21 TEU. According to Art. 212 TFEU this also applies for economic, financial and technical cooperation with third countries other than developing

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Union – Conference Edition ' (2010) <[http://fra.europa.eu/sites/default/files/fra\\_uploads/1308-FRA-report-rights-child-conference2010\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1308-FRA-report-rights-child-conference2010_EN.pdf)> accessed 11 November 2014.

<sup>53</sup> Further information on content of the Multi-Annual Framework will be given in chapter on relevant EU policy implementation instruments (II.C.1).

<sup>54</sup> European Parliament and Council Regulation (EC) No. 1922/2006 of 20 December 2006 establishing a European Institute for Gender Equality [2006] OJ L403/9, Art. 4 2.

<sup>55</sup> Consolidated Version of the Treaty on European Union (2012) OJ C 326/13, Art. 21.

countries. None of these provisions foresee rules on monitoring, evaluating or measuring human rights.<sup>56</sup> In the 1990s, the European Union has started introducing the so-called ‘human rights clause’ in all international agreements with third countries, including Free Trade Agreements (FTAs), stating that in case of violations of human rights the EU might suspend the agreement or parts of it.<sup>57</sup> There is however no mechanism set to objectively measure when a serious violation occurs, leaving this determination to the parties’ discretion.<sup>58</sup>

Art. 8 TEU foresees the development of special relations to neighbouring countries ‘aiming to establish an area of prosperity and good neighbourliness’. According to Art. 8 TEU these relations have to be founded on the values of the EU, including fundamental rights, still not foreseeing more specific provisions on how those rights should be guaranteed.

In the enlargement policy, a particular focus is laid on human rights assessment and monitoring: according to Art. 49 TEU, any European State which respects the values of Art. 2 and is committed to promoting them, may apply to become a member of the Union. At the Copenhagen meeting in 1993, the European Council agreed on objective criteria required for EU membership – the so called ‘Copenhagen Criteria’.<sup>59</sup> Besides the economic criteria and the criteria concerning the adoption of the *acquis communautaire*, membership requires that the candidate country has achieved ‘stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities’.<sup>60</sup> Although the Copenhagen criteria are not explicitly mentioned, Art. 49 TEU refers to them as preconditions by stipulating that ‘[t]he conditions of eligibility agreed upon by the European Council shall be taken into

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<sup>56</sup> These third states can be distinguished according to their status and relation to the EU. Consequently, a differentiation can be made between third states wishing to accede to the EU, states already in the process of accession, states being neighbouring countries and further states the Union has relations to. Different types of (financial) instruments are foreseen for those countries. A list of the currently applied restrictive measures is regularly updated by the European Commission. The up to date list as of December 2014 is: European Commission, ‘Restrictive Measures in Force’ of 5 December 2014 <[http://eeas.europa.eu/cfsp/sanctions/docs/measures\\_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf)>.

<sup>57</sup> Christina Churrua Muguruza and others, ‘Report mapping Legal and Policy Instruments of the EU for Human Rights and Democracy Support’ (2014) Frame Deliverables, pp. 37-36, <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>> accessed on 14 October 2014; Lorand Bartels, *The European Parliament's Role in relation to Human Rights in Trade and Investment Agreements* (Publications Office of the European Union 2014); Laura Beke and others, ‘Report on the integration of human rights in EU development and trade policies’ (2014) Frame Deliverables, <<http://www.fp7-frame.eu/reports>> accessed on 11 November 2014.

<sup>58</sup> Lorand Bartels, *The European Parliament's Role in relation to Human Rights in Trade and Investment Agreements* (Publications Office of the European Union 2014), p. 10; Laura Beke L. and others, ‘Report on the Integration of Human Rights in EU Development and Trade Policies’ (2014) Frame Deliverables, pp. 58-71, <<http://www.fp7-frame.eu/reports>> accessed 11 November 2014.

<sup>59</sup> European Council, ‘Presidency Conclusions on the European Council Meeting in Copenhagen of 21-22 June 1993’ SN 18/1/93 REV. 1.

<sup>60</sup> European Council, ‘Presidency Conclusions on the European Council Meeting in Copenhagen of 21-22 June 1993’, SN 18/1/93 REV. 1, para. 7 (A) (iii).

account'. The fulfilment of the political criteria and the adoption, implementation and application of the *acquis* are periodically assessed during the accession negotiations.

Fundamental rights have thus become core values of the European Union that need to be considered in the European Union's internal as well as external action. Only recently however the issue of monitoring and quantifying the level of protection and fulfilment of fundamental rights have been introduced in the legal framework. Furthermore fundamental rights are one of the criteria to evaluate potential Member States' preparedness to join the European Union.

## 2. Political commitments

The legal analysis showed a discrepancy between the high value attributed to human rights and a corresponding system to measure whether and how far human rights are guaranteed and safeguarded by the Member States. However, the issue of measurement is increasingly gaining attention in the European Union and some important initiatives to strengthen human rights measurement have been undertaken in the last years (e.g. the creation of FRA and EIGE). It appeared therefore necessary to examine a rapidly growing body of policy documents in order to evaluate if, and how far the European Union's institutions have committed themselves to assessing, measuring and evaluating human rights.

In the following section the analysis will focus on the need for concrete policies to measure human rights, as well as political commitments towards strengthening already existing human rights measurement tools. Because of the EU's different legal frameworks regarding its Member States, third countries and accessing countries, the analysis will be structured according to countries' status and relation to the EU (internal, enlargement and external) and according to the different stages within the policy cycle. For the purpose of this report the different stages of the policy cycle are defined as follows:<sup>61</sup>

- 1) Policy planning: encompasses all the policy stages up to decision making. Policy planning entails identifying and defining problems, agenda setting, defining policy objectives, evaluating policy options and finally the adoption of the policy;
- 2) Policy implementation and monitoring of the implementation of the policy;
- 3) Policy evaluation, which measures the outcome of a policy relative to its initial purposes.

However, as the term 'policy cycle' already indicates, a distinction between these three stages is only made for analytical purposes, as in practice these three stages are strictly interrelated. Focus is also kept on the function that human rights measurement/human rights indicators have within the policy cycle. Therefore, although some initiatives might fall into one or more stages within the policy cycle, the distinction is kept up to allow for a more structured overview.

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<sup>61</sup> Patrice Muller and others, *Performance-based Policy* (Publications Office of the European Union 2013).

## a) Internal

### (1) Planning

The idea to check for the compatibility of legislative proposals with the Charter<sup>62</sup> and the possible impact that these might have on fundamental rights was born already in 2001. This is despite the fact the Charter was at the time not a legally binding instrument. Already in 2002 the Commission had started to evaluate the possible impact of legislative proposals and those procedures have been strengthened in the years since.<sup>63</sup> Although impact assessment on fundamental rights is still incorporated in the analysis of the economic, social and environmental impacts, the Commission has recently complemented the Impact Assessment Guidelines.<sup>64</sup> These guidelines provide a framework for assessing the impact of legislative proposals on fundamental rights.<sup>65</sup> The rationale behind this closer scrutiny of legislative proposals has been explained by the Commission:

Respect for fundamental rights is a legal requirement, subject to the scrutiny of the European Court of Justice. Respect for fundamental rights is a condition of the lawfulness of EU acts. (...) The Court requires EU institutions to prove — in the light of the fundamental rights

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<sup>62</sup> In 2001 the Commission stated that: ‘Any proposal for legislation and any draft instrument to be adopted by the Commission will therefore, as part of the normal decision-making procedures, first be scrutinised for compatibility with the Charter’. European Commission, ‘Application of the Charter of Fundamental Rights of the European Union’ (Memorandum) SEC(2001) 380/3, p. 4.

A draft methodology to assess the compatibility of legislative proposals with the Charter was issued in 2005 and further refined in 2009: European Commission, ‘Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals. Methodology for Systematic and Rigorous Monitoring’ (Communication) COM(2005) 172 final; European Commission, ‘Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights’ COM(2009) 205 final.

<sup>63</sup> European Commission, ‘Impact Assessment Guidelines’ SEC(2009) 92; European Commission, ‘Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union’ (Communication) COM(2010) 573 final; On this topic see also: Olivier De Schutter, ‘The Implementation of the Charter by the Institutions of the European Union’ in Steve Peers and others (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2014).

<sup>64</sup> European Commission, ‘Impact Assessment’ (Communication) COM(2002) 276.

The Impact Assessment guidelines are currently under revision. In Particular the Impact Assessment Board suggests that:

Greater efforts need to be made regarding the description of the problem, the assessment of the need to act, the added value of EU action, and the development of clear alternative options to tackle the identified problem(s). Efforts also need to be kept up as regards the analysis and – where possible – the quantification of impacts, including on SMEs and competitiveness.

European Commission, ‘Impact Assessment Board Report for 2013’, p. 8, <[http://ec.europa.eu/smart-regulation/impact/key\\_docs/docs/iab\\_report\\_2013\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/key_docs/docs/iab_report_2013_en.pdf)> accessed 10 November 2014. A study has also commissioned to review different methods for estimating costs and benefits in its *ex ante* impact assessment: Renda A. and others, ‘Assessing the Costs and Benefits of Regulation’ (CEPS 2013).

<sup>65</sup> European Commission, ‘Operational Guidance on taking Account of Fundamental Rights in Commission Impact Assessment’ (Commission Staff Working Paper) SEC(2011) 567 final.

protected by the Charter — that they have carefully considered different policy options and have chosen the most proportionate response to a given problem.<sup>66</sup>

In this statement, the Commission called for – at the very least – a qualitative assessment of the impact of future legislation on fundamental rights, and suggested including in the policy planning stage, the definition of which indicators should be used for monitoring and evaluating the fundamental rights impact of policies, as well as what data should be collected for filling in those indicators.<sup>67</sup>

## (2) Monitoring

The same dynamic that saw the European Communities focusing initially on economic integration, and only later taking ownership of fundamental rights, can be observed when analysing the political commitments on monitoring human rights in the internal area: first the focus was drawn on those fundamental rights more closely linked to the economic and social sphere, while the need to measure fundamental rights as such only gained attention later, especially with the ‘raising’ of the Charter of Fundamental Rights into a full-fledged treaty.

The Lisbon Council in March 2000 defined ‘modernizing the European Social model, investing in people and combating social exclusion’ as a strategic goal towards becoming ‘the most competitive and dynamic knowledge-based economy in the world’.<sup>68</sup> To this end the Council adopted the Open Method of Coordination (OMC) for social policies, a governance instrument primarily intended ‘to orienting Member States’ policies towards common strategic priorities and towards the adoption of shared action frameworks for bringing about valuable outcomes’.<sup>69</sup> Part of this strategy consisted in the adoption of a common set of indicators to evaluate progress towards commonly agreed objectives. The coordination process started with the adoption of common objectives by the Member States at the Nice Council in December 2000 (e.g. facilitating participation in employment and access for all to the resources, rights, goods and services; preventing the risk of exclusion; helping the most vulnerable; and mobilizing all relevant bodies).<sup>70</sup> These objectives were subsequently transposed into national and regional policies. Regularly Member States issue reports on the progress achieved, whose results are evaluated and jointly published by the Member States and the Commission in the form of the Joint Report on Social Protection and Social Inclusion. The first set of indicators for social inclusion, which had been developed over the

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<sup>66</sup> European Commission, ‘Operational Guidance on taking Account of Fundamental Rights in Commission Impact Assessment’ (Commission Staff Working Paper) SEC(2011) 567 final, p. 4.

<sup>67</sup> European Commission, ‘Operational Guidance on taking Account of Fundamental Rights in Commission Impact Assessment’ (Commission Staff Working Paper) SEC(2011) 567 final, pp. 17 and 22.

<sup>68</sup> European Council, ‘Presidency Conclusions on the European Council Meeting in Lisbon of 23-24 March 2000’ SN 100/1/00, para. 5.

<sup>69</sup> On the Open Method of Coordination see: Maurizio Ferrera and Stefano Sacchi, ‘The Open Method of Coordination and National Institutional Capabilities: The Italian Experience’ (2004) Urge Working Papers 2/2004, p. 1, <[http://www.urge.it/files/papers/2\\_1\\_wp\\_2\\_2004.pdf](http://www.urge.it/files/papers/2_1_wp_2_2004.pdf)> accessed 17 October 2014; Egidijus Barcevicus and others (eds.), *Assessing the Open Method of Coordination* (Palgrave Macmillan 2014).

<sup>70</sup> European Council, ‘Presidency Conclusions on the the European Council Meeting in Nice of 8 December 2000’ SN 400/1/00.

years by the Social Protection Committee and its Indicators Sub-group, was adopted by the Laeken Council in December 2001: it included a provisional list of eighteen indicators on poverty, employment, health and education, which has been fine-tuned and complemented over time by the Indicator Sub-Group of the Social Protection Committee.<sup>71</sup>

In 2010 the Lisbon Strategy was replaced by the Europe 2020 strategy for smart, sustainable and inclusive growth, also setting targets in the field of employment and social inclusion (e.g. employment rate of 75% of the population aged 20-64; reduction of people at risk of poverty of 20 million).<sup>72</sup> Progress towards the targets is appraised in the framework of the European Semester where three instruments have already been developed: the Joint Assessment Framework (JAF), the Employment Performance Monitor (EPM) and the Social Protection Performance Monitor (SPPM).

In a recent communication, the Commission also suggested that social indicators be strengthened in the Alert Mechanism Report in order to 'better reflect the social implications of macroeconomic imbalances'.<sup>73</sup> In the same document the Commission suggested the creation of a Scoreboard of key indicators requiring closer monitoring that 'should serve as an analytical tool allowing better and earlier identification of major employment and social problems, especially any that risk generating effects beyond national borders'.<sup>74</sup> The first scoreboard of five key employment and social indicators (e.g. the unemployment rate (15-74 age group), the NEET rate (Not in Employment, Education or Training) in conjunction with the youth unemployment rate (15-24 age group), real gross household disposable income and the at-risk-of-poverty rate (15-64 age group) and income inequalities) has been published this year by the Commission for the first time in the Joint Employment Report accompanying the Communication from the Commission on Annual Growth Survey 2014.<sup>75</sup> In a recent resolution, the

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<sup>71</sup> European Council, 'Presidency Conclusion on the European Council Meeting in Laeken of 14 and 15 December 2001' SN 300/1/REV 1, para. 22. On the history of the European Union efforts to measure social inclusion see: Anthony B. Atkinson and others, 'Indicators and Targets for Social Inclusion in the European Union' (2004) 1 *Journal of Common Market Studies* 47; Isabelle Maquet Engsted, 'The European Context: Measuring Social Inclusion in the European Union', in Ruggeri Laderchi C. and Savastano S. (eds.), *Poverty and Exclusion in the Western Balkans* (Springer 2013); European Union Agency for Fundamental Rights (FRA), *Developing Indicators for the Protection, Respect and Promotion of the Rights of the Child in the European Union* (European Union Agency for Fundamental Rights 2010), pp. 91–97.

<sup>72</sup> European Council, 'Presidency Conclusions on the European Council Meeting of 25-26 March 2010' EUCO 7/10; European Commission, 'Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth' (Communication) COM(2010) 2020 final.

<sup>73</sup> European Commission, 'Strengthening the Social Dimension of the Economic and Monetary Union' COM(2013) 690 provisoire, p. 5.

<sup>74</sup> European Commission, 'Strengthening the Social Dimension of the Economic and Monetary Union' COM(2013) 690 provisoire, p. 6.

<sup>75</sup> See: European Commission, 'Draft Joint Employment Report accompanying the Communication from the Commission on Annual Growth Survey 2014' COM(2013) 801 final; European Parliament, 'Resolution on the European Semester for Economic Policy Coordination: Employment and Social Aspects in the Annual Growth Survey 2014 of 25 February 2014 (2013/2158(INI))', P7\_TA(2014)0129; Council of the European Union, 'Conclusions on the 2014 Annual Growth Survey and Joint Employment Report: political guidance on employment and social policies' of

Parliament has however demanded the social indicators be made binding for the Macroeconomic Imbalance Procedure scoreboard, as well as 'to include additional indicators, in particular child poverty levels, access to healthcare, homelessness, and a decent work index, in order to allow for proper assessment of the social situation in the Member States'.<sup>76</sup>

It can thus be said that in the field of employment and social protection there is a clear political commitment towards the use of indicators: this political commitment has led to the development of a methodology and a set of commonly agreed indicators for measuring employment and social protection in the European Union.

In relation to fundamental rights, one of the first initiatives to monitor their status in the EU has been promoted by the Parliament. The possibility to initiate an Art. 7 procedure and the proclamation of the Charter, have motivated the Parliament to start regular monitoring of fundamental rights in the EU in order to be able to identify whether real or potential breaches of Art. 2 occurred.<sup>77</sup> The Parliament is taking stock of the situation of fundamental rights within the European Union<sup>78</sup> on a yearly basis and voiced on many occasions the need to strengthen fundamental rights monitoring, as well as the prominent role of the FRA in this regard. Although the report itself is not based on indicators, in the 2010-2011 Report on the Situation of Fundamental Rights in the EU, the Parliament asked for a broader mandate of the FRA, to cover also the former third pillar of the European Union (police and judicial cooperation in criminal matters), as well as the establishment of an annual report on the situation of fundamental rights in the European Union from the Commission.<sup>79</sup>

The European Parliament Resolution on the Situation of Fundamental Rights in Hungary<sup>80</sup> reiterated the need for a more comprehensive evaluation of EU Member States compliance with Art. 2 TEU, as well as the discrepancy between a mechanism to evaluate the fundamental rights performances of accessing countries and the absence of any comprehensive evaluation after accession. It further mentioned the importance of the Commission as 'guardian of the Treaties'; as the pre-destined body to be entrusted with the establishment of such a mechanism. In its latest Resolution on the Situation of Fundamental Rights in the European Union of February 2014, the Parliament urged the Commission to establish 'a "new

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10 March 2014; Marion Schmid-Drüner, *Employment and Social Affairs in the European Parliament* (Publications Office of the European Union 2014).

<sup>76</sup> European Parliament, 'Resolution on the European Semester for Economic Policy Coordination: Employment and Social Aspects in the Annual Growth Survey 2014 of 25 February 2014 (2013/2158(INI))', P7\_TA(2014)0129, para. 4.

<sup>77</sup> European Parliament, 'Resolution on the Situation as regards Fundamental Rights in the European Union (2000) of 5 July 2001 (2000/2231(INI))' A5-0223/2001, para. 2.

<sup>78</sup> European Parliament, 'Resolution on the Situation as regards Fundamental Rights in the European Union (2000) of 5 July 2001 (2000/2231(INI))' A5-0223/2001.

<sup>79</sup> European Parliament, 'Resolution on the Situation of Fundamental Rights in the European Union (2010 - 2011) of 12 December 2012 (2011/2069(INI))' P7\_TA(2012)0500.

<sup>80</sup> European Parliament, 'Resolution on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) of 3 July 2013 (2012/2130(INI))' P7\_TA-PROV(2013)0315.

Copenhagen Mechanism” to ensure that the fundamental rights and values of the Union referred to in Art. 2 of the EU Treaty and in the Charter of Fundamental Rights of the European Union are respected, protected and promoted’ in the Member States of the European Union.<sup>81</sup> The Parliament suggests that this mechanism could be activated immediately on the basis of a decision by the Commission. It defines also the main traits that this ‘new Copenhagen mechanism’ should possess and further identifies the Commission and the FRA as main actors to be involved in this process. The Parliament suggests using a set of indicators based on existing fundamental rights standards (i.e. developed by the UN, the CoE, etc.) to be developed in consultation with non-governmental organisations, the FRA and the Commission. The indicators should be based on objective and reliable data and information. This also includes strategies to make relevant existing data and analysis more accessible and visible. Moreover the Report calls for objective, comparative and regular assessments for each fundamental right and/or subject area and for each institution and Member State individually. At the same time, all relevant parties should be striving for maximum comparability.<sup>82</sup>

In the field of integration the Council of the European Union highlighted in 2004 that ‘developing clear goals, indicators and evaluation mechanisms are necessary to adjust policy, evaluate progress on integration and to make the exchange of information more effective.’<sup>83</sup> Ten years later the Council, whilst setting the priorities in the area of Freedom Security and Justice, asked the Commission to help Member States develop core indicators in the field of integration ‘in order to increase the comparability of national experiences and reinforce the European learning process’.<sup>84</sup> Following this call, the ministers responsible for integration agreed on a core list of indicators that was then approved by the Council.<sup>85</sup> The Commission then ordered a study on the development and use of EU immigrant integration indicators as well as a pilot study on the availability and quality of data for those indicators that will be discussed later in more detail.<sup>86</sup>

In the field of justice and home affairs, the Commission has recently started to evaluate the efficiency of Member States’ judicial systems. In 2012 the Commission published the first EU Justice Scoreboard, anchoring it to the European Semester.<sup>87</sup> Its findings, based on data collected on a voluntary basis by the

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<sup>81</sup> European Parliament, ‘Resolution on the Situation of Fundamental Rights in the European Union (2012) of 27 February 2014 (2013/2078(INI))’ P7\_TA-PROV(2014)0173, para. 8 (o).

<sup>82</sup> European Parliament, ‘Resolution on the Situation of Fundamental Rights in the European Union (2012) of 27 February 2014 (2013/2078(INI))’ P7\_TA-PROV(2014)0173, para. 9.

<sup>83</sup> Council of the European Union, ‘Council Conclusions on Immigrant Integration Policy in the European Union’ 14615/04 of 19 November 2004, p. 18.

<sup>84</sup> European Council, ‘The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens’, 2010/C 115/01 of 4 April 2010, p. 30.

<sup>85</sup> Council of the European Union, ‘Conclusions of the Council and the Representatives of the Governments of the Member States on Integration as a Driver for Development and Social Cohesion’ 9248/10 of 4 September 2010, p. 16.

<sup>86</sup> Thomas Huddleston and others, *Using EU Indicators of Immigrants Integration* (Publications Office of the European Union 2013); EUROSTAT, *Indicators of Immigrant Integration: A Pilot Study* (Publications Office of the European Union 2011).

<sup>87</sup> European Commission, ‘The 2014 EU Justice Scoreboard’ (Communication) COM(2014) 155 final.

European Commission for the Efficiency of Justice of the Council of Europe (CEPEJ) in the EU Member States, only relates to the efficiency of civil, commercial and administrative proceedings (e.g. length, number of cases pending, training of judges, perceived independence, etc.).

Concerning the fight against corruption, which is a fundamental part of the rule of law as well as directly affecting the population's possibility of enjoying other human rights, the Stockholm Programme outlined the reason why it was important to 'develop indicators, on the basis of existing systems and common criteria, (and) to measure efforts in the fight against corruption'.<sup>88</sup> In response to this call, the Commission has recently published the first EU Anti-Corruption report.<sup>89</sup>

As it was discussed earlier, in March 2014 the Commission also presented a New Framework for Safeguarding the Rule of Law in the EU.<sup>90</sup> However, according to the public information available on this mechanism, no set of indicators on measuring the rule of law has been introduced in the assessment stage.

In relation to the rights of the child, the Commission has stated that:

Experience with implementing the 2006 Communication has revealed a significant lack of reliable, comparable and official data. This is a serious obstacle for the development and implementation of genuine evidence-based policies. Improving the existing monitoring systems, establishing child rights-related policy targets, and monitoring their impact are one of the key challenges. Gaps in knowledge about the situation and needs of the most vulnerable groups of children should be addressed as a matter of priority.<sup>91</sup>

### (3) Evaluation

On the specific topic of children's rights the Commission, in the Staff Working Document accompanying the communication *Towards an EU Strategy on the Rights of the Child*, has stated that all relevant EU actions should review their impact on children and that:

The assessment would be made on the basis of a set of appropriate indicators. The indicators would be both qualitative and quantitative and would cover the internal as well as the external dimension. They would include, amongst others, the effect on children's health, economic situation, education, participation, living conditions and the enjoyment of civil rights.<sup>92</sup>

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<sup>88</sup> European Council, 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens', 2010/C 115/01 of 4 April 2010, p. 23.

<sup>89</sup> European Commission, 'Fighting Corruption in the EU' (Communication) COM(2011) 308 final; European Commission, 'Commission Decision establishing an EU Anti-Corruption Reporting Mechanism for Periodic Assessment ("EU Anti-Corruption Report")' C(2011) 3673 final.

<sup>90</sup> European Commission, 'A New EU Framework to strengthen the Rule of Law' COM(2014) 158 final/2.

<sup>91</sup> European Commission, 'An EU Agenda for the Rights of the Child' COM(2011) 60 final, p. 5.

<sup>92</sup> European Commission, 'Commission Staff Working Document accompanying the Communication from the

The FRA has taken up this initiative in 2010 by developing a set of indicators to evaluate the impact of already adopted EU law and policy on children's status and experience.<sup>93</sup>

### *b) Accession*

In order to 'follow closely progress in each associated country towards fulfilling the conditions of accession to the Union',<sup>94</sup> the Commission developed a methodology for assessing applications for membership that should ensure that all candidate countries were treated on an equal basis. A composite paper on enlargement was presented in the Agenda 2000,<sup>95</sup> explaining the criteria and methodology used.

The methodology for the assessment of applications developed by the Commission was confirmed by the Luxembourg European Council in 1997, where two significant elements were introduced in the Enlargement Strategy. On the one hand, the European Council adopted a comprehensive enlargement framework, under which the Commission was asked to submit regular reports to the Council assessing the candidate country's preparedness for accession in the light of the Copenhagen criteria. For these assessments the Council decided 'to follow the method adopted by Agenda 2000 in evaluating applicant states' ability to meet the economic criteria and fulfil the obligations deriving from accession.'<sup>96</sup> The progress towards meeting each criterion in terms of legislation and measures actually adopted or implemented was to be assessed against a standardised checklist that ensured transparency and equal treatment of all countries aspiring accession to the EU. On the other hand, the Luxembourg European Council enhanced its pre-accession strategy, introducing the Accession Partnerships and increasing pre-accession aid. The new Instrument for Pre-Accession Assistance (IPA) II regulation states that 'Progress towards achievement of the specific objectives (...) shall be monitored and assessed on the basis of pre-defined, clear, transparent and, where appropriate, country-specific and measurable indicators'.<sup>97</sup>

The Cooperation and Verification Mechanism (CVM) was created by the Commission in order to monitor improvements in the areas of judicial reform and the fight against corruption for Romania and Bulgaria. This was required because the 2006 Monitoring Report on the state of preparedness for EU membership<sup>98</sup> showed that further progress was still necessary. The instrument is based on the Art. 37 and 38 of the Act

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Commission - Towards an EU Strategy on the Rights of the Child - Impact assessment COM(2006) 367 final' SEC(2006) 88.

<sup>93</sup> European Union Agency for Fundamental Rights (FRA), *Developing Indicators for the Protection, Respect and Promotion of the Rights of the Child in the European Union* (European Union Agency for Fundamental Rights 2010).

<sup>94</sup> European Council, 'Presidency Conclusions on the European Council Meeting in Copenhagen of 21-22 June 1993' SN 18/1/93 REV. 1, p. 13.

<sup>95</sup> European Commission, 'Agenda 2000: For a Stronger and Wider Union' (Communication) COM(97) 2000 final.

<sup>96</sup> European Council, 'Presidency Conclusions on the European Council Meeting in Luxembourg of 12-13 December 1997' SN 400/97, para. 29.

<sup>97</sup> 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, p. 14.

<sup>98</sup> European Commission, 'Monitoring Report on the State of Preparedness for EU Membership of Bulgaria and Romania' (Communication) COM(2006) 549 final, pp. 9-10.

of Accession.<sup>99</sup> Under this mechanism, Bulgaria and Romania were requested to report regularly on the progress made in addressing specific benchmarks in the field of judicial reform and the fight against corruption.

*c) External<sup>100</sup>*

*(1) Planning*

In 2011 the Commission issued a series of communications redefining its policy towards a more tailored and effective approach to country needs, highlighting among others the importance of evaluating the human rights performances of third countries:

While the overall objectives of the EU's human rights and democracy policy remain valid and unaltered, an approach that seeks to match objectives in a country with the realities on the ground is more likely to deliver concrete results than a one size fits all approach. Tailor made country strategies covering human rights and democracy should therefore be an integral part of the EU's overall strategy towards that country. This will help to prioritise and rationalise work, especially of EU Delegations and Member State Embassies, whilst better drawing on the relevant mix of EU tools and instruments and working in the areas most likely to deliver lasting improvements and change.<sup>101</sup>

In the communication 'An Agenda for Change', the Commission highlighted the importance of third countries' commitment to human rights, democracy and the rule of law, making the extent and modalities of aid allocation dependent on third country necessities, capacities and, among others, human rights performance.<sup>102</sup> In this line, focus on human rights was further enhanced with the adoption of the human rights country strategies, which are based on the EU Delegations quantitative and qualitative analysis of human rights in third countries.<sup>103</sup>

For example, in relation to the issue of LGBT rights, the Council has highlighted the importance of 'monitor(ing) the situation of the human rights enjoyed by LGBT people in the respective country to

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<sup>99</sup> Act concerning the Conditions of Accession of the Republic of Bulgaria and Romania and the Adjustments to the Treaties on which the European Union is Founded [2005] OJ L157/203.

<sup>100</sup> For a good overview of the EU policy instruments for human rights and democracy support see the Frame Deliverable 12.1: Christina Churruca Muguruza and others, 'Report mapping Legal and Policy Instruments of the EU for Human Rights and Democracy Support' (2014) Frame Deliverables, <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>> accessed on 14 October 2014.

<sup>101</sup> European 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 to the European Parliament and the Council) COM(2011) 886 final, p. 8.

<sup>102</sup> European Commission, 'Increasing the Impact of EU Development Policy: an Agenda for Change' (Communication) COM(2011) 637 final, p. 5.

<sup>103</sup> Rosa Balfour, *The Role of EU Delegations in EU Human Rights Policy* (Publications Office of the European Union 2013), p. 16.

identify progress/setbacks'.<sup>104</sup> The Council produced a 'checklist' that was further developed into a EU Guideline – a non-binding tool aimed at supporting EU representations to better frame and advance specific topics in their relations with third countries. The LGBT guidelines suggest a series of indicators and possible sources of information, such as the existence of systematic practice of torture or abuse by police officers of LGBTI people or the provision within anti-discrimination law of grounds of sexual orientation or gender identity.<sup>105</sup>

## (2) Monitoring

In 2000 the Council welcomed the Commission's proposal to develop 'common analytical tools as well as sharing information' for Country Strategy Papers (CSPs).<sup>106</sup> These were further defined in the European Commission's Guideline on the Use of Indicators of 2002, aiming to 'define principles and guidance for the choice of indicators to be monitored in Country Strategy Papers' intervention frameworks'.<sup>107</sup> In its communication Human Rights and Democracy at the Heart of EU External Action the Commission even suggested 'developing benchmarks to assess progress in human rights, democracy and the rule of law',<sup>108</sup> while more recently the Parliament suggested the establishment of 'a common threshold for Member States and for EU officials in terms of the human rights concerns that they have to raise, as a minimum, with their strategic partner counterparts'.<sup>109</sup>

The respect and promotion of human rights as a *conditio sine qua non* for the EU's cooperation with third countries has been strengthened with the inclusion of the so-called 'human rights clause' in the EU agreements with third countries. This clause allows for the suspension of the agreement in case of serious violations of human rights.<sup>110</sup> At the moment there is no mechanism in place to evaluate when to make use of the human rights clause.<sup>111</sup> The Parliament has noted that the human rights clause 'necessarily

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<sup>104</sup> Council of the European Union, 'Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People' 11179/10 of 17 June 2010, p. 8.

<sup>105</sup> 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' of 24 June 2013. In particular Annex II of the Guidelines defines the indicators to be used for assessing the promotion and protection of human rights by LGBTI.

<sup>106</sup> Council of the European Union – Development, 'Standard Framework for Country Strategy Papers: The Council Conclusions' 13357/00 of 17 November 2000.

<sup>107</sup> European Commission, 'Guidelines for the Use of Indicators in Country Performance Assessment' (December 2002), p. 1, <[http://ec.europa.eu/development/icenter/repository/guidelines\\_indicators\\_cpa\\_en.pdf](http://ec.europa.eu/development/icenter/repository/guidelines_indicators_cpa_en.pdf)> accessed 3 October 2014.

<sup>108</sup> European 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 to the European Parliament and the Council) COM(2011) 886 final, p. 11.

<sup>109</sup> European Parliament, 'Resolution on the Review of the EU's Human Rights Strategy of 13 December 2012 (2012/2062(INI))' P7\_TA(2012)0504, para. 41.

<sup>110</sup> For a good overview on the nexus between trade, development and human rights see: Laura Beke and others, 'Report on the integration of human rights in EU development and trade policies' (2014) Frame Deliverables, <<http://www.fp7-frame.eu/reports>> accessed on 11 November 2014.

<sup>111</sup> Lorand Bartels, *The European Parliament's Role in relation to Human Rights in Trade and Investment Agreements* (Publications Office of the European Union 2014); Laura Beke and others, 'Report on the Integration of Human Rights

requires a clear mechanism for its implementation at the institutional and political levels, and that it therefore needs to be complemented by an operational enforcement mechanism'.<sup>112</sup> The Parliament has also called for the introduction of benchmarks on the protection and promotion of human rights in these agreements.<sup>113</sup>

Besides sanctioning mechanisms, the EU is using positive conditionality to strengthen human rights in development policy.<sup>114</sup> Human rights monitoring is used for example by the Commission in the Neighbourhood Policy (ENP) where the introduction of the 'more for more' mechanism made EU support dependent on the progress towards the core values of the European Union, which is regularly appraised through the ENP country reports.<sup>115</sup> The ENP country reports build on a list of well established and accredited human rights indicators systems (e.g. UNDP report, Gender Equality Index, Freedom House Index, Transparency International Corruption Perception Index, etc.) as well as some structural indicators<sup>116</sup> (e.g. legality of homosexuality, ratification of core labour standards, etc.) to highlight countries' progress and setbacks.<sup>117</sup> Similarly the Generalised Scheme of Preferences (GSP) and the GSP+ systems make their incentives dependent on third countries' human rights commitment and evaluate countries' progress and setbacks mainly through analysis of the reports submitted to the main treaty-based human rights bodies.<sup>118</sup> From these few examples it can thus be said that although development policy is working towards strengthened conditionality and clearer rules in its applicability, there is no further need identified towards strengthening the use of human rights indicators and benchmarks. In the recent conclusions on a rights-based approach to development cooperation however, the Council stressed the importance of 'a context-specific assessment of the human rights situation, examining the capacity gaps of both duty bearers to respect, protect and fulfil human rights and of rights-holders to know,

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in EU Development and Trade Policies' (2014) Frame Deliverables, pp. 59-71, <<http://www.fp7-frame.eu/reports>> accessed 11 November 2014.

<sup>112</sup> European Parliament, 'Resolution on the Review of the EU's Human Rights Strategy of 13 December 2012 (2012/2062(INI))' P7\_TA(2012)0504, para. 47.

<sup>113</sup> See for example: European Parliament, 'Resolution containing the European Parliament's Recommendations to the Council, the Commission and the European External Action Service on the Negotiations of the EU-Azerbaijan Association Agreement of 18 April 2012 (2011/2316(INI))' P7\_TA(2012)0127.

<sup>114</sup> David D'Hollander and others, 'Integrating Human Rights in EU Development Cooperation Policy: Achievements and Challenges' in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights 14* (Intersentia 2014).

<sup>115</sup> European Commission, 'A New Response to a Changing Neighbourhood' (Communication) COM(2011) 303, p. 3.

<sup>116</sup> Structural indicators measure the *de jure* protection of specific rights and thus, they give information on the commitment of a state or government.

<sup>117</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 'Implementation of the European Neighbourhood Policy: Statistical Annex' (Joint Staff Working Document) SWD(2014) 98 final.

<sup>118</sup> European Parliament and Council Regulation (EU) No. 978/2012 of 25 October 2012 Applying a Scheme of Generalised Tariff Preferences and repealing Council Regulation (EC) No 732/2008 [2012] OJ L 303/1; Laura Beke and others, 'Report on the Integration of Human Rights in EU Development and Trade Policies' (2014) Frame Deliverables, pp. 33-35, <<http://www.fp7-frame.eu/reports>> accessed 11 November 2014

exercise and claim their rights, with a view to identifying the root causes of poverty and social exclusion'.<sup>119</sup>

### (3) Evaluating

In its Resolution on the Annual Report on Human Rights and Democracy in the World 2008, the Parliament called 'for a regular periodic assessment of the use and the results of European Union policies, instruments and initiatives on human rights in third countries' and 'to develop specific quantifiable indices and benchmarks in order to measure the effectiveness of those policies'.<sup>120</sup> Following this call, the Strategic Framework on Human Rights and Democracy and its annexed Action Plan were adopted in 2012 and constitute key documents for the strengthening of the EU human rights policy in third countries.<sup>121</sup> The Action Plan transforms the policy goals of the Strategic Framework into concrete actions, identifying not only the EU institutions responsible for its implementation, but also a time-frame in which the action needs to be completed. Progress made by the European institutions in pursuing the objectives of the Strategic Framework is appraised in the Annual Report on Human Rights and Democracy in the World.<sup>122</sup> The importance of a sound monitoring of human rights for policy reasons is highlighted in different parts of the Action Plan, mainly as an instrument for making more justifiable decisions when delivering aid or concluding trade and investment agreements.<sup>123</sup>

Notwithstanding improvements in the field of policy evaluation, the Parliament 'regrets, nevertheless, that the country reports still seem to lack a systematic, clear and coherent framework that would allow for more rigorous analysis on the impact and efficiency of EU action,<sup>124</sup> and generally calls for 'benchmarking policy for all instruments (including geographical policies and strategies) which should be able to measure and monitor respect for human rights and democratic principles based on specific, transparent, measurable, achievable and time-bound indicators'.<sup>125</sup>

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<sup>119</sup> Council of the European Union, 'Conclusion on a Rights-Based Approach to Development Cooperation, encompassing All Human Rights' of 19 May 2014, para. 5.

<sup>120</sup> European Parliament, 'Resolution on the Annual Report on Human Rights in the World 2008 and the European Union's policy on the matter (2008) of 7 May 2009 (2008/2336(INI)) P6\_TA(2009)0385, para. 6.

<sup>121</sup> Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' 11855/12 of 25 June 2012. For an overview of the genesis of the Strategic Framework and Action Plan see: Engelbert Theuermann, 'The Review of the EU Human Rights Policy: A Commitment to Strengthened EU Action on Human Rights' (2013) European Yearbook on Human Rights 31.

<sup>122</sup> Council of the European Union, 'EU Annual Report on Human Rights and Democracy in the World in 2013' 11107/14 of 23 June 2014.

<sup>123</sup> See for example: Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' 11855/12 of 25 June 2012, point IV, 10 and 11; Jarmo Oikarinen, 'Reform of the EU Human Rights Policy and the Challenge of Implementation' (2014) European Yearbook on Human Rights 115.

<sup>124</sup> European Parliament, 'Resolution on the Annual Report on Human Rights and Democracy in the World 2012 and the European Union's Policy on the Matter of 11 December 2013 (2013/2152(INI)) P7\_TA(2013)0575, para 9.

<sup>125</sup> European Parliament, 'Resolution on the Review of the EU's Human Rights Strategy of 13 December 2012 (2012/2062(INI))' P7\_TA(2012)0504, para. E.

In relation to development policy, the European Commission suggested in an Agenda for Change the introduction of a common EU results reporting framework:

for measuring and communicating the results of development policy, including for inclusive and sustainable growth. In line with the Operational Framework on Aid Effectiveness, the EU will work with partner countries and other donors on comprehensive approaches to domestic and mutual accountability and transparency, including through the building of statistical capacity.<sup>126</sup>

Indicators are also used in different programmes, like the European Instrument for Democracy and Human Rights (EIDHR), to evaluate the impact of projects financed by the European Commission on human rights.

In the new Multiannual Financial Framework (MFF) for 2014-2020, when it comes to allocating funds to partner countries, the EU aims for donor-recipient mutual accountability, stating that indicators will be used to evaluate the efficiency of the financial instruments.<sup>127</sup>

### 3. Conclusions

Looking at the historical development of the EU, it can be said that although the promotion of peace, stability and human rights in the European continent was the reason behind the European project, the European Communities only slowly took ownership of human rights; through the ECJ's jurisprudence human rights were taken up and brought forward within the Communities up to their inclusion in the treaties.

Given the mandates of the EMCO and the SPC, one may conclude that the TFEU entails a certain obligation to monitor – although not to measure – some issues related to economic and social rights in areas that have been on the agenda of the European Communities since their establishment (e.g. right to work, poverty, etc.). By way of secondary law, the EU has equipped itself with two institutions that have an explicit mandate to collect objective, reliable and comparable data on fundamental rights and gender equality within the EU Member States. This is certainly already a great achievement. However, while fundamental rights today constitute core values of the EU and compliance with human rights is generally required, there is no provision in the treaties foreseeing an instrument for measuring this compliance.

The policy analysis showed however that European Union institutions are increasingly calling for or developing initiatives to strengthen human rights scrutiny within and outside the European Union. Thus, a trend towards the creation or strengthening of human rights measurement systems can be identified. This trend is in line with an effort called for by many human rights stakeholders and academia, i.e. to make (the progress in the realisation of) human rights more quantifiable. Human rights measurements are

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<sup>126</sup> European Commission, 'Increasing the impact of EU Development Policy: an Agenda for Change' (Communication) COM(2011) 637 final, p. 11.

<sup>127</sup> European Commission, 'The Multiannual Financial Framework: The External Action Financing Instruments (Memo)' MEMO/13/1134 of 11 December 2013; Council Regulation (EU, EURATOM) 1311/2013 of 2 December 2013 laying down the Multiannual Financial Framework for the Years 2014-2020 [2014] OJ L 347/884.

required for both the EU's internal and external policies, as a matter of coherence and consistency. It became also apparent that, at the very least, a strengthened monitoring of human rights is called for in a wide variety of policies in the internal, enlargement and external spheres. Furthermore it became apparent also that human rights measurement tools support/should support all phases of the policy cycle.

## **B. Purposes of human rights measurement**

This chapter discusses the purposes of current and possible future human rights measurements. The aim is to find out who needs human rights measurement for what reason. The purposes of human rights measurement will be analysed from the perspective of the users, namely the interviewed EU officials. At the beginning of each interview, the following definition was shared with the interviewees:

The term 'mechanism to measure human rights' denotes any kind of mechanism that resorts to qualitative and/or quantitative indicators to measure the current state and/or progress of particular human rights or impact in a defined geographical area within a given time-frame. This includes, for instance, human rights benchmarks, indicators, data on progress or impact, etc. Such a mechanism does not necessarily have to be a stand-alone initiative, but could also be a (minor) part of a policy.

Despite this given definition, the perceptions of human rights measurement differ among the interviewees. For instance, some interviewees understand human rights measurement as evaluation of human rights policies, while others understand it as human rights-relevant data gathering. Thus, the information provided by the interviewees cannot be regarded as exhaustive. Nevertheless the results shed light on the importance of current and future measurements for EU officials from a practical perspective.

The previous chapter on the political commitment to measure human rights shows that human rights measurement tools support, and are needed in this capacity throughout all phases of the policy cycle. Thus, the discussion of purposes of human rights measurements will be structured along these stages, namely policy planning, policy implementation (which practically means assessing compliance of countries with human rights standards and decision making in this regard) and policy evaluation. Whenever the purposes differ, the analysis will be differentiated by policy area, i.e. internal, external and enlargement policies.

### **1. Policy planning**

This section discusses the way in which human rights measurement is needed for the development and assessment of policy proposals. At the stage of planning, human rights measurement has the overall purpose of translating the fundamental values and principles of the EU into concrete measures. Additionally it is needed to provide factual evidence for policy planning. As will be shown in more detail, human rights measurement also serves the purpose of strengthening a coherent and consistent EU human rights policy in both the EU's internal and external areas.

*a) Provide evidence for policies*

According to some interviewees, human rights measurement as defined in the introduction of this section, as well as more general research on human rights, is required in order to help identify various issues as human rights-related problems. This is true in different phases of policy planning, namely for the identification of a problem and challenges, and the reasons for intervention and for the assessment of policy options. Human rights measurement provides the empirical basis that is needed for evidence-based policy planning and can serve as the basis for arguments on policy proposals or reforms.<sup>128</sup> Some interviewees mention that this is of particular relevance against the background of the broader trend towards more evidence-based policies.<sup>129</sup> Additionally, human rights measurement has the purpose of discovering good practices to inform policy making.<sup>130</sup> Human rights measurement thus initiates and informs the process of developing policy proposals in various ways.

When it comes to already existing policy proposals, human rights measurement in the EU's **internal area** has the purpose of assessing the impact of these proposals on fundamental rights. The Commission has already provided guidance to its departments on how to assess the impacts of legislative proposals on fundamental rights.<sup>131</sup> It is a clear purpose of such impact assessments to help EU institutions designing policies and laws in compliance with the Charter of Fundamental Rights. Additionally it facilitates better informed decision making throughout the entire legislative process. Thus, at the stage of policy planning, proposals are scrutinised for their compliance with the Charter of Fundamental Rights.<sup>132</sup> The European Commission's Impact Assessment Guidelines make clear that this approach helps ensure coherence of the European Commission's policies and consistency with treaty objectives, such as the respect for fundamental rights.<sup>133</sup> The interviewed officials dealing with EU internal policies indeed confirmed the necessity of measuring human rights to assess the impact of legislative proposals on human rights.<sup>134</sup>

As it was discussed earlier, the EU is currently turning to a country specific approach in **external area** that seeks to better match objectives in a country with the realities on the ground. The underlying assumption is that such an approach is more likely to deliver concrete results than a one size fits all top-down approach.<sup>135</sup> Human rights measurement can support this turn to more tailor-made country strategies and help in achieving a maximised impact on the ground. More concretely, human rights measurement in

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<sup>128</sup> Interview conducted by the ETC with a member of the European Parliament's Committee FEMM (Brussels, June 2014).

<sup>129</sup> Interview conducted by the ETC with an EU official from the DG Home (Brussels, June 2014).

<sup>130</sup> Interview conducted by the ETC with a member of the FRA (Vienna, June 2014).

<sup>131</sup> European Commission, 'Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessment' (Commission Staff Working Paper) SEC(2011) 567 final, pp. 3-5.

<sup>132</sup> European Commission, 'Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights' COM(2009) 205 final.

<sup>133</sup> European Commission, 'Impact Assessment Guidelines' SEC(2009) 92, pp. 4-6.

<sup>134</sup> Interview conducted by the ETC with an EU official from the DG Home (Brussels, June 2014).

<sup>135</sup> European 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 to the European Parliament and the Council) COM(2011) 886 final, pp. 5-8.

external area has the purpose of informing decision-making on topics, as well as focussing target groups and instruments of policies.<sup>136</sup> Interviewees dealing with human rights in the EU external area point out the need for accessible qualitative and quantitative information about the situation on the ground to inform policy making.<sup>137</sup> Here, previous research has shown that human rights measurement can serve the function of contextual description and documentation.<sup>138</sup> This includes gathering locally-based and rich descriptive statistics, which cover human rights violations. In addition, data on the perceptions of experts, as well as on the activities of state and non-state actors which have a bearing on human rights is included.

Interviewees emphasised particularly, in regards to the EU's external action that one single set of indicators is not reasonably applicable, since situations, programmes, topics and countries are too different.<sup>139</sup> Contextual indicators in country programming are relevant but they cannot be found in practice, except for human rights indicators related to gender, children and LGBT persons. In addition, given the new efforts and tools relating to a rights-based approach, there is a need to use (contextual) human rights indicators. Also the stronger emphasis on ESCR necessitates thinking on how these are measured.

#### *b) Strengthen coherence of EU human rights policies*

Interviewees identify a lack of coherence related to the EU internal and external human rights strategy<sup>140</sup> and some of them even worry about the credibility of the EU in this regard. Consequently, contributing to the coherence and consistency of the EU's human rights policies was identified as an important purpose of a mechanism to measure human rights. An objective, comparative and regularly applied human rights measurement that assesses the compliance with fundamental rights by every Member State in an effective and binding manner would make the EU's human rights policies in external action and enlargement more coherent with the internal area. Externally it would make the EU's calls for action more credible.<sup>141</sup> In this respect also interviewees pointed out that the implementation of human rights measurement at EU level would make the EU's human rights strategy in external action more coherent and thus more credible.<sup>142</sup> Interviewed EU officials, whose mandate explicitly deals with human rights, mentioned that more coherence created by such a mechanism would make the Commission's call for

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<sup>136</sup> Interview conducted by the ETC with official from the European Parliament Subcommittee DROI (Graz, June 2014) and from EEAS/COHOM (Brussels, June 2014).

<sup>137</sup> Interview conducted by the ETC with EU officials from EEAS/COHOM and DG DEVCO (Brussels, June 2014).

<sup>138</sup> Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Routledge, 2010), pp. 4-5.

<sup>139</sup> Interview conducted by the ETC with an EU official from the DG DEVCO (Brussels, June 2014).

<sup>140</sup> Interviews conducted by the ETC with EU officials from the EEAS, DEVCO, FRA and LIBE (Brussels and Graz, June 2014).

<sup>141</sup> European Parliament, 'Resolution on the Situation of Fundamental Rights in the European Union (2012) of February 2014 (2013/2078(INI))' P7:TA-PROV(2014)0173, pp. 15-16.

<sup>142</sup> Interviews conducted by the ETC with EU officials from LIBE and DG HOME (Brussels, June 2014).

action more assertive.<sup>143</sup> Finally, the need for coherence and consistency between the EU's external and internal human rights policies are addressed in the Action Plan on Human Rights and Democracy.<sup>144</sup>

## 2. Implementing policies and assessing compliance with human rights standards

The information provided by the interviewees clearly indicates that human rights measurement is needed at the policies' implementation stage and even more so when assessing countries' compliance with human rights standards. Human rights measurement is required by interviewees for the purpose of a more consistent implementation of policies and a more standardised human rights assessment. In the EU's internal area, human rights assessment concerns the compliance of Member States with the TEU and the Fundamental Rights Charter. In the EU enlargement area, human rights measurement is needed to support the assessment of compliance of candidate countries with the *aquis communautaire* and the Copenhagen Criteria. In the EU external area, human rights measurement is used to assess the human rights situation of those third countries benefiting from development aid, budgetary support or general preferential EU market access schemes.<sup>145</sup>

The importance of human rights measurements for monitoring the degree to which states respect, protect and fulfil the various rights over time is also discussed in the literature. The availability of human rights measurement increases the possibility of making more profound analytical statements about the human rights situation and about changes, progress or regress in this regard.<sup>146</sup> Human rights measurement thus has the function of contextual description and documentation. To achieve this, data on the ground needs to be converted into systematic analysis.<sup>147</sup>

### a) Provide standardised tools for assessing compliance with fundamental rights

Interviewees assessing Member States' compliance with human rights standards and obligations point out their need for human rights measurement including statistical data regarding the situation on the ground.<sup>148</sup> A set of standardised indicators to measure human rights has the purpose of improving the quality of the assessment.<sup>149</sup>

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<sup>143</sup> Interview conducted by the ETC with officials of the European Parliament Subcommittee DROI (Brussels, June 2014).

<sup>144</sup> Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' 11855/12 of 25 June 2012.

<sup>145</sup> Interviews conducted by the ETC with EU officials from INTA (Brussels, June 2014).

<sup>146</sup> Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Routledge, 2010), p. 5.

<sup>147</sup> Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Routledge, 2010), pp. 4-5.

<sup>148</sup> Interview conducted by the ETC with an EU official from DG Home (Brussels, June 2014).

<sup>149</sup> Interviews conducted by the ETC with EU officials from LIBE and DG HOME (Brussels, June 2014).

When preparing the Annual Report on the Situation of Fundamental Rights in the European Union, the Parliament currently follows rather general guidelines.<sup>150</sup> The interviewed officials of the European Parliament Committee on Civil Liberties, Justice and Home Affairs thus emphasised the need to strengthen human rights measurement in the EU internal area. They further asserted that by using human rights measurement, monitoring fundamental rights in the EU and in the individual Member States can be carried out more objectively and comparably.<sup>151</sup> In its recent annual report, the Parliament called for the immediate activation of a ‘new Copenhagen mechanism’.<sup>152</sup> In the interview, officials of LIBE support this claim but acknowledge that the comparability of Member States’ data is an important precondition for its effective implementation. They believe that the implementation of human rights measurement in the EU would make the Parliament’s fundamental rights reports better informed and thus less vulnerable to attacks at the political level.<sup>153</sup> The importance of a shared set of comparable data and a common methodology for assessing fundamental rights in the EU has also been emphasised by the interviewed member of the Social Protection Committee.<sup>154</sup>

In addition, interviewees identified a risk of applying double standards in the current way of assessing fundamental rights in the EU Member States: when it comes to assessing compliance with the EU’s fundamental rights and values, some Member States might feel to be under more scrutiny than others. These interviewees believe that objective and comparable indicators on the compliance of Member States with the Fundamental Rights Charter can help to avoid double standards in the internal application of fundamental rights assessment tools.<sup>155</sup>

Currently, fundamental rights assessments of EU accession candidates are carried out in accordance with the Enlargement Strategy and the Copenhagen criteria. The Copenhagen criteria have the purpose of guaranteeing an adequate level of fundamental rights protection and to identify weak spots in the factual enjoyment of fundamental rights in candidate countries. This purpose is clearly related to human rights measurements. Interviewees dealing with EU enlargement point out that a mechanism to measure human rights is needed to support the assessment of candidate countries regarding their capacity to implement the *acquis communautaire*. They perceive this as particularly necessary since the tools to measure the implementation of the *acquis communautaire* are not very elaborate in certain areas, such as the rule of law. While the rule of law and the assessment of the candidate countries’ progress are core issues in the

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<sup>150</sup> Interview conducted by the ETC with officials of the LIBE Committee of the EP (Brussels, June 2014).

<sup>151</sup> European Parliament, ‘Resolution on the Situation of Fundamental Rights in the European Union (2012) of 27 February 2014 (2013/2078(INI))’ P7\_TA-PROV(2014)0173, pp. 15-17.

<sup>152</sup> European Parliament, ‘Resolution on the Situation of Fundamental Rights in the European Union (2012) of 27 February 2014 (2013/2078(INI))’ P7\_TA-PROV(2014)0173, pp. 15-16.

<sup>153</sup> Interview conducted by the ETC with officials of the LIBE Subcommittee of the EP (Brussels, June 2014).

<sup>154</sup> Interview conducted by the DIHR with members of the Indicators’ subgroup of the Social Protection Committee (Copenhagen, June 2014).

<sup>155</sup> Interview conducted by the ETC with EU officials from LIBE (Brussels, June 2014).

enlargement strategy,<sup>156</sup> truly measurable indicators are missing for both.<sup>157</sup> Although benchmarks for assessing the rule of law became available through the revision process of the accession tools, and although the dialogue with candidate countries has been intensified, indicators are not available yet. Thus, when assessing candidate countries' performance, the European Commission still relies on the *acquis*, the (good) practices of the Member States and standards set by international organisations like the CoE and the UN. However, the Commission uses indicators occasionally. These indicators usually are structural indicators measuring the progress in adapting the legal framework to the *acquis*. Although indicators are lacking in the EU enlargement process, missions indeed receive detailed terms of reference from the European Commission.

When assessing rule of law issues and providing candidate countries with related recommendations, DG Enlargement intends to ensure a consistent and coherent approach.<sup>158</sup> Thus, interviewees pointed out that human rights measurement has the general purpose of ensuring a fair and strict negotiation policy with candidate countries in order to create a coherent accession process. To achieve this purpose, a common methodology needs to be applied and benchmarks based on best practices in Member States need to be developed.<sup>159</sup> Generally, it is found that a standardised human rights measurement supports the implementation of the EU enlargement strategy.<sup>160</sup>

Human rights measurement has the purpose of creating more coherence and consistency when assessing fundamental rights in different countries, irrespective of whether they are Member States or candidate countries.<sup>161</sup>

#### *b) Provide evidence for incentives and sanctions in EU external action*

The EU Strategic Framework and the corresponding Action Plan emphasise the joint responsibility of the EU and its Member States in the promotion of human rights and democracy abroad. This encompasses the promotion of human rights in all areas of external action, including strengthened efforts to assist partner countries in implementing their human rights obligations<sup>162</sup> and a differentiated approach to development aid in order to reach maximum impact and value for money.<sup>163</sup>

Interviewees, who deal with the EU's **external area**, pointed out a need for benchmarks, and indicators of progress and achievement in third countries' human rights obligations. Human rights measurement is

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<sup>156</sup> European Commission 'Enlargement Strategy and Main Challenges 2013-2014' COM(2013) 700 final, pp. 2-6.

<sup>157</sup> Interview conducted by the ETC with an EU official from the DG Enlargement (Brussels, June 2014).

<sup>158</sup> Interview conducted by the ETC with an EU official from the DG Enlargement (Brussels, June 2014).

<sup>159</sup> Interviews conducted by the ETC with EU officials from DG Enlargement (Brussels, June 2014).

<sup>160</sup> Interviews conducted by the ETC with EU officials from DG Enlargement (Brussels, June 2014).

<sup>161</sup> Interview conducted by the ETC and the DIHR with an EU official from the EEAS (Brussels, June 2014).

<sup>162</sup> Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' 11855/12 of 25 June 2012.

<sup>163</sup> European Commission, 'Increasing the impact of EU Development Policy: an Agenda for Change' (Communication) COM(2011) 637 final.

also required to provide a tool for measuring the commitment of a government to human rights.<sup>164</sup> Thus, a mechanism to measure these dimensions (commitment, progress/regress and achievement) of human rights in third countries has the purpose of facilitating the decision-making process of EU officials in external action.

Further, human rights measurement in external action has the key purpose of supporting the application of human rights related tools of EU policies (e.g., GSP+, Human Rights dialogues, Human Rights country strategies) correctly and to inform decision-making regarding the provision of incentives, the (temporary) withdrawal of incentives and the imposition of sanctions.<sup>165</sup> This is also related to human rights clauses in free trade agreements and other policies, which are based on incentives for the ratification and implementation of fundamental rights obligations. In addition, human rights measurement is needed to provide evidence for the EU's decision making on imposing sanctions.<sup>166</sup>

### 3. Evaluation of human rights policies

Interviewees working in **external area** pointed out that the application of human rights policies needs to be adjusted through the findings of human rights measurement. Human rights measurement therefore needs to be applied in order to find out whether the EU policies are coherent with the EU's strategic tools.<sup>167</sup>

Interviewees dealing specifically with human rights in external area additionally mentioned a need for human rights measurement for the evaluation of certain human rights policies or projects. Thus, human rights measurements serve to make human rights policies more (country-) specific. These interviewees mention concrete measures to be evaluated, namely the human rights dialogues, the countries' human rights strategies and urgent actions on human rights.<sup>168</sup> These issues are highlighted here because the interviewed EU officials perceive these instruments as not sufficiently standardised and some (particularly interviewed members of DROI and COHOM) even doubt their effectiveness.<sup>169</sup> Interviewees noted that, for instance, no overall checklist is publicly available for the human rights dialogues, while checklists are available for example in the United States. Therefore, regarding the human rights dialogues, interviewed EU officials call for an impact assessment in the sense of an evaluation.<sup>170</sup> Additionally, according to the interviewed members of DROI and COHOM, the human rights country strategies need to be standardised

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<sup>164</sup> Interview conducted by the ETC with an official of DG DEVCO (Brussels, June 2014).

<sup>165</sup> Interviews conducted by the ETC with EU officials from the EEAS/COHOM and DG DEVCO (Brussels and Graz, June 2014).

<sup>166</sup> For more information see: Laura Beke and others, 'Report on the integration of human rights in EU development and trade policies' (2014) Frame Deliverables, <<http://www.fp7-frame.eu/reports>> accessed on 11 November 2014.

<sup>167</sup> Telephone interview conducted by the ETC with an EU official from the EEAS (Graz, June 2014).

<sup>168</sup> Interview conducted by the ETC and DIHR with an EU official from EEAS (Brussels and Copenhagen, June 2014).

<sup>169</sup> See also: Katrin Kinzelbach, *The EU's Human Rights Dialogue with China: Quiet Diplomacy and its Limits*, (Routledge, 2014).

<sup>170</sup> Telephone and face-to-face Interviews conducted by the ETC with a member and officials of the Parliament's Committee DROI and with an EU official from COHOM (Graz and Brussels, June 2014).

and improved concerning quality, scope and retraceability.<sup>171</sup> Some EU officials furthermore believe that an overall assessment of the implementation of the EU Strategic Framework and Action Plan on Human Rights and Democracy through benchmarks and indicators has to be considered in the future.<sup>172</sup>

The interviewed officials of DG Enlargement call for an evaluation of the EU enlargement policies. According to them, human rights measurement is a suitable mechanism for achieving such an evaluation. The overall purpose of this evaluation would be to find out whether policies lead to changes in the candidate countries' human rights situation.<sup>173</sup>

Information on the situation, progress and impact of policies needs to be integrated into the analysis.<sup>174</sup> The importance of information on the situation, progress and impact of policies was also highlighted by the interviewed member of the FRA.<sup>175</sup> Since the evaluation of policies and projects is required to allow the identification of causality between measure and impact, it has to be discussed whether human rights measurement is needed for project management in the sense of project monitoring. For example, although benchmarks along core obligations of a specific right are indeed useful for project monitoring, project management tools and scientific work provide valuable methods for project evaluation. In this respect, secondary analysis can be used to examine the degree to which a policy intervention has had a direct or contributory effect on a particular human rights situation. Literature on human rights measurement suggests for example the application of social science methods, namely hypothesis-testing and impact assessment for this purpose.<sup>176</sup> The significance of relationships between and among human rights and other variables (i.e. level of economic growth and inequality) needs to be tested in order to achieve the purpose of project evaluation.

#### 4. Conclusion

The aim of this chapter was to find out who needs human rights measurement and for what reason(s). The answer to that question is that the majority of the interviewees are convinced that human rights measurement would be useful for their work. Regarding the question – for what reason human rights measurement is needed – the overall conclusion is that human rights measurement is needed for evidence-based policy making. Human rights measurement serves to create more consistency and coherence between the internal and external human rights strategy of the EU and to make human rights assessments more standardised and coherent in order to avoid double standards.

The findings of the interviews allow the identification of purposes for human rights measurement in all stages of the **policy cycle**.

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<sup>171</sup> Interview conducted by the ETC with an EU official from COHOM (Brussels, June 2014).

<sup>172</sup> Interview conducted by the ETC with an EU official from COHOM (Brussels, June 2014).

<sup>173</sup> Telephone interviews conducted by the ETC with EU officials from DG Enlargement (Graz, June 2014).

<sup>174</sup> United Nations Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (United Nations 2012), pp. 33-70.

<sup>175</sup> Interview conducted by the ETC with a member of the FRA (Vienna, June 2014).

<sup>176</sup> Todd Landman and Edzia Carvalho, *Measuring Human Rights* (Routledge, 2010), p. 5.

In **policy planning** human rights measurement is needed to inform the development of policy proposals with evidence. Human rights measurement allows the identification of good practices as well as weak spots and needs to be addressed in policy planning. Furthermore, human rights measurement in policy planning supports the *ex ante* impact assessment of policy options.

At the stage of **implementation**, human rights measurement helps EU officials to apply human rights policies and monitoring tools more effectively and coherently.

Additionally, human rights measurement supports **decision-making** in the course of monitoring countries' compliance with human rights standards and obligations, for instance decisions on incentives or sanctions in external action. More generally, human rights measurement makes political decisions more evidence-based.

At the stage of **evaluation**, human rights measurement serves to tailor policies and assessing the human rights impact of policies.

The parameters of meaningful and applicable human rights measurements have to be critically assessed in light of the specific requirements of the diverse internal and external policies of the EU. In addition, the experiences of EU officials who currently apply instruments to measure human rights, have to be taken into account. Thus, the next section is dedicated to human rights measurements currently applied and to the requirements for future measurements deriving from them.

## C. Human rights measurements by EU bodies: current applications and future requirements

### 1. Mapping of existing applications of human rights measurement tools

This section analyses in more detail how instruments which are deemed to give information on human rights are currently applied by the EU. To this end a broad mapping of instruments established by EU institutions will be presented and a particular focus will be given to their methodology.

The mapping discusses instruments comprising elements of human rights protection. As introduced in the previous chapters, the findings will be structured according to the EU (a) internal, (b) enlargement and (c) external area.<sup>177</sup> Furthermore, the analysis is structured according to the functions of these instruments in the policy cycle as introduced in section II A. Therefore a closer look will be given to the stages of (1) policy planning, (2) monitoring, as well as (3) policy evaluation. Some of the analysed instruments cannot always be clearly attributed only to one stage of the policy cycle, as their results also inform other stages. The policies and instruments will be presented and discussed regarding their scope, how they approach human rights (i.e. which dimension is taken into account, respect for human rights (HRs), performance regarding HRs, analysing the HRs situation on the ground, etc) and how they are analysed (i.e. which data is used, who generates the information, etc). Furthermore it will be discussed whether there is already a coherent approach of the EU regarding measuring human rights. Is there one underlying concept or are the policies and instruments highly diversified?

#### a) *The internal sphere of the EU*

This subchapter addresses instruments which are deemed to give information on fundamental rights in the EU internal area. FRA and EIGE will be addressed twice, since they have instruments in place for policy planning as well as for monitoring.

##### (1) Policy Planning

With the FRA and EIGE, the EU has established two institutions to provide research, data and expertise on the fundamental rights situation within the EU. As pointed out in section II B, such data is very useful and is required for evidence-based policy planning. Additionally, in the preparatory stages of new legislation, the European Commission foresees an *ex ante* impact assessment of policy options regarding fundamental rights. The FRA, the EIGE and the European Commission's *ex ante* impact assessment will therefore be described in more detail below.

#### **The Fundamental Rights Agency**

The FRA was established in 2007 with the specific task to

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<sup>177</sup> Please note that Annex II of this report presents three case studies on the use of rule of law indicators in the EU enlargement process of Bulgaria, Croatia and Montenegro.

provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.<sup>178</sup>

According to Art. 5 of the Regulation establishing the FRA, the Council of the EU shall adopt a Multi-annual Framework for the Agency, which shall cover five years and determine the thematic areas of activities of FRA. The fight against racism, xenophobia and related intolerance must always be included.

The FRA plans its work programme three years in advance. It is thereby supported by its Scientific Committee and stakeholders through continuous dialogue and consultation. This allows the FRA to carry out multi-annual research projects, following a cross-departmental approach. Research and analysis is carried out by the departments Equality and Citizen's Rights and Freedoms and Justice, as well as by project stakeholders. Based on this research, the FRA develops opinions and expert advice. The communication department then undertakes awareness raising activities and facilitates cooperation and engagement with the FRA's key partners., such as the national Liaison Officers, EU institutions, the Fundamental Rights Platform, National Human Rights Institutions (NHRIs), equality bodies and ombudsperson institutions.<sup>179</sup>

In July 2011, the FRA installed a multidisciplinary research network, the FRANET network.<sup>180</sup> It consists of research institutes – so called 'National Focal Points' – in all EU Member States, which are contracted by the FRA to gather and present information and data on the fundamental rights situation in each Member State. FRANET provides data for annual reports on the topics of the MAF. The current topics are access to justice, victims of crime, information society, 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. The data provided by FRANET on these topics is then collected and comparatively analysed by the FRA.

The methodology applied is a combination of legal analysis and data on the experiences of individuals on the ground. Thus, desk research is complemented with social fieldwork research (surveys, interviews or secondary analysis of existing data). The FRA publishes the results of this socio-legal research in reports to the EU institutions and Member States. Additionally, the FRA prepares training materials and training programmes, and collects and shares promising practices. Promising practices are those that have a

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<sup>178</sup> Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/1.

<sup>179</sup> European Union Agency for Fundamental Rights, 'How we do it' <<http://fra.europa.eu/en/about-fra/how-we-do-it>> accessed 25 September 2014. Prior to this network, FRA worked from 2007 until 2011 with a network of legal experts called FRALEX.

<sup>180</sup> European Union Agency for Fundamental Rights, 'FRANET' <<http://fra.europa.eu/en/research/franet>> accessed 25 September 2014.

beneficial effect on fundamental rights among the Member States. They aim at offering Member States the opportunity to learn about successful solutions from others.<sup>181</sup>

In addition the FRA itself gathers data. This is usually quantitative research on one fundamental rights topic, which is examined across the EU. Such fundamental rights topics are homophobia, transphobia, and discrimination on grounds of sexual orientation and gender identity in the EU Member States (2010), or violence against women (2014).<sup>182</sup>

### **The European Institute for Gender Equality**

The EIGE was established in 2007, first in Brussels then moving to Vilnius. The official launch of EIGE's activities however only took place in June 2010. EIGE was established as an autonomous body with the tasks of contributing to, and strengthening the promotion of gender equality and gender mainstreaming in all EU policies as well as the fight against discrimination based on sex, and raising awareness among citizens. Similar to the FRA, EIGE has been entrusted with the explicit task of providing EU institutions and Member States with independent, evidence-based advice on fundamental rights and gender equality, therefore acting within the area of policy planning.<sup>183</sup>

### **European Commission's *ex ante* Impact Assessment**

The *ex ante* Impact assessment of the European Commission has the purpose to assess policy options and their possible impact on fundamental rights: it covers only legislative proposals made by the Commission, while amendments to their texts are assessed in a later stage by the legislative bodies.<sup>184</sup>

The European Commission Impact Assessment Guidelines<sup>185</sup> are meant to help find evidence on advantages and disadvantages of policy options.<sup>186</sup> The guidelines include different checklists encompassing formal requirements of the Impact Assessment, such as procedural and analytical steps and exemplary questions to ask. In 2011 the Commission issued a Staff Working Paper on how to identify, compare and screen policy options' impacts on fundamental rights.<sup>187</sup> This operational guidance is one of

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<sup>181</sup> European Union Agency for Fundamental Rights, 'How we do it' <<http://fra.europa.eu/en/about-fra/how-we-do-it>> accessed 25 September 2014.

<sup>182</sup> 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](http://fra.europa.eu/sites/default/files/fra_uploads/1697-FRASymp2011-outcome-report.pdf)> accessed 5 November 2014.

<sup>183</sup> Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/1, Art. 2; European Parliament and Council Regulation (EC) No. 1922/2006 of 20 December 2006 establishing a European Institute for Gender Equality [2006] OJ L 403/9, Art. 2.

<sup>184</sup> European Parliament, 'Resolution on guaranteeing Independent Impact Assessments of 8 June 2011 (2010/2016(INI))' P7\_TA(2011)0259.

<sup>185</sup> European Commission, 'Impact Assessment Guidelines' SEC(2009) 92, p. 6.

<sup>186</sup> European Commission, 'Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' (Communication) COM(2010) 573 final, p. 6.

<sup>187</sup> European Commission, 'Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessment' (Commission Staff Working Paper) SEC(2011) 567 final.

the initiatives planned in the Strategy for the effective implementation of the Charter of Fundamental Rights of October 2010.

## (2) Monitoring

There are various EU instruments in place that allow for monitoring fundamental rights in the Member States of the EU. On the one hand, these instruments address certain areas related to human rights such as corruption, gender equality, independence of the justice systems, social protection, or employment. These instruments are either mainly or at least partially based on indicators. On the other hand, the European Commission and the European Parliament carry out regular reporting on the fundamental rights situation in the Member States of the EU. 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.

### **Promotion of the Rights of the Child**

The FRA carries out a project specifically dealing with the development of human rights indicators. This project also aims at gathering more comparable data and information across the EU Member States. As early as 2007, the FRA had started to work on child rights indicators. Concrete structures, process and outcome indicators were developed on child rights focusing especially in the issues of family and migration, protection from violence and exploitation, adequate living standards, child poverty, and education.<sup>188</sup>

### **The Right to Political Participation of Persons with Disabilities**

A list of 28 indicators was developed by the FRA in close cooperation with the European Commission and the Academic Network of European Disability Experts on the right to political participation of persons with disabilities. The indicator set was then populated, wherever possible, with publicly available data. The thematic areas for grouping data are: lifting legal and administrative barriers; increasing rights awareness; making political participation more accessible; and expanding opportunities for participation. For each of these areas, structure, process and outcome indicators have been developed. These indicators may be considered independently but should be read in the context of the whole set of indicators. In May 2014, the FRA presented its first findings:<sup>189</sup> The study revealed the lack of systematic data collection in the Member States and made clear that 'No reliable or accurate data were identified in the Member States to populate many of the indicators. In many cases, the use of different methodologies and criteria for data collection made comparative analysis challenging'.<sup>190</sup> The FRA generally aims at intensifying the

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<sup>188</sup> 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.

<sup>189</sup> 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).

<sup>190</sup> 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), p. 16.

development of indicators in its work programme for the years 2013-2017.<sup>191</sup> It is planned that indicators and benchmarks will be developed and applied for the identification of trends in fundamental rights over time<sup>192</sup> as well as to evaluate the FRA's work and its impact.<sup>193</sup>

### Gender Equality Index

EIGE was assigned by the European Commission with the task of constructing a composite indicator<sup>194</sup> on gender equality to reflect the multi-faceted reality of gender equality and tailored towards the policy framework of the EU and its Member States.<sup>195</sup> EIGE started working on this issue in 2010 and the results were officially launched at an EU conference in 2013.<sup>196</sup> The so-called 'Gender Equality Index'<sup>197</sup> was developed following the Organisation for Economic Co-operation and Development (OECD) handbook on constructing composite indicators<sup>198</sup> and is formed by combining gender equality indicators of six core domains (work, money, knowledge, time, power and health) and two satellite domains (intersecting inequalities and violence). The indicators are based on outcome variables, which measure people's rights enjoyment instead of countries' commitments and efforts to promote gender equality. The indicators within the Gender Equality Index in the area of work for example deal with full-time equivalent employment rates, duration of working life, training at work, flexibility of working time, etc. With regard to money the indicators deal with earning, income, poverty and income distribution. With regards to the domain of time issues of childcare activities, domestic activities, sport, culture and leisure activities as well as volunteering and charitable activities are taken into account.<sup>199</sup>

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<sup>191</sup> European Union Agency for Fundamental Rights, 'Annual Work Programme 2015' <[http://fra.europa.eu/sites/default/files/annual\\_work\\_programme\\_2015.pdf](http://fra.europa.eu/sites/default/files/annual_work_programme_2015.pdf)> accessed 25 September 2014

<sup>192</sup> European Union Agency for Fundamental Rights, 'Annual Work Programme 2015' <[http://fra.europa.eu/sites/default/files/annual\\_work\\_programme\\_2015.pdf](http://fra.europa.eu/sites/default/files/annual_work_programme_2015.pdf)> accessed 25 September 2014

<sup>193</sup> European Union Agency for Fundamental Rights, 'Annual Work Programme 2015' <[http://fra.europa.eu/sites/default/files/annual\\_work\\_programme\\_2015.pdf](http://fra.europa.eu/sites/default/files/annual_work_programme_2015.pdf)> accessed 25 September 2014, p. 7.

<sup>194</sup> Composite indicators synthesise individual indicators relating to different areas into a single measurement.

<sup>195</sup> European Commission, *A Roadmap for Equality between Women and Men 2006-2010* (Publications Office of the European Communities 2006).

<sup>196</sup> European Institute for Gender Equality, 'Gender Equality Index - Launch Conference', <<http://eige.europa.eu/content/event/gender-equality-index-launch-conference>> accessed 25 September 2014.

<sup>197</sup> European Institute on Gender Equality, *Gender Equality Index: Main Findings* (Publications Office of the European Union 2013).

<sup>198</sup> Organisation for Economic Co-operation and Development (OECD) and European Commission's Joint Research Centre, *Handbook on Constructing Composite Indicators: Methodology and User Guide* (OECD 2008).

<sup>199</sup> European Institute for Gender Equality, *Gender Equality Index Report* (EIGE 2013).

Apart from the Gender Equality Index, the EIGE provides for an overview of the key policy initiatives to promote gender equality, as well as data on some structural indicators in its Country Profiles.<sup>200</sup>

### European Justice Scoreboard

The EU Justice Scoreboard is a comparative tool seeking to provide data on the efficiency of non-criminal justice systems in the Member States. This tool is not treaty-based, but anchored in the European Semester, which is a yearly cycle of economic policy coordination set up by the European Union. In the frame of the European Semester, the Commission undertakes a detailed analysis of EU Member States' plans of budgetary and structural reforms and provides them with recommendations for the next year. 'An efficient and independent justice system contributes to trust and stability. Predictable, timely and enforceable justice decisions are important structural components of an attractive business environment'.<sup>201</sup> The EU Justice Scoreboard does not present an overall ranking of countries, but rather provides an overview of the functioning of all justice systems based on various indicators. The EU Justice Scoreboard brings together data from various sources. Most of the quantitative data is provided by the Council of Europe Commission for the Evaluation of the Efficiency of Justice.<sup>202</sup> The CEPEJ itself collects relevant data from Member States.

The 2014 EU Justice Scoreboard focuses on litigious civil and commercial cases as well as administrative cases. It looks at the same indicators as in 2013 (efficiency, quality and independence of justice systems) while also drawing on some additional sources of information. Measuring the efficiency of justice systems includes indicators on the length of proceedings, the clearance rate, and the number of pending cases. Indicators on the quality of justice systems includes measuring the compulsory training of judges, monitoring and evaluation of court activities, the budget and human resources allocated to courts, the availability of Information and Communication Technology, and of alternative dispute resolution methods. The independence of justice systems is measured through data and assessments rather than indicators. For the purpose of measurement, independence is divided analytically into the dimensions of perceived independence and structural independence. The 2014 EU Justice Scoreboard provides a first general comparative overview of how national justice systems are organised to protect independence of the juridical system in certain types of situations where it may be at risk. It looks at legal safeguards against, for instance, the transfer or dismissal of judges.<sup>203</sup> The findings of the Scoreboard indicators are analysed more thoroughly through a country specific assessment carried out in the context of the European Semester through a bilateral dialogue with the Member States' authorities and stakeholders.

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<sup>200</sup> European Institute on Gender Equality, *Gender Equality Index: Country Profiles* (Publications Office of the European Union 2013).

<sup>201</sup> European Commission, 'The EU Justice Scoreboard: A Tool to Promote Effective Justice and Growth' COM(2013) 160 final, p. 2; European Commission, 'The 2014 EU Justice Scoreboard' COM(2014) 155 final.

<sup>202</sup> Council of Europe Commission for the Evaluation and the Efficiency of Justice (CEPEJ), 'Study on the Functioning of Judicial Systems in the EU Member States: Facts and Figures from the CEPEJ Evaluation 2012-2014 Exercise' CEPEJ(2014) 4 final.

<sup>203</sup> European Commission, 'The 2014 EU Justice Scoreboard' (Communication) COM(2014) 155 final, p. 7

The aim of this assessment is to find out, for instance, the reasons for a poor performance and to take into account the particularities of the countries' legal systems. An outcome of this assessment may be country-specific recommendations on the need to improve the justice system.<sup>204</sup>

### **Anti-Corruption Report**

The European Commission's Anti-Corruption Report was established in 2011 and was first published in February 2014.<sup>205</sup> The report is produced by the European Commission every two years,<sup>206</sup> and provides an analysis of corruption in the Member States, and their efforts to prevent and fight it. The report adopts a right-based approach, anchoring its understanding of corruption in international law and in the law of the Member States. The report defines corruption as any 'abuse of power for private gain'<sup>207</sup> and thereby covers two aspects. Firstly, the specific acts of corruption and measures of Member States to prevent and punish it as defined by law. Secondly, it covers certain types of conduct and measures which influence the risk of corruption and the capacity of a state to control it. The Anti-Corruption Report is methodologically based on a qualitative assessment. Quantitative approaches play a minor role because it is difficult to quantify corruption and even more to rank countries by results.<sup>208</sup> Indicators were used, but not as a basis of a new index on corruption, but rather to provide elements of analysis supplementing the qualitative assessment that is at the core of the report.<sup>209</sup> The qualitative assessment of corruption in each country focuses on what works and what does not work in dealing with corruption. Information and data derive from a different range of sources, such as monitoring mechanisms (e.g. Group of States against Corruption (GRECO), OECD, World Bank, Transparency International), from other data sources (academia, national authorities, independent experts, civil society organizations, etc.) and from various Commission departments and relevant EU agencies (Europol and Eurojust).<sup>210</sup>

### **Joint Assessment Framework**

The Employment Committee, the Social Protection Committee and the European Commission (DG EMPL) developed a proposal for a Joint Assessment Framework for tracking progress and monitoring the

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<sup>204</sup> European Commission, 'The EU Justice Scoreboard: A Tool to Promote Effective Justice and Growth' COM(2013) 160 final, p. 2; European Commission, 'The 2014 EU Justice Scoreboard' COM(2014) 155 final.

<sup>205</sup> European Commission, 'Commission Decision establishing an EU Anti-Corruption Reporting Mechanism for Periodic Assessment ("EU Anti-Corruption Report")' C(2011) 3673 final; European Commission, 'EU Anti-Corruption Report' COM(2014) 38 final.

<sup>206</sup> European Commission, 'Commission fights Corruption: a Stronger Commitment for Greater Results' (Press Release) IP/11/678 of 6 June 2011.

<sup>207</sup> European Commission, 'EU Anti-Corruption Report', COM(2014) 38 final, p. 2.

<sup>208</sup> European Commission, 'EU Anti-Corruption Report' COM(2014) 38 final, p. 37.

<sup>209</sup> European Commission, 'Commission fights Corruption: a Stronger Commitment for Greater Results' (Press Release), IP/11/678 of 6 June 2011.

<sup>210</sup> European Commission, 'EU Anti-Corruption Report' COM(2014) 38 final, p. 37.

Employment Guidelines<sup>211</sup> under Europe 2020.<sup>212</sup> It is an indicator-based monitoring system, which acts primarily as an analytical tool with the aim to identify key employment challenges and to track progress of Member States towards the Europe 2020 goals.

For this purpose, relatively homogenous policy areas are selected from the Employment Guidelines to be assessed through indicators. In each of the selected policy areas, country specific progress in the implementation of policies and towards the related objectives is assessed in three steps. Step one is a quantitative assessment based on a limited number of indicators, building on existing monitoring practices as developed under the Lisbon Strategy and the Open Method of Coordination.<sup>213</sup> For each key policy area a main, or key indicator is defined, which provides a representative summary of the objective of that particular policy. This main indicator is then supplemented by policy specific sub-indicators, which measure the outcome of the policy and explain the findings of the key indicators. For example, if the country specific progress in the policy area ‘increase of labour market participation’ is assessed, the main indicator is the employment rate of a country. Explanatory sub-indicators then are the employment gender gap or the employment rate of low-skilled persons.<sup>214</sup> For the quantitative assessment, the key indicator and the individual outcome-sub-indicators are standardized to allow for an easier comparison and analysis (the EU 27 average is suggested as mean). In step two, the quantitative assessment of policy specific progress and outcome is then complemented by a qualitative assessment. Hereby, contextual information and country specific evidence, as well as expert knowledge, are taken into account. The qualitative assessment involves, for instance, changes over time. This is important since the quantitative part of the assessment is mainly based on the level from the latest available period. Additionally, the quantitative assessment addresses data problems, recent changes or sub-areas, for which no indicators are available. Building on the qualitative and the quantitative assessment, key challenges and best practices are identified in step three.<sup>215</sup>

The Employment Performance Monitor<sup>216</sup> reflects the results of the JAF for the employment policies’ area. It assesses the employment situation in the Member States of the EU and the progress towards the Europe 2020 targets. Among others, labour market participation disaggregated regarding gender and age is

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<sup>211</sup> Council Decision 2010/707/EU of 21 October 2010 on Guidelines for the Employment Policies of the Member States [2010] OJ L 308/46.

<sup>212</sup> Council of the European Union, ‘The Joint Assessment Framework and the Employment Performance Monitor’ (Joint EMCO–SPC Opinion) 16984/10 of 26 November 2010.

<sup>213</sup> Council of the European Union, ‘The Joint Assessment Framework and the Employment Performance Monitor’ (Joint EMCO–SPC Opinion) 16984/10 of 26 November 2010, p. 6.

<sup>214</sup> Council of the European Union, ‘The Joint Assessment Framework and the Employment Performance Monitor’ (Joint EMCO–SPC Opinion) 16984/10 of 26 November 2010, pp. 12-13.

<sup>215</sup> Council of the European Union, ‘The Joint Assessment Framework and the Employment Performance Monitor’ (Joint EMCO–SPC Opinion) 16984/10 of 26 November 2010, pp. 10-19.

<sup>216</sup> Council of the European Union, ‘Europe 2020 – Employment Performance Monitor June 2014’ 10763/1/14 Rev 1 of 16 June 2014.

presented for all EU 27 countries, as well as adequate and employment oriented social security systems, and gender equality. It is published twice a year, in the framework of the European Semester.

### **Social Protection Performance Monitor**

The Social Protection Performance Monitor aims to identify main and common social trends and reinforce multilateral surveillance to the social dimension targets of Europe 2020. It is prepared by the Social Protection Committee. The indicators used are based on those agreed in Laeken in 2001 and further developed by the Indicator Subgroup of the Social Protection Committee in the field of social protection and social inclusion. They aim to give a synthetic but comprehensive picture on the main changes in the social situation in Europe and lead to the identification of trends.<sup>217</sup> Data is predominantly provided by EUROSTAT, through the EU Statistics on Income and Living Conditions (EU-SILC) and the EU Labour Force Survey (EU-LFS) datasets.<sup>218</sup> The Social Protection Performance Monitor contains an overview of the social development trends in the EU, as well as more detailed country analysis, which looks at the progress of each Member State towards the national targets. The list of indicators is not static, but is reviewed regularly in order to ensure that policy and statistical developments are reflected appropriately. Trends and data from the SPPM can be found in the Annual Report of the Social Protection Committee on the social situation in the EU.<sup>219</sup>

### **Migrant Integration Indicators**

The Zaragoza Declaration<sup>220</sup> has been adopted in April 2010 by EU Ministers responsible for immigrant integration issues and has been approved at the Justice and Home Affairs Council in June 2010. It called upon the European Commission to undertake a pilot study to examine proposals for common integration indicators and to report on the availability and quality of the data from agreed harmonised sources, which are necessary for the calculation of these indicators.<sup>221</sup> The report on this Pilot Survey has been prepared by EUROSTAT within the frame of the Zaragoza pilot study on common integration indicators.<sup>222</sup>

The European Commission requested the further development and use of EU immigrant integration indicators. This research based work was undertaken between 2012 and 2013 by the Migration Policy Group (MPG) and the European Services Network (ESN) on behalf of the European Commission. It reconfirms the relevance and usefulness of the Zaragoza Indicators and identifies three types of factors

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<sup>217</sup> Social Protection Committee 'Social Protection Performance Monitor (SPPM) – Methodological Report by the Indicators Sub-group of the Social Protection Committee' of 17 October 2012 <<http://ec.europa.eu/social/main.jsp?catId=758>> accessed 3 November 2014.

<sup>218</sup> EUROSTAT, *Measuring Material Deprivation in the EU: Indicators for the Whole Population and Child-Specific Indicators* (Publications Office of the European Union 2012).

<sup>219</sup> Social Protection Committee, *Social Europe – Many ways, one objective* (Publications Office of the European Union 2014).

<sup>220</sup> Council of the European Union, 'Zaragoza Declaration of the European Ministerial Conference on Integration' of 16 April 2010.

<sup>221</sup> EUROSTAT, *Indicators of Immigrant Integration: A Pilot Study* (Publications Office of the European Union 2011).

<sup>222</sup> EUROSTAT, *Indicators of Immigrant Integration: A Pilot Study* (Publications Office of the European Union 2011).

that influence societal integration outcomes in four areas. These factors concern personal characteristics of the immigrant population (such as time of residence, gender, origin country, socio-economic), the general context in the country (welfare systems, education systems, housing or the labour market) and its specific migration and integration policies. The four areas are employment, education, social inclusion and active citizenship. In each of these areas, the EU selected an initial number of indicators (the Zaragoza indicators), and complemented them with proposed new indicators. In the field of employment, for instance, the Zaragoza indicators are: employment rate, unemployment rate, activity rate<sup>223</sup>, self-employment and over-qualification. Proposed new indicators are: public sector employment, temporary employment, part-time employment, long-term unemployment, share of foreign diplomas recognised (data is not available every year) and the retention of international studies (data either needs to be collected or migrant sample size boosted). In addition to these four areas already identified in the Zaragoza Study, the researchers of the MPG and the ESN suggest a new category of indicators, namely 'welcoming society'. The new category includes the Zaragoza Indicators on perceived experience of discrimination, trust in public institutions and sense of belonging (for all three, data needs to be collected). Moreover, new indicators are proposed, such as public perception of racial/ethnic discrimination and public attitudes toward political leaders having an ethnic minority background (for both, the use of Eurobarometer data is suggested). Different options for the use of these indicators are mentioned, such as to describe the situation in societies, to clarify the link between integration policies and societal outcomes (monitoring). Additionally, the indicators can also be used for the evaluation of policies. Overall, the report is designed to be explorative and descriptive in its nature.<sup>224</sup>

### **Regular reporting on Fundamental Rights in the EU**

The European Commission's Annual Report on the Application of the Charter, first published in 2010, contains an overview of how the Charter has been taken into consideration by the EU bodies when taking decisions, promoting legislation or in the case law of the Court of Justice of the EU.<sup>225</sup> It does 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.

The status of fundamental rights in the EU is also assessed by the European Parliament and published in the Annual Report on the Situation of Fundamental Rights in the EU. This Report is drafted by a Rapporteur within the LIBE Committee and then adopted in plenary by resolution. There is hardly any public information available on the methodology used to draft the report. The Parliament's report bases its evaluation on reports and findings of other European and International institutions, e.g. the European Commission, the FRA, the Council of Europe, the human rights treaty bodies of the UN, etc.

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<sup>223</sup> The activity rate represents active persons as a percentage of the total population of the same age group.

<sup>224</sup> Thomas Huddleston and others, *Using EU Indicators of Immigrants Integration* (Publications Office of the European Union 2013).

<sup>225</sup> European Commission, '2013 Report on the Application of the EU Charter of Fundamental Rights' COM(2014) 228 final, p. 2.

Also the FRA publishes an annual report on the fundamental rights situation in the 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.<sup>226</sup>

Rather recently, the EC and EUROSTAT started to gather data in the field of trafficking in human beings – EUROSTAT just published its second report with statistical data on trafficking<sup>227</sup>, and the EC published its mid-term evaluation of the Member States' implementation of the Anti-Trafficking Strategy.<sup>228</sup> In the EUROSTAT survey common indicators, such as information on victims by gender and age, number of victims by citizenship, police data on suspected traffickers by age, gender and citizenship, data on prosecuted traffickers by age and gender or on court data on judgments of traffickers by age and gender, among others were selected.<sup>229</sup> The EC report measures progress against the background of the Anti-Trafficking Strategy's key priorities, which are: identifying, protecting and assisting victims of trafficking; stepping up the prevention of trafficking in human beings; increased prosecution of traffickers and enhanced coordination, cooperation and policy coherence.<sup>230</sup>

### (3) Evaluation

As far as can be determined by looking into the mapping of instruments established by the EU institutions, human rights indicators do not yet play a role in the evaluation of internal EU policies or projects. The Indicators on Migrants Integration are suggested to be used also for evaluation. Other recent developments regarding the use of fundamental rights indicators in this regard in the EU internal area will be discussed in the next subchapter.

#### *b) Enlargement*

This subchapter addresses instruments that measure fundamental rights in the context of the EU enlargement process. As can be seen when looking into the historical development of pre-accession assistance, the financing possibilities within this instrument were adjusted to ensure that pre-accession assistance is more closely linked to the enlargement priorities and will favour a sectoral approach.<sup>231</sup>

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<sup>226</sup> European Union Agency for Fundamental Rights, *Annual Report 2013 – Fundamental Rights, Challenges and Achievements in 2013* (Publications Office of the European Union 2013).

<sup>227</sup> Eurostat, *Trafficking in Human Beings 2014 edition* (Publications Office of the European Union 2014).

<sup>228</sup> European Commission, 'Commission Staff Working Document –Mid-term Report on the Implementation of the EU Strategy Towards the Eradication of Trafficking in Human Beings' COM(2014) 635 final of 17 October 2014.

<sup>229</sup> Eurostat, *Trafficking in Human Beings 2014 Edition* (Publications Office of the European Union 2014), p. 17. Note: it proved difficult for some Member States to provide some of those common indicators, as was mentioned in the report on p. 18.

<sup>230</sup> European Commission, 'Commission Staff Working Document –Mid-term Report on the Implementation of the EU Strategy Towards the Eradication of Trafficking in Human Beings' COM(2014) 635 final of 17 October 2014.

<sup>231</sup> European Commission, *2012 Annual Report on Financial Assistance for Enlargement, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee*, (Publications Office of the European Union 2013), p. 6.

Enlargement is discussed separately from the internal and external issues, as it stands at point somewhere in between those two areas and the measurement context is somewhat different.

The enlargement strategy and process changed and developed over the years. Similarly, the three case studies on the use of rule of law indicators in the EU enlargement process of Bulgaria, Croatia and Montenegro, which form Annex II of this report, also reveal that the tools and indicators applied for measuring the rule of law in the EU enlargement processes have continuously improved over time. Generally, any country seeking membership of the EU must confirm the prerequisites of Art. 40 and Art. 6 (1) TEU. The relevant criteria were established in 1993 in Copenhagen, and then reaffirmed and strengthened in 1995. A composite paper on enlargement was presented as Part Two of the Agenda 2000<sup>232</sup> and explained the methodology for an assessment of applications for membership through the application of predefined accession criteria.

One of the criteria relevant for accession is the political criterion: guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. To meet those criteria many of the accession states had to adapt legislation, judiciary, etc. Progress is analysed within the accession procedure. Once the criteria are met, accession to the Union is possible. Acting on the mandate of the Council and the European Council, the Commission has a key position in the assessment of the progress made by the candidate and potential candidate countries towards fulfilling the conditions of the Copenhagen criteria. Each year the Commission presents a set of documents to the Council, explaining its strategy in line with the EU enlargement policy and reporting on the progress achieved at country level. The so-called 'Enlargement package' adopted by the Commission includes the Progress Reports for each candidate and potential candidate country as well as the annual Enlargement Strategy Paper. This paper takes stock of the developments in the last twelve months and sets out the way forward for the coming year.<sup>233</sup> The Council and the European Council take their decisions to move on in the accession process of a country based on the recommendations contained in the Commission's assessments. In this way, the assessment of the progress towards the fulfilment of the membership criteria is one of the most important and powerful tools in the accession process.<sup>234</sup> Progress in the countries in question is partly 'monitored' by on-site visits by experts in the respective areas, but no common set of indicators is currently used.

The accession process is closely monitored by the Commission, taking into account various sources of information, like international report, expert country visits, etc. However there is no generally applicable indicator scheme developed for assessing progress in the accession procedures for the acceding countries.

In the next subsection, monitoring instruments linked to the enlargement process will be presented.

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<sup>232</sup> European Commission, 'Agenda 2000: For a Stronger and Wider Union' (Communication) COM(97) 2000 final.

<sup>233</sup> European Commission, DG Enlargement, 'Strategy and Progress Reports' <[http://ec.europa.eu/enlargement/countries/strategy-and-progress-report/index\\_en.htm](http://ec.europa.eu/enlargement/countries/strategy-and-progress-report/index_en.htm)> accessed 9 October 2014.

<sup>234</sup> Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008), p. 59.

## Instruments for Pre-Accession Assistance II

The Instrument for Pre Accession Assistance II will be presented here and not in the section on the EU's external sphere, as it has a closer link to the enlargement area regarding its scope to bring countries towards achievement of the *aquis* in the relevant sectors. As of 2007, the CARDS programme and the other programmes providing assistance to candidate countries (namely PHARE, SAPARD and ISPA) were replaced by one single instrument, the IPA.<sup>235</sup> Assistance granted under the IPA was linked to the progress and needs identified through the Commission's evaluations and was subject to a suspension clause in the case of failure to make sufficient progress in the accession process.<sup>236</sup> IPA was in place from 2007 until 2013.

The new IPA II was set up by a Regulation 231/2014 in March 2014 and is applicable retroactively as of 1<sup>st</sup> January 2014.<sup>237</sup> For this instrument monitoring, progress will be conducted by using appropriate country-specific and measurable indicators.<sup>238</sup> IPA II has a strategic focus and Indicative Strategy Papers are the planning documents for each beneficiary for the seven years. For each country a country-specific strategy paper is developed. Those papers foster a larger self-responsibility of the countries in question. IPA II targets reforms in pre-defined sectors, which are closely linked to the enlargement strategy and also include democracy and the rule of law, which should help bring the relevant sectors to EU standards.<sup>239</sup> The IPA II Regulation foresees that progress towards the achievement of specific targets shall be monitored by the use of clear, transparent, country-specific and measurable indicators. These indicators shall cover *inter alia* the area of strengthening democracy, the rule of law, and an independent and efficient justice system. The relevant performance indicators shall be pre-defined and shall enable objective assessment of progress over time and across programmes. Indicators shall also be taken into account for the contribution of performance rewards. The performance element laid down in Article 14 of the Regulation makes it possible to reward countries with good performance and to re-allocate funds in case of underperformance. Therefore, the indicators shall act as a means of efficiency control. The indicators are agreed with the beneficiaries and used to measure whether the goals are really achieved. Each beneficiary shall set up sectorial monitoring committees no later than six months after the first financing agreement enters into force. The sectorial monitoring committee shall then review the effectiveness, efficiency, quality, coherence, coordination and compliance of the implementation of actions in the policy areas. Progress shall be measured by means of indicators related to a baseline study

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<sup>235</sup> Council Regulation (EC) 1085/2006 of 17 July 2006 Establishing an Instrument for Pre-Accession Assistance (IPA) [2006] OJ L210/82.

<sup>236</sup> 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.

<sup>237</sup> 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.

<sup>238</sup> 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.

<sup>239</sup> European Commission 'Overview Instrument for Pre-Accession Assistance <[http://ec.europa.eu/enlargement/instruments/overview/index\\_en.htm#ipa2](http://ec.europa.eu/enlargement/instruments/overview/index_en.htm#ipa2)> accessed 9 October 2014.

as laid down in Art. 19 of the Implementing Regulation No 447/2014.<sup>240</sup> Current beneficiaries are Albania, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia, Iceland, Kosovo, Montenegro, Serbia and Turkey.

In June 2014 the Commission issued a multi-country indicative strategy paper for 2014-2020 on the IPA II.<sup>241</sup> It sets out the priorities for the period until 2020. The paper complements the Country Strategy Papers and only foresees some more indicators, 'which are considered to be specific for regional interventions'.<sup>242</sup> Additional to the indicators laid down in the CSPs, human rights indicators are predicted to be relevant. Examples of such indicators include overall effectiveness of the governments or number of Erasmus+ students of the region completing an EU Master programme. Annex 2 of the document provides for the entire list of indicators mentioned in the paper. Data for those indicators is taken from other institutions, like EUROSTAT or the World Bank.<sup>243</sup>

Looking for example into the indicative strategy paper for Kosovo (2014-2020) in the course of IPA II several indicators are mentioned. There are three different types of indicators foreseen. Firstly context indicators taken from EUROSTAT like public debt, unemployment rate or GDP per capita. Furthermore, outcome and impact indicators are listed, and are closely linked to DG Enlargement Progress Reports, such as progress made towards meeting the political criteria or progress made on implementation of the *acquis*. The last set of indicators is the so-called sector indicators; the most relevant sectors to this research being governance and democracy, and the rule of law and fundamental rights. In those sectors, data from the World Bank, the World Economic Forum, Transparency International, as well as other actors are used together with the DG Enlargement Progress reports to assess progress towards meeting the Copenhagen criteria in areas like governance, judicial reform, fundamental rights or refugees and border

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<sup>240</sup> European Commission Implementing Regulation (EU) No 447/2014 of 2 May 2014 on the Specific Rules for Implementing Regulation (EU) No 231/2014 of the European Parliament and of the Council establishing an Instrument for Pre-accession Assistance (IPAI) [2014] OJ L 132/32.

<sup>241</sup> European Commission, 'Instrument for Pre-Accession Assistance (IPA II) – Multi-country indicative strategy paper (2014-2020) of 30 June 2014.

<sup>242</sup> European Commission, 'Instrument for Pre-Accession Assistance (IPA II) – Multi-country indicative strategy paper (2014-2020) of 30 June 2014, p. 12.

<sup>243</sup> European Commission, 'Instrument for Pre-Accession Assistance (IPA II) – Multi-country indicative strategy paper (2014-2020) of 30 June 2014, p. 29.

management.<sup>244</sup> The same indicators are also foreseen in the IPA II Indicative Strategy Paper for Turkey<sup>245</sup>, Albania<sup>246</sup>, the Former Yugoslav Republic of Macedonia<sup>247</sup>, Serbia<sup>248</sup> and Montenegro<sup>249</sup>.

### **Cooperation and Verification Mechanism**

Bulgaria and Romania acceded to the EU in 2007 but with the special condition that they must continue reforms in the area of justice and rule of law. The Cooperation and Verification Mechanism was implemented to monitor the implementation of reforms. A report is published by the Commission once a year regarding improvements and challenges.<sup>250</sup> Within the CVM structure, process and outcome indicators are used, e.g. for measuring the independence and accountability of the judiciary.

Due to insufficient progress, the Commission decided in July 2012 to suspend the CVM for 18 months in order to give Bulgaria the time to achieve visible results in the implementation of reforms. The Commission underlined that the potential of the mechanism has not been used to the full and the lack of consistent direction of reforms puts into question the sustainability and irreversibility of the progress.<sup>251</sup> Due to a lack of political commitment to a long-term strategy for reform, and of concrete short-term measures to bring the process forward – also in January 2014 – the Commission could identify no sufficient progress.<sup>252</sup> This leads to the conclusion that the post-accession incentives and the sanctions applied were too weak to bring about the requested changes after accession.<sup>253</sup>

### *c) External relations and foreign affairs*

In this subchapter on external relations relevant EU instruments are presented regarding human rights assessment and monitoring. Again the subdivision in different stages of the policy cycle is used in this subchapter.

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<sup>244</sup> European Commission, Instrument for Pre-Accession Assistance (IPA II), 'Indicative Strategy Paper for Kosovo (2014-2020), Annex 2, p. 38 seq.

<sup>245</sup> European Commission, Instrument for Pre-Accession Assistance (IPA II), 'Indicative Strategy Paper for Turkey (2014-2020), Annex 2, p. 47 seq.

<sup>246</sup> European Commission, Instrument for Pre-Accession Assistance (IPA II), 'Indicative Strategy Paper for Albania (2014-2020), Annex 2, p. 37 seq.

<sup>247</sup> European Commission, Instrument for Pre-Accession Assistance (IPA II), 'Indicative Strategy Paper for the Former Yugoslav Republic of Macedonia (2014-2020), p. 33 seq.

<sup>248</sup> European Commission, Instrument for Pre-Accession Assistance (IPA II), 'Indicative Strategy Paper for Serbia (2014-2020), p. 41 seq.

<sup>249</sup> European Commission, Instrument for Pre-Accession Assistance (IPA II), 'Indicative Strategy Paper for Montenegro (2014-2020), p. 39 seq.

<sup>250</sup> European Commission, 'The reports on progress in Romania and Bulgaria' <[http://ec.europa.eu/cvm/progress\\_reports\\_en.htm](http://ec.europa.eu/cvm/progress_reports_en.htm)> accessed 9 October 2014.

<sup>251</sup> European Commission 'Progress in Bulgaria under the Cooperation and Verification Mechanism' (Report) COM(2012) 411 final, p. 20.

<sup>252</sup> European Commission, 'Progress in Bulgaria under the Cooperation and Verification Mechanism' (Report) COM(2014) 36 final, p. 9.

<sup>253</sup> Christophe Hillion, 'Enlarging the European Union and Deepening its Fundamental Rights Protection' (2013) 11 European Policy Analysis <[http://www.sieps.se/sites/default/files/2013\\_11epa.pdf](http://www.sieps.se/sites/default/files/2013_11epa.pdf)> accessed 9 October 2014, p. 13.

## (1) Policy Planning

### Council Human Rights Guidelines

The Human Rights Guidelines play an important role in the formulation of the EU's policy on human rights in its external actions. They were adopted in 1998 and cover human rights topics of particular importance to the EU. They are pragmatic guidelines offering different EU actors a range of tools to carry out specific actions in those areas of concern. So far 11 Guidelines have been issued covering a broad range of topics: freedom of expression, promotion and protection of religion or belief, LGBTI, death penalty, torture, children and armed conflict, protection of the rights of the child, violence against women and girls, human rights defenders, promoting compliance with international humanitarian law and freedom of expression online and offline.

These Guidelines are revised periodically. While the use of indicators has not been a common feature of the Guidelines, it is worth noting that the Guidelines of the Council on the Enjoyment of Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex Persons, adopted in 2013, set out a set of indicators with a checklist to measure their situation.<sup>254</sup> In these guidelines the EU states, that 'tailor made approaches and human rights country strategies will be an important tool to identify the best way forward in different contexts'. The indicators are formulated along the lines of specific human rights, i.e. right to life, prohibition of torture, non-discrimination, freedom of association, freedom of assembly, etc. The checklist shall be used to track and monitor the situation of human rights of LBGTI persons in the country concerned and 'to identify progress/setbacks'.<sup>255</sup> From the Guidelines it is not clear where, how and how often those indicators are used in practice. The EU stresses the importance of identifying tools used in 'enabling data to be collected and to help boost national capacities to collect and disseminate reliable, accurate data'.<sup>256</sup>

Similarly, the Guidelines on freedom of expression online and offline,<sup>257</sup> adopted in 2014, include a list of resources related to freedom of opinion and expression that the EU may use in contacts with third countries. This list includes a reference to the tools developed by the UNESCO for that purpose.

In the EU guidelines on violence against women and girls and combating all forms of discrimination against them,<sup>258</sup> the need for accurate, comparable, and quantitative data and relevant indicators is emphasised. It is mentioned that there are still disparities in the types of data that are collected.

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<sup>254</sup> 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' of 24 June 2013.

<sup>255</sup> 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' of 24 June 2013, p. 8.

<sup>256</sup> 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' of 24 June 2013.

<sup>257</sup> Council of the European Union, 'EU Human Rights Guidelines on Freedom of Expression Online and Offline' of 12 May 2014.

<sup>258</sup> Council of the European Union, 'EU Guidelines on Violence against Women and Girls and combating All Forms of Discrimination against them' of 8 December 2008.

## Country Human Rights Strategies

Country Human Rights Strategies were firstly established in 2011 to better assess and more comprehensively analyse key human rights challenges in third countries. They shall also underline the fact that human rights are at the very core of EU external action. These strategies include an analysis of the human rights situation in the country and identification of priorities and objectives for EU action. As stated in the Joint Communication, the Human Rights Strategies shall be taken into account when conducting policy-making, and programming financial assistance with third countries, so they must be considered in all further instruments mentioned below and should be mainstreamed effectively.<sup>259</sup> There is no further information available on those strategies regarding content or method, as they are kept confidential.

## Tool-Box – a rights-based approach encompassing all human rights for EU development cooperation<sup>260</sup>

In April 2014 a Commission Staff Working document on a rights-based approach encompassing all human rights for EU development cooperation was released. The tool-box was foreseen in the Council Conclusions on the EU Action Plan on Human Rights and Democracy in 2012.<sup>261</sup> The tool-box ‘describes what a Rights Based Approach to development is by highlighting its core concepts and their rationale, clarifying common misunderstandings, introducing relevant legal references and other donors’ commitments’. Furthermore, it describes how to apply such an approach in development cooperation. According to the document, all policies and activities of development cooperation, which were implemented using a Rights Based Approach (RBA), are ‘aimed at directly contributing to the realisation of human rights’.<sup>262</sup> The rights based approach was again confirmed in the Council conclusions on a rights-based approach to development cooperation, encompassing all human rights in May 2014.<sup>263</sup>

As an example, the new Development Cooperation instrument is framed in the line of rights based approach and will be presented in further detail below. The working document provides a check-list for those people working in the area, stating that the RBA has to be used in every step of the project cycle; namely identification, formulation, implementation, monitoring and evaluation.<sup>264</sup> The checklist suggests

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<sup>259</sup> European 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 to the European Parliament and the Council) COM(2011) 886 final, p. 8.

<sup>260</sup> A more extensive description and discussion of this tool-box is provided in FRAME Deliverable 9.1: Laura Beke and others, ‘Report on the Integration of Human Rights in EU Development and Trade Policies’ (2014) Frame Deliverables, <<http://www.fp7-frame.eu/reports>> accessed 11 November 2014, section IV C, p. 135 seq.

<sup>261</sup> European Commission, ‘Tool-Box a Rights-based Approach, Encompassing All Human Rights for EU Development Cooperation’ (Commission Staff Working Document) SWD(2014) 152 final. Also in 2014, a similar tool was released by the EC and UNICEF in relation to children’s rights and development cooperation, see <http://www.unicef.org/eu/crtoolkit/>. Module 5 specifically deals with child rights impact assessment.

<sup>262</sup> European Commission, ‘Tool-Box a Rights-based Approach, Encompassing All Human Rights for EU Development Cooperation’ (Commission Staff Working Document) SWD(2014) 152 final, p. 6.

<sup>263</sup> Council of the European Union, ‘Council Conclusions on a Rights Based Approach to Development Cooperation, encompassing All Human Rights’ of 19 May 2014.

<sup>264</sup> European Commission, ‘Tool-Box a Rights-based Approach, Encompassing All Human Rights for EU Development Cooperation’ (Commission Staff Working Document) SWD(2014) 152 final, p. 20.

considering whether a proposed intervention strategy identifies human rights indicators, without further references to which type or content of indicators are to be used.

## (2) Assessment and Monitoring

### Country Strategy Papers

In 2000 the Council asked the Commission to draft Country Strategy Papers to provide a common framework for programming aid in developing countries.<sup>265</sup> Those CSPs are set up with the purpose to provide a strategic framework for EU's assistance programmes. The CSPs covered the period from 2007 to 2013, and more detailed indicative programmes are set up for shorter periods. The CSPs considered available indicators to assess the situation in the country in question, e.g. World Bank Worldwide Governance Indicators, Transparency International Corruption Perception Index, the Public Expenditure and Financial Accountability (PEFA) Assessment, et. al. The improvements of the country in the given areas are then assessed in the CSPs, analysing the developments over the last period using the existing indicators. This is also done in human rights relevant areas such as education, health, etc. The indicators used may vary from country to country. The CSPs of 2007-2013 were not set up in a standardised way, which lead to criticism by many institutions such as DROI or COHOM, and doubts regarding their effectiveness. Critics complained about a lacking retraceability as a result of the missing standardised impact assessment and reporting. Connected with that, the confidentiality of the Country Strategy Papers, as it was the case for the CSPs of 2007-2013, has been criticised by these organisations.<sup>266</sup>

According to instructions for planning the 11<sup>th</sup> Development Fund and the Development Cooperation Instrument, CSPs should no longer be the rule, but the exception in the period from 2014 to 2020.<sup>267</sup> Programming should, as a rule, mainly be based on the partner countries'/regions' own development plans or other equivalent documents. The multi-annual indicative programmes of the EU should be synchronised as much as possible with the country's/region's plans. If the delegations come to the conclusion that a plan of a country/region is not a sufficient basis for programming of EU assistance, then a CSP should still be drafted.

However, the use of indicators for CSP has been debated for a long period of time before. As early as 2002, the European Commission issued guidelines on the use of indicators with the aim 'to define principles and guidance for the choice of indicators to be monitored in CSP's (i.e. Country Strategy Papers) intervention framework'.<sup>268</sup> These guidelines propose that a minimum of ten indicators, drawn from the Millennium

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<sup>265</sup> Council of the European Union – Development, 'Standard Framework for Country Strategy Papers: The Council Conclusions' 13357/00 of 17 November 2000.

<sup>266</sup> See Chapter II.B on Purposes.

<sup>267</sup> European External Action Service, 'Instructions for the Programming of the 11th European Development Fund (EDF) and the Development Cooperation Instrument (DCI) – 2014-2020' of 15 May 2012, p. 10.

<sup>268</sup> European Commission, 'Guidelines for the Use of Indicators in Country Performance Assessment' (December 2002), <[http://ec.europa.eu/development/icenter/repository/guidelines\\_indicators\\_cpa\\_en.pdf](http://ec.europa.eu/development/icenter/repository/guidelines_indicators_cpa_en.pdf)> accessed 3 October 2014.

Development Goals should be monitored across all countries.<sup>269</sup> The Commission proposes as a typology: input (i.e. process), output, outcome and impact indicators; indicating that according to a pilot project in Burkina Faso, special focus shall be laid on outcome indicators.<sup>270</sup> The Commission states that it is preferable to restrict lists used to a number of essential indicators, which have to be defined clearly and precisely. Also the necessity to keep in mind reliability and availability of data is clearly stated. It was further proposed that the target values for the indicators will be set by the country in question and discussed with the donors. The guidelines also emphasise that the evaluation of a countries' performances should never be a simple mechanical interpretation of indicators, but should rather be accompanied by a policy dialogue with the responsible government.

### **Instruments for EU Development Cooperation**<sup>271</sup>

The list of specific instruments for EU development cooperation presented is not exhaustive, but focuses on instruments where there are hints to human rights measurements, and indicators as means to conduct such measurement. The programmes by the EU in the area of development cooperation are divided along two lines: on the one hand there are thematic instruments, like EIDHR, on the other hand there are geographical programmes, like the European Neighbourhood Policy, the Development Cooperation Instrument, etc. The instruments presented are those of relevance for further research regarding human rights measurements. Through the Multi-annual Financial Framework 2014-2020 the instruments were newly set-up. The instruments comprised in the MFF are:

- Instrument for Pre-accession Assistance: €11,699 million
- European Neighbourhood Instrument (ENI): €15,433 million
- Development Cooperation Instrument (DCI): €19,662 million
- Partnership Instrument (PI): €955 million
- Instrument contributing to Stability and Peace (IcSP): €2,339 million
- European Instrument for Democracy & Human Rights: €1,333 million

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<sup>269</sup> European Commission, 'Guidelines for the Use of Indicators in Country Performance Assessment' (December 2002), <[http://ec.europa.eu/development/icenter/repository/guidelines\\_indicators\\_cpa\\_en.pdf](http://ec.europa.eu/development/icenter/repository/guidelines_indicators_cpa_en.pdf)> accessed 3 October 2014, p. 7 seq.

<sup>270</sup> European Commission, 'Guidelines for the Use of Indicators in Country Performance Assessment' (December 2002), <[http://ec.europa.eu/development/icenter/repository/guidelines\\_indicators\\_cpa\\_en.pdf](http://ec.europa.eu/development/icenter/repository/guidelines_indicators_cpa_en.pdf)> accessed 3 October 2014, p. 3.

<sup>271</sup> Frame Report 9.1 presents development cooperation instruments in more detail: Laura Beke and others, 'Report on the Integration of Human Rights in EU Development and Trade Policies' (2014) Frame Deliverables, <<http://www.fp7-frame.eu/reports>> accessed 11 November 2014.

These instruments are complemented by Regulation 236/2014<sup>272</sup> laying down common rules and procedures for the implementation of the Union's instrument for financing external action. This regulation talks about indicators generally, stating in the recitals that 'Whenever possible and appropriate, the results of the Union's external action and the efficiency of the particular Instrument should be monitored and assessed on the basis of pre-defined, clear, transparent and, where appropriate, country-specific and measurable indicators, adapted to the specificities and objectives of the Instrument concerned'. Also in Art. 12 on monitoring and evaluation of actions, it is stated that evaluations shall be carried out on the basis of such indicators. As of 2015 the Commission shall submit an annual report to the Council and the Parliament on the achievement of the objectives of each regulation, measuring the results by means of indicators according to Art. 13. No later than 31 December 2017 a mid-term review on the implementation of each instrument is to be submitted by the Commission. This review shall focus on the achievement of the objectives of each Instrument by means of indicators, measuring the results delivered and the efficiency of the instruments as laid down in Art. 17.

Generally speaking for all instruments of the MFF, Multi-Annual Indicative Programmes (MIPs) are set up for the thematic instruments and programmes. For national or regional programmes, national or regional indicative programmes are established (NIPs and RIPs). Based on the strategies, annual action programmes are developed, laying down plans for the respective year. Indicators are foreseen in those programming documents – in some areas also targeted directly at human rights, and in other areas with no direct link to human rights. Examples of the areas where indicators are established will be presented further below when discussing the instruments.

In relation to the geographic instruments, the Instrument for Pre-Accession Assistance II, dealing with countries wishing to accede to the EU was already presented. Further instruments in this regard are the European Neighbourhood Policy and the Development Cooperation Instrument. The European Development Fund should also be mentioned in this regard, playing an important role as the financial arm of the Cotonou Agreement. However, strictly speaking it is not an EU funded instrument, as it is financed by the Member States rather than directly within the EU budget.

### **The Instrument contributing to Stability and Peace (IcSP)**

This Instrument is the EU's main instrument supporting security initiatives and peace-building. It was implemented through Regulation No 230/2014 and replaces the Instrument for Stability. According to Art. 8 of the Regulation, assistance through this instrument on the basis of conflict prevention, peace building and crisis preparedness, as well as assistance in addressing global, trans-regional and emerging threats shall be based on thematic strategy papers. These thematic strategy papers should also be accompanied by a multi-annual indicative programme, pointing out priority areas selected for EU financing and outlining objectives, expected results as well as performance indicators and the time frame of assistance.

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<sup>272</sup> European Parliament and Council Regulation (EU) No. 236/2014 of 11 March 2014 laying down Common Rules and Procedures for the Implementation of the Union's Instruments for Financing External Action [2014] OJ L 77/95.

Funding can be received by Member States, partner countries, partner regions as well as international organisations.

Looking into the multi-annual indicative programme, performance indicators are presented among others.<sup>273</sup> In a lengthy annex to this programme, indicators are presented, focusing mainly on quantitative data such as number of trainings, number of crisis response actions, etc. In the area of addressing global, trans-regional and emerging threats, indicators regarding improvement of effectiveness of the criminal justice system, further implementation of international standards in countering terrorist financing, etc. are set.<sup>274</sup> As has been shown, some of the indicators established are human rights-related, while others are not human rights-related at all (e.g. increasing national and regional maritime information sharing capacities).

### **Generalised Scheme of Preferences/ Generalised Scheme of Preferences +**

Generally speaking the, Generalised Scheme of Preferences standard arrangement offers tariff reductions to developing countries to export their products to the EU. It only looks into one single dimension, namely tariffs and does not aim at tackling any other problems faced by developing countries.

The GSP+ scheme provides enhanced preferences and full removal of tariffs covered by the GSP, if countries ratify and effectively implement international conventions relating to human and labour rights, environment and good governance. Through this incentive human rights development shall be fostered. Beneficiary countries are obligated to report about their progress in the implementation of the ratified conventions in the field of human rights every second year. Additionally, the effective implementation is monitored through a regular dialogue with beneficiary countries. The beneficiary countries are obliged to accept and cooperate with the EU monitoring procedure. Furthermore, the burden of proof has been reversed in the GSP+. When evidence points out towards problems in the implementation, it is up to the beneficiary country to prove positive outcomes. Thus, the GSP+ enhances the monitoring mechanisms of the EU compared to the GSP.<sup>275</sup>

Beneficiary countries' reports are mandated more frequently now (every second year) and the European Parliament has a scrutinising mandate in addition to the Council of the EU.<sup>276</sup>

### **European Neighbourhood Instrument**

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<sup>273</sup> European Commission, 'Commission Implementing Decision of 11.8.2014 adopting the Thematic Strategy Paper 2014-2020 and accompanying Multiannual Indicative Programme 2014-2017 of the Instrument contributing to Stability and Peace' C(2014) 5607 final

<sup>274</sup> European Commission, 'Commission Implementing Decision of 11.8.2014 adopting the Thematic Strategy Paper 2014-2020 and accompanying Multiannual Indicative Programme 2014-2017 of the Instrument contributing to Stability and Peace' C(2014) 5607 final, p. 43 seq.

<sup>275</sup> European Commission 'The EU's Generalised Scheme of Preferences (GSP)', <[http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc\\_152502.pdf](http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152502.pdf)> accessed 15 October 2014.

<sup>276</sup> European Commission 'The EU's Generalised Scheme of Preferences (GSP)', <[http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc\\_152502.pdf](http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152502.pdf)> accessed 15 October 2014, pp. 11-13.

The European Neighbourhood Instrument specifically targets the southern and eastern neighbours of the EU. In particular they are the South Mediterranean countries and Eastern neighbouring countries (apart from Russia, which concluded a cooperation framework with the EU outside the ENI). The purpose of this instrument is to reach close political association and a greater degree of economic integration. The partner countries agree on an ENI action plan with the EU underlining their commitment to democracy, human rights, and other core values. The action plans build on already existing agreements with the EU and their implementation is monitored through committees. ENP progress reports are published once a year. During the last review of the ENI in 2010-2011 the EU introduced the more-for-more principle, by which the EU intends to develop stronger partnerships and provide greater incentives for those countries making a quicker progress towards democratic reform. Progress towards democratic reform will come in the form of free elections, freedom of expression, judicial independence, etc.<sup>277</sup>

Still within the period of the previous European Neighbourhood Policy, in the Statistical Annex to the Implementation of the ENP in 2013, indicators which are deemed to give information about the human rights situation in a country are listed.<sup>278</sup>

On 11 March 2014, the new European Neighbourhood Instrument was established through Regulation 232/2014.<sup>279</sup> The ENI is a bilateral policy between the EU and each partner country. The objective of this instrument is to advance further 'towards an area of shared prosperity and good neighbourliness [...] by developing a special relationship founded on cooperation, peace and security, mutual accountability and a shared commitment to the universal values of democracy, the rule of law and respect for human rights in accordance with the TEU' (Art. 1 (1)). An incentive-based approach is new to this Regulation and is laid down in Art. 4 (1); thus, the EU will differentiate its support for the partners depending on their needs and also their willingness to improve. This way, the EU will be able to strengthen its support to those countries willing to improve their democracy and the implementation of human rights.

In Art. 2 of the ENI Regulation, dealing with the specific objectives of Union support, indicators are mentioned:

The achievement of the specific objectives set out in paragraphs 1 and 2 shall be measured using, in particular, the relevant Union periodic reports on the implementation of the ENP; for points a, d and e (i.e. promoting human rights, development and confidence building) of

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<sup>277</sup> European Union External Action Service, 'European Neighbourhood Policy' <[http://eeas.europa.eu/enp/index\\_en.htm](http://eeas.europa.eu/enp/index_en.htm)> accessed on 15 October 2014.

<sup>278</sup> The document lists deep democracy indicators (e.g. Transparency International Corruption Perception Index, Freedom House Freedom in the World, etc.) as well as other indicators (e.g. on the death penalty, LGBT rights, Gender Inequality Index, etc.).

European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, 'Implementation of the European Neighbourhood Policy: Statistical Annex' (Joint Staff Working Document) SWD(2014) 98 final.

<sup>279</sup> European Parliament and Council Regulation (EU) No. 232/2014 of 11 March 2014 establishing a European Neighbourhood Instrument [2014] OJ L 77/27.

paragraph 2 the relevant indicators established by international organisations and other relevant bodies [...]. The indicators to measure the achievement of the specific objectives shall be predefined, clear, transparent and, where appropriate, country specific and measurable and shall include, inter alia, adequately monitored democratic elections, respect for human rights and fundamental freedoms, an independent judiciary, cooperation on issues of justice, freedom and security, the level of corruption, trade flows, gender equality and indicators enabling international economic disparities, including employment levels, to be measured.

The progress of partner countries will be regularly assessed, in particular through the ENP progress reports which include trends compared to previous years (Art. 4 (2)).

In the spirit of differentiation, the programming in the area of the ENI has been streamlined into a Single Support Framework (SSF). Indicators can be identified by looking into the Sector Intervention Frameworks that are annexed to the SSF. Indicators which are deemed to give information about the human rights situation in a country are foreseen especially for the sector on justice reform, as reference is made to the numbers of recommendations implemented by the National Preventive Mechanisms (NPMs) of the UN Convention against Torture, as well as the number of human rights cases brought to the courts, etc.<sup>280</sup> Those Sector Intervention Frameworks foresee expected results, indicators, as well as means of verification such as Council of Europe documents, UN reports, other reports.

For the programming period 2014-2020, strategic priorities and a multi-annual indicative programme for 2014-2017 were set for European Neighbourhood-wide measures.<sup>281</sup> One such priority (Objective No 2) targets higher education and as a result indicators for measuring the progress in the area of education were established.<sup>282</sup>

### **European Development Fund**

The European Development Fund (EDF) is the main instrument to provide development assistance to the African, Caribbean and Pacific countries (ACP countries), and to the Overseas Countries and Territories (OCTs). The EDF is the financial arm of the Cotonou agreement and strictly speaking not part of the EU

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<sup>280</sup> See e.g. European Commission, 'Programming of the European Neighbourhood Instrument (ENI) – 2014-2020, Single Support Framework for EU support to Armenia (2014-2017)', <[http://eeas.europa.eu/enp/pdf/financing-the-enp/armenia\\_2014\\_2017\\_programming\\_document\\_en.pdf](http://eeas.europa.eu/enp/pdf/financing-the-enp/armenia_2014_2017_programming_document_en.pdf)> accessed 16 October 2014.

<sup>281</sup> European Commission, 'Programming of the European Neighbourhood Instrument (ENI) – 2014-2020, Strategic Priorities 2014-2020 and Multi-annual Indicative Programme 2014-2017, European Neighbourhood-wide Measures', <[http://eeas.europa.eu/enp/pdf/financing-the-enp/enp\\_wide\\_strategic\\_priorities\\_2014\\_2020\\_and\\_multi\\_annual\\_indicative\\_programme\\_2014\\_2017\\_en.pdf](http://eeas.europa.eu/enp/pdf/financing-the-enp/enp_wide_strategic_priorities_2014_2020_and_multi_annual_indicative_programme_2014_2017_en.pdf)> accessed 16 October 2014

<sup>282</sup> European Commission, 'Programming of the European Neighbourhood Instrument (ENI) – 2014-2020, Strategic Priorities 2014-2020 and Multi-annual Indicative Programme 2014-2017, European Neighbourhood-wide Measures', <[http://eeas.europa.eu/enp/pdf/financing-the-enp/enp\\_wide\\_strategic\\_priorities\\_2014\\_2020\\_and\\_multi\\_annual\\_indicative\\_programme\\_2014\\_2017\\_en.pdf](http://eeas.europa.eu/enp/pdf/financing-the-enp/enp_wide_strategic_priorities_2014_2020_and_multi_annual_indicative_programme_2014_2017_en.pdf)> accessed 16 October 2014, p. 8 seq.

budget itself, but financed by the Member States. The EDF's primary goal is the eradication of poverty in the concerned countries. In the implementation of the cooperation, attention should be paid to the themes mentioned in the Cotonou Agreement, including among others human rights and democracy. Within the 10<sup>th</sup> EDF, action programmes are drafted by the European Commission and the respective country or partner region in cooperation with the Member State present on the ground. These programmes outline the general framework and provide for evaluation. They also include a chapter on expected results formulated in qualitative and quantitative indicators.<sup>283</sup>

It was expected by experts, that the new, 11<sup>th</sup> EDF would establish a common set of indicators as opposed to an *ad hoc* negotiation for each allocation.<sup>284</sup> In May 2014 a Regulation was issued on Financial Regulation applicable to the 10<sup>th</sup> EDF as regards the application of transition period until the entry into force of the 11<sup>th</sup> EDF.<sup>285</sup> In the Annex to the Regulation, replacement Articles are foreseen for Art. 1 to 159 of Regulation (EC) No 215/2008. In Art. 11 on the principle of sound financial management, indicators are mentioned; specific, measurable, achievable, relevant and timed objectives shall be set and the achievement of these objectives shall be monitored by performance indicators.<sup>286</sup>

### Development Cooperation Instrument

The Development Cooperation Instrument shall increase the EU's development cooperation by merging various thematic and geographical mechanisms into one single instrument. The DCI applies to all developing countries, but not to those eligible for pre-accession assistance. A new regulation for the Development Cooperation Instrument (Regulation 233/2014) entered into force on 11 March 2014 based on Art. 209 TFEU and covers cooperation with partner countries and regions, namely Latin America, Asia, Central Asia, the Middle- East and South Africa.<sup>287</sup> The aim of cooperation in this instrument is to reduce, and in the long term, eradicate poverty. However, 'consolidating and supporting democracy, the rule of law, good governance, human rights and the relevant principles of international law' shall also be points this regulation should contribute to (Art 1 b ii). In Art. 1 the use of relevant indicators 'including human development indicators, in particular Millennium Development Goal 1 for point a (i.e. poverty) and MDGs

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<sup>283</sup> European Commission, *Budget Support* (Publications Office of the European Union 2008), p. 38.

<sup>284</sup> German Development Institute, 'Allocating the Next European Development Fund for ACP countries' of 5 December 2013 <[http://www.die-gdi.de/uploads/media/German-Development-Institut\\_Mario\\_Negre\\_05.12.2013.pdf](http://www.die-gdi.de/uploads/media/German-Development-Institut_Mario_Negre_05.12.2013.pdf)> accessed 15 October 2014.

<sup>285</sup> Council Regulation (EU) No. 567/2014 as of 26 May 2014 amending Regulation (EC) No 215/2008 on the Financial Regulation Applicable to the 10th European Development Fund as regards the Application of the Transition Period between the 10th European Development Fund and the 11th European Development Fund until the entry into force of the 11th European Development Fund Internal Agreement (OJ L 157/52).

<sup>286</sup> There is no further more specified information on those indicators to be found in the regulation.

<sup>287</sup> European Parliament and Council Regulation (EU) No. 233/2014 of 11 March 2014 establishing a Financing Instrument for Development Cooperation for the Period 2014-2020 [2014] OJ L 77/44.

1 to 8 for point b (i.e. among others human rights) and, after 2015, other indicators agreed at the international level by the Union and the Member States.’ Art. 11 on programming documents for geographic programmes sets down that ‘multiannual indicative programmes for geographic programmes shall set out the priority areas selected for Union financing, the specific objectives, the expected results, clear, specific and transparent performance indicators, the indicative financial allocations, both overall and per priority area, and where applicable aid modalities.’ Similar provisions are foreseen for other strands, such as Pan-African programmes. Those multiannual indicative programmes shall be the centre of the programming process and EU specific strategy papers as CSPs should in the majority of cases no longer be needed.<sup>288</sup>

The DCI is twofold and includes on the one hand, geographic programmes, supporting bilateral or regional cooperation with developing countries. On the other hand the DCI comprises thematic programmes on ‘global public goods and challenges’ and ‘civil society organisations and local authorities’.

For the Pan-African programme within the Development Cooperation Instrument, the Multi-Annual Indicative Programme foresees indicators for each of the priorities, namely peace and security, democracy, good governance and human rights, human development, sustainable and inclusive development and growth, and continental integration as well as global and cross-cutting issues.<sup>289</sup> Specific indicators have been formulated for each strategic area, together with priorities and objectives for those areas. The joint priorities are peace and security; democracy, good governance and human rights; human development; sustainable and inclusive development and growth and continental integration and global and cross-cutting issues.<sup>290</sup> Within the strategic area of democracy, good governance and human rights four components were identified, namely African governance architecture; electoral observation and support; CSOs contribution to good governance and human rights and public finance management. For each of those components specific indicators were formulated.

### **EU Budget Support**

Another instrument in the area of development aid is the EU Budget Support, which will be presented at this point as another instrument with a link to human rights measurements.

General budget support from the European Commission is set up to promote development and reduce poverty by improving living standards (this is measured using health and education indicators, which are

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<sup>288</sup> European External Action Service, ‘Instructions for the Programming of the 11th European Development Fund (EDF) and the Development Cooperation Instrument (DCI) – 2014-2020’ of 15 May 2012.

<sup>289</sup> Pan-African Programme 2014-2020 ‘Multiannual indicative Programme 2014-2017’, <[http://www.africa-eu-partnership.org/sites/default/files/documents/c\\_2014\\_5375\\_1\\_annex\\_en\\_v1\\_p1\\_771842.pdf](http://www.africa-eu-partnership.org/sites/default/files/documents/c_2014_5375_1_annex_en_v1_p1_771842.pdf)> accessed 15 October 2014.

<sup>290</sup> Pan-African Programme 2014-2020 ‘Multiannual indicative Programme 2014-2017’, <[http://www.africa-eu-partnership.org/sites/default/files/documents/c\\_2014\\_5375\\_1\\_annex\\_en\\_v1\\_p1\\_771842.pdf](http://www.africa-eu-partnership.org/sites/default/files/documents/c_2014_5375_1_annex_en_v1_p1_771842.pdf)> accessed 15 October 2014, p. 13.

human rights indicators as such).<sup>291</sup> The financing agreement, the formal fixation of the contract with the country in question specifies the performance criteria and indicators for payments.

Budget support is an aid modality, as it is 'not an end in itself, but [...] means of delivering better aid and achieving sustainable development results'.<sup>292</sup> There are three forms of budget support programmes: Good Governance and Development Contracts to provide budget support to a national development or reform policy and strategy; Sector Reform Contracts to provide budget support to address sector reforms; and State Building Contracts to support in fragile and transition situations.<sup>293</sup>

The commitment to fundamental values is assessed as a pre-condition for signing the so-called Good Governance and Development Contracts (GGDCs), and subsequently is monitored during the implementation of budget support. Monitoring during implementation is based on a dynamic approach, looking at past and recent policy performance benchmarked against reform commitments. This works on the basis of process and outcome indicators, as well as extensive discussions with the Governments through budget support dialogues. The indicators should be drawn from the respective countries' national and/or sectorial development policy and a mix of process, output and outcome indicators should be foreseen. Indicators and targets are to be reviewed each year in the course of the annual review and adapted according to lessons learned.

#### **Partnership-Instrument for Cooperation with third Countries**

The Partnership Instrument for cooperation with third Countries (Regulation 234/2014) was set up through Regulation 234/2014 and adopted as of 11 March 2014, as the successor of the instrument for cooperation with industrialised Countries (2007-2013).<sup>294</sup> Its objective is to advance and promote EU interests by supporting the external dimensions of EU internal policies and addressing major global challenges. In the recitals of the regulation the following section on indicators was introduced:

The Union's external action under this Regulation should contribute to clear results (covering outputs, outcomes and impacts) in countries benefiting from Union assistance. Whenever appropriate and possible, the results of the Union's external action and the efficiency of the instrument established by this Regulation should be monitored and assessed on the basis of pre-defined, clear, transparent and, where appropriate, country-specific and measurable indicators, adapted to the specificities and objectives of that instrument.

The material part of the regulation does not contain any further provision in this regard. As for other instruments already mentioned, Multiannual Indicative Programmes shall be adopted for the Partnership Instrument. The first MIP predicts within the programming principles that indicators of efficiency,

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<sup>291</sup> European Commission, *Budget Support* (Publications Office of the European Union 2008), p. 20.

<sup>292</sup> European Commission, 'The Future Approach to EU budget Support to Third Countries' COM(2011) 638 final.

<sup>293</sup> European Commission, 'Tools and Methods Series Working Document – Budget Support Guidelines, Programming, Design and Management – A Modern Approach to Budget Support' of September 2012.

<sup>294</sup> European Parliament and Council Regulation (EU) No. 234/2014 of 11 March 2014 establishing a Partnership Instrument for Cooperation with Third Countries [2014] OJ L 77/77.

effectiveness and impact should be provided.<sup>295</sup> In the MIP, indicators are indeed mentioned for each of the priorities (energy security, climate change, environment, trade, enhancing understanding and visibility of the EU and its role on the world scene), but not formulated in detail. Some of the indicators roughly listed in this MIP are closely linked to human rights (e.g. positive impact on the quality of higher education; positive impact on the development of individuals).<sup>296</sup>

### **Indicators for the comprehensive approach to the EU implementation of the UN SC Res 1325 and 1820 on women, peace and security**

By 2008 the Council had already adopted four indicators regarding women and armed conflict. In 2010 the Political and Security Committee (PSC) endorsed the indicators of the UN SC Res 1325 and 1820, and transmitted the indicators to evaluate the EU implementation of Res 1325 and 1820 to the Permanent Representatives Committee (COREPER).<sup>297</sup> The EU Comprehensive Approach includes a commitment to elaborate indicators, based on the Beijing +15 indicators regarding protection and empowerment of women in conflict and post-conflict situations. The indicators were developed in a number of meetings of the 'Informal Women, Peace and Security Task Force' that commenced in April 2010. Meetings were open to other participants, such as NGOs, UN agencies, etc. Also prior meetings took place with grassroots organisations from conflict and post-conflict countries. The indicators are also based on a set of 26 indicators by the UN, with UNIFEM having the technical lead.<sup>298</sup>

The Task Force tried to compile indicators that were 'achievable, directly measurable (data available), specific and relevant'. Measurement concentrates on the implementation process and the steps taken, without further specifications mentioned in the document.<sup>299</sup> The UN indicators will be used to complement the EU indicators. Seventeen indicators were developed, including topics such as number of regional level dialogues that include specific attention to women, peace and security in outcome documents, conclusions, and targets. Looking into the documents the indicators seem to be a mixture of quantitative and qualitative indicators, e.g. asking for numbers of partner countries in specific areas or modalities and tools. However, a focus is laid on quantitative data.

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<sup>295</sup> European Commission, 'Partnership Instrument - First Multi-annual Indicative Programme for the Period 2014-2017', <[http://ec.europa.eu/dgs/fpi/documents/pi\\_mip\\_annex\\_en.pdf](http://ec.europa.eu/dgs/fpi/documents/pi_mip_annex_en.pdf)> accessed 14 October 2014.

<sup>296</sup> European Commission, 'Partnership Instrument - First Multi-annual Indicative Programme for the Period 2014-2017', <[http://ec.europa.eu/dgs/fpi/documents/pi\\_mip\\_annex\\_en.pdf](http://ec.europa.eu/dgs/fpi/documents/pi_mip_annex_en.pdf)> accessed 14 October 2014, p. 23.

<sup>297</sup> Council of the European Union, 'Item Note – Indicators for the Comprehensive approach to the EU Implementation of the United Nations Security Council Resolutions 1325 and 1820 on Women, Peace and Security' 11948/10 of 14 July 2010.

<sup>298</sup> Council of the European Union, 'Item Note – Indicators for the Comprehensive approach to the EU Implementation of the United Nations Security Council Resolutions 1325 and 1820 on Women, Peace and Security' 11948/10 of 14 July 2010, p. 6.

<sup>299</sup> Council of the European Union, 'Item Note – Indicators for the Comprehensive approach to the EU Implementation of the United Nations Security Council Resolutions 1325 and 1820 on Women, Peace and Security' 11948/10 of 14 July 2010, p. 7.

On the basis of the indicators developed, questionnaires were sent out to all EU Member States 36 EU delegations, as well as other actors such as EU Special Representatives, or Common Security and Defence Policy (CSDP) missions. The response-rate differed, from 64% regarding EU missions to 89% of the Member States. This first round of assessment showed, that the information provided did not always allow easy compilation and further instructions: it was found that reviewing some of the indicators might be necessary.<sup>300</sup>

### (3) Evaluation

#### **Annual Report on Human Rights and Democracy in the World**

As already described above in the policies section, the Strategic Framework and the Action Plan on Human Rights and Democracy were adopted in 2012 and now constitute key documents for furthering the EU's human rights policy in third countries. The Action Plan foresees concrete actions, identifying the responsible EU institutions and a timeframe for completion. The EU's progress is assessed in the Annual Report on Human Rights and Democracy in the World.<sup>301</sup>

Up to date the Annual Report is the main tool to evaluate the EU's human rights and democracy policies. It has been published since 1999. Since the adoption of the Strategic Framework and the Action Plan the Annual Report follows the structure of this document in order to allow for a thorough overview of implementation of actions within the respective year. This report acts as a catalogue of the EU's action and also allows the reader to see where further progress is needed. It does not use a coherent set of monitoring tools or even a set of universal indicators, but presents the developments in a descriptive manner on specific topics.

#### **European Instrument for Democracy and Human Rights<sup>302</sup>**

As already indicated by the name, the European Instrument for Democracy and Human Rights is a specific instrument to promote democracy and human rights. EIDHR was first established in 2006 by way of Regulation 1889/2006 with the main aim to provide financial assistance in order to contribute to developing and consolidating democracy, the rule of law and respect for human rights. The current Regulation 235/2014 covers the period from 1 January 2014 until 31 December 2020.<sup>303</sup> The EU's cooperation with civil society actors is especially high on the agenda of this instrument. Assistance by

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<sup>300</sup> Council of the European Union, 'Note – Report on the EU – Indicators for the Comprehensive Approach to the EU Implementation of the UN Security Council UNSCRs 1325 and 1820 on Women, Peace and Security' 9990/11 of 11 May 2011, p. 2.

<sup>301</sup> Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' 11855/12 of 25 June 2012.

<sup>302</sup> On this instrument see D 12.1: Christina Churruca Muguruza and others, 'Report mapping Legal and Policy Instruments of the EU for Human Rights and Democracy Support' (2014) Frame Deliverables, <<http://www.fp7-frame.eu/wp-content/materiale/reports/05-Deliverable-12.1.pdf>> accessed on 14 October 2014.

<sup>303</sup> European Parliament and Council Regulation (EU) No. 235/2014 of 11 March 2014 of the European Parliament and of the Council establishing a Financing Instrument for Democracy and Human Rights Worldwide' [2014] OJ L 77/85.

EIDHR is not dependent on agreements with the respective countries, but can also be given to other parties such as NGOs without the consent of the government. The new Regulation foresees certain priority themes in Art. 2, such as:

- Support to an enhancement of participatory and representative democracy;
- Promotion and protection of human rights and fundamental freedoms;
- Strengthening the international framework for the protection of human rights, justice, gender equality, the rule of law and democracy, and for the promotion of international humanitarian law;
- Building confidence in democratic electoral processes and institutions. Non-discrimination, gender mainstreaming, participation, empowerment, accountability, openness and transparency are introduced as cross-cutting themes for all measures of the Regulation.

The assistance shall be implemented through strategy papers setting out the priority areas selected for financing, the specific objectives, the expected results, the performance indicators, and the indicative financial allocations.<sup>304</sup>

In 2012 EIDHR presented a study on performance indicators for EU parliamentary support, providing a guide on how to take performance indicators into account when implementing parliamentary support projects.<sup>305</sup>

So far EIDHR has not developed a coherent set of indicators for measuring the output and/or impact of its work. Still on its website EIDHR presents a couple of measurement schemes such as the Press Freedom Index.<sup>306</sup>

#### *d) Conclusion*

Looking into the considerable number of instruments presented above, it can be clearly concluded that there is no systematic EU-approach to assess/monitor human rights situations or measure human rights as such. However, it seems that in certain areas, such as development cooperation, a paradigm shift has taken place from a particulate to a more comprehensive but flexible approach, that uses indicators for assessing human rights in different countries.

Regarding the data used in the course of those instruments presented above it is noteworthy that quite a few instruments make reference to already existing sources (for example Transparency International

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<sup>304</sup> European Parliament and Council Regulation (EU) No. 235/2014 of 11 March 2014 of the European Parliament and of the Council establishing a Financing Instrument for Democracy and Human Rights Worldwide' [2014] OJ L 77/85, Art. 4 and 5.

<sup>305</sup> European Commission – EIDHR, 'Strengthening Democracy Support to EU Delegations: from Performance Indicators, Knowledge sharing to Expert Services – Study on Performance Indicators for EU Parliamentary Support' of September 2012.

<sup>306</sup> European Commission - EIDHR, 'Human Wrong Index', <<http://www.eidhr.eu/human-wrongs-index>> accessed 30 October 2014.

Corruption Perception Index, Freedom House Freedom in the World and various others), which they also take into account in their assessment.

While this compilation presents a variety of instruments established by the EU institutions for human rights related assessment and measurement in the internal, enlargement and external area, little is known about how they work in practice.<sup>307</sup> In order to address these practical matters, interviews with relevant EU officials have been carried out. The findings of these interviews provide insights into these matters and will be presented in the next section.

## **2. Assessing current EU measuring instruments and identifying future requirements**

This subchapter deals with the assessment of current EU instruments and the requirements identified by interviewees for future instruments to measure human rights. It is based on the information gathered through the interviews with EU officials. The aim of this subchapter is to get practical insights into human rights measurement in the EU through the perspectives of those involved.

The interviewed EU officials were asked about the strengths and weaknesses, as well as about the lessons learnt regarding currently applied human rights measurement tools. Interviewees were also asked about data requirements. Is qualitative or quantitative data preferred and is comparability important? What are the suggestions regarding the frequency of applying measuring instruments? The scope of human rights measurement was discussed too.

Despite being confronted with a definition of human rights measurement (see chapter II B) the perceptions on human rights measurement differ among the interviewees. Thus, the following remarks are about measurements which EU bodies themselves perceive as such. They provide information on which role human rights measurement plays in the daily work of human rights experts.

The information gathered through the interviews cannot be seen as exhaustive; neither for human rights (related) measurement applied by EU bodies in general, nor for the interviewee's respective departments. Still the findings provide valuable information on how human rights measurement is carried out in practice. The 'users' perspective is an important complement to the mapping presented in the previous section.

The discussion of findings is divided into two sections. Firstly the interviewees' perceptions on currently applied measurements are presented. Analysis is structured along the different approaches to human rights measurement as identified through the interviews. Secondly the requirements stated by the respondents on future human rights measurements will be discussed.

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<sup>307</sup> For further details regarding the use of rule of law indicators in the EU enlargement process of Bulgaria, Croatia and Montenegro see Annex II of this report.

### a) *Evaluating the initiatives taken by EU bodies to measure human rights*

The findings from the interviewees' perceptions on self-applied human rights measurement are strongly related to their mandates. Generally, the findings indicate two approaches to human rights measurement, which differ from each other regarding their purposes. On the one hand, there is human rights measurement that pursues fundamental rights as the end in itself. On the other hand, there is human rights measurement that is mainly policy-related. Within policy-related human rights assessment, two types can be found: *ex ante* impact assessment and monitoring human rights. The latter measures countries' compliance with human rights standards (internal) and obligations (enlargement, external), as well as countries' progress/regress in this regard.

#### (1) Research on fundamental rights

The FRA collects and analyses data on fundamental rights in the EU, basing its work on human rights standards. For its work on indicators, FRA uses the conceptual framework on indicators developed by the United Nations Office of the High Commissioner for Human rights. According to the interviewed FRA member, the methodology of the OHCHR mechanism provides comparability and it is complex but not over-complicated.<sup>308</sup> Through the structure/process/output classification, this mechanism is perceived to be suitable to translate international/EU human rights norms into everyday life, thus this division is considered to be very useful by the FRA.<sup>309</sup> Structural indicators are about states' duties, 'they reflect the ratification and adoption of legal instruments and the existence as well as the creation of basic institutional mechanisms deemed necessary for the promotion and protection of human rights.'<sup>310</sup> They are quite easy to populate with data, since data is accessible, and changes at the structural level do not take place very often. Process indicators measure the actual activity of the duty bearers to 'transform their human rights commitments into the desired results'.<sup>311</sup> Process indicators encompass strategies, action plans and other activities of the duty bearers. The FRA's experiences show that the process indicators are more complicated to apply. Outcome indicators look at the rights holders' actual enjoyment of human rights: 'an outcome indicator consolidates over time the impact of various underlying processes; it is often a slow moving indicator, less sensitive to capturing momentary changes than a process indicator.'<sup>312</sup> The FRA has already developed indicators on the right to political participation of persons with disabilities.<sup>313</sup> Examples for structure, process and outcome indicators in this regard can be found on

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<sup>308</sup> Interview conducted by the ETC with an EU official from the FRA (Vienna, June 2014).

<sup>309</sup> Interview conducted by the ETC with an EU official from the FRA (Vienna, June 2014).

<sup>310</sup> United Nations Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (United Nations 2012), p. 34.

<sup>311</sup> United Nations Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (United Nations 2012), p. 36.

<sup>312</sup> United Nations Office of the High Commissioner for Human Rights, *Human Rights Indicators: A Guide to Measurement and Implementation* (United Nations 2012), p. 37.

<sup>313</sup> 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).

their website.<sup>314</sup> According to the interviewed member of the FRA, it is difficult to gather data on the situation on the ground to populate outcome indicators and in practice often only proxies are available. The FRA uses qualitative data for structure indicators, qualitative and quantitative data for process indicators, and mostly quantitative data from independent sources for outcome indicators which are usually individually gathered for the respective purpose.<sup>315</sup>

## (2) *Ex ante* impact assessment of policy options

Interviewed staff of EU bodies who deal with legislation, namely DG JUST and DG HOME, conduct *ex ante* impact assessments of policy options. DG HOME coordinates infringement procedures and legislative proposals. Regarding the latter, the DG assesses compliance with the Charter of Fundamental Rights in the European Union. Therefore, they examine different policy options in order to assess the (negative or positive) impacts on fundamental rights in the preparatory stages of new legislation. There are guidelines and checklists available for *ex ante* impact assessment, but no indicators are used. According to the interviewed member of DG HOME, the main drivers for legislative proposals are gaps in legislation and eliminating barriers to the *actual* enjoyment of human rights. Usually, these gaps are identified through NGO reports, or data from FRA or EUROSTAT. Furthermore, Parliament resolutions, initiatives of Member States, and EU level political goals are drivers of legislative proposals. Although these EU officials do not explicitly measure human rights (which is outsourced to other DGs), they ‘mainstream’ human rights in all stages of elaborating policy proposals. DG HOME assesses the human rights impact of legislation in the preparation, presentation and transposition of policy proposals. When monitoring the implementation and application of EU law, as well as in the context of infringement proceedings, the human rights dimension is considered too. For both tasks, the DG resorts to data from other sources, such as the FRA, NGO reports, international organisations, government or local authorities.<sup>316</sup>

The Parliament’s Impact Assessment Unit was established in 2012 as part of the new Directorate for Impact Assessment and European Added Value. This unit provides a detailed assessment of the Commissions Impact Assessment (IA) (e.g. to check the quality and independence of this IA and its relevance for parliamentary work). It additionally assesses the impact on substantive amendments being considered by the Parliament (carried out by external experts).

## (3) Human rights assessment

The findings of desk research as pointed out above are confirmed by the findings of the interviews. The largest share of human rights measurement is carried out within the framework of human rights assessment, which usually means assessing the human rights situation in the EU internal, enlargement and external area, and reporting on this. In the internal area this means assessing compliance with the

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<sup>314</sup> European Agency for Fundamental Rights, ‘Indicators on the Right to Political Participation of Persons with Disabilities’, <[www.fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/political-participation](http://www.fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/political-participation)> accessed 4 December 2014.

<sup>315</sup> Interview conducted by the ETC with an EU official from the FRA (Vienna, June 2014).

<sup>316</sup> Interview conducted by the ETC with an EU official from DG HOME (Brussels, June 2014).

Fundamental Rights Charter, while in the enlargement and external area this means assessing compliance with international human rights standards and obligations.

This approach to human rights measurement is primarily adopted by the European Parliament's Committees FEMM, DROI, LIBE and INTA (parliamentary reporting) and additionally by the Commission's DGs ENLARG, DEVCO, EMPL and the SPC.

For human rights assessment, the interviewed EU bodies use different tools ranging from standardised methods including coherent indicator systems, to unstructured analysis. Some of these bodies develop indicators related to certain human rights, such as the indicator sub group of the SPC in the area of social exclusion and poverty. When carrying out reporting on human rights, however these bodies usually resort to data from established measurement tools, such as the FRA, EIGE, EUROSTAT, OSCE and EU-SILC data. Others resort to information from the Bertelsmann Foundation, the NGO Freedom House, the World Bank, and the Ibrahim Foundation for Africa. EMCO and SPC make use of a shared dataset and methodology to have a common basis for decision making. This is the Open Method of Coordination (OMC) for social policies, adopted by the Council (see section II A).<sup>317</sup>

When assessing human rights, the majority of the interviewed EU officials do not carry out their own surveys/measurements. These interviewees do not perceive themselves as human rights measurers. This is probably because the mandate of these bodies does not explicitly cover human rights measurement, but is rather related to assessing and reporting.

DROI uses an informal set of indicators, and data from the UN and the Council of Europe but a system of benchmarking based on indicators is not yet implemented. Interviewees perceive this secondary analysis as problematic because the outcomes of human rights reports and data used differ and evaluation is difficult. Thus, they are strongly in favour of a coherent set of indicators as they can also be used in their statements, opinions and annual reports.<sup>318</sup> For the Annual Report on the Situation of Fundamental Rights in the EU, members of the Committee LIBE use data made available by the Commission, the Council of Europe, Member States, the FRA and other human rights institutes. If legal opinions are needed, LIBE consults the Parliament's legal department.<sup>319</sup>

In international trade relations, human rights assessments are carried out when applying GSP and the GSP+. The Commission and the EEAS are required to assess whether or not benefiting countries meet the requirements according to the GSP. They also monitor progress in this regard. Thereby they apply a standardised set of indicators and a structured reporting mechanism. According to the interviewed civil

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<sup>317</sup> Interview conducted by DIHR with EU officials from DG EMPL and members from the Indicators Subgroup of the Social Protection Committee (Copenhagen, June 2014).

<sup>318</sup> Interview conducted by the ETC with civil servants from the Parliament's Subcommittee DROI (Brussels, June 2014).

<sup>319</sup> Interview conducted by the ETC with civil servants from the Parliament's Subcommittee LIBE (Brussels, June 2014).

servants at INTA, this assessment is working well and has been updated in 2014.<sup>320</sup> An interviewed member of EEAS also points out that the sanctions-regime itself is a ‘nuclear option’ to strengthen human rights.<sup>321</sup>

Regarding development aid and budget support, DG DEVCO uses a variety of tools including indicators on human rights, democracy and the rule of law. These tools are used for the design, as well as for the impact assessment of development aid policies. For the broad multi-annual programmatic level (which currently covers the period 2014-2020), more standardised and general tools and indicators are applied. Therefore, a focus lies on UN level standards as available, reliable and recognised information sources. DG DEVCO sometimes commissions data collection to provide evidence for decision making.<sup>322</sup>

As the findings of desk research show, a more standardised system of indicators is applied in development aid, since beneficiary countries are required to comply with certain criteria. An interviewed member of DG DEVCO who is involved in the assessment of the beneficiary countries’ achievement, confirms this. Additionally, he refers to fundamental values and risk assessments (e.g. corruption), which are carried out by the Commission at country level.<sup>323</sup>

Particularly in the external and enlargement areas, assessing human rights is carried out through on-site guided reporting performed by EU bodies (EU delegations, ambassadors) and by thematic experts. These on-site assessments and reporting are more (e.g. enlargement) or less (e.g. human rights country strategies) structured by internal guidelines or checklists, but do not necessarily build on indicators that are rooted in human rights standards.

In the EU enlargement area, reporting on human rights and the rule of law is made by peer review missions and experts. These reports are conducted for each candidate country. The focus lies on the capacity of the candidate countries’ institutions to implement the *acquis communautaire*. Peer review reports are available for most of the countries on a yearly basis.<sup>324</sup> According to the interviewed members of DG ENLARG, this is more closely linked with political reporting than the application of a human rights measurement.<sup>325</sup> Information gathered through this reports is supplemented by the use of existing monitoring mechanisms and data from several international organisations.

Also in the external area, EU delegations perform regular on-site reporting on a weekly or monthly basis. For countries where the human rights situation is of concern and a priority for the EU, additional *ad hoc*

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<sup>320</sup> Interview conducted by the ETC with civil servants from the Parliament’s Subcommittee INTA (Brussels, June 2014).

<sup>321</sup> Interview conducted by the ETC and DIHR with an EU official from EEAS (Brussels and Copenhagen, June 2014).

<sup>322</sup> Interview conducted by the ETC with an EU official from DG DEVCO (Brussels, June 2014).

<sup>323</sup> Interview conducted by the ETC with an EU official from DG DEVCO (Brussels, June 2014).

<sup>324</sup> Interview conducted by the ETC with an EU official from DG Enlargement (Brussels, June 2014).

<sup>325</sup> Interview conducted by the ETC with an EU official from DG Enlargement (Brussels, June 2014).

reports are prepared. These reports either focus on the HR situation in general or on specific human rights issues.<sup>326</sup>

EU Delegations (ambassadors) and thematic experts who carry out guided reporting are located in most countries around the world. An interviewed member of the EEAS perceives it as a good source of information.<sup>327</sup> The *ad hoc* assessments conducted by EU diplomatic representations (Head of Missions) are the basis for the human rights priorities set by the EEAS.<sup>328</sup>

Human rights assessment through guided reporting by EU delegations also plays a role in aid funding and development cooperation. DG DEVCO administers development funds together with partners and stakeholders, ranging from Intergovernmental Organizations (IGOs) to small local NGOs. The interviewed member of DG DEVCO mentions that EU delegations are advised to use indicators and benchmarks, which allow for measuring each country's achievements and progress in relation to the set objectives. In practice, the EU delegations do not always apply all or constant indicators. Indicators and benchmarks are applied flexibly according to country specific relevance, sector and topics at stake. Furthermore, the kind of indicators used depends on the size of the development cooperation programme and the stakeholders involved. Benchmarks, indicators and objectives are very carefully chosen in order to be relevant and meaningful to country specific development aid projects. They also need to allow for measuring the progress concerning the development aid measures taken and the achievements in relation to the set objectives. DG DEVCO already tried to develop one set of indicators to be used in development cooperation, but since situations, topics, programmes and countries are too different to be directly addressed by it, they decided to use more country and topic specific indicators.<sup>329</sup>

As these few examples indicate, throughout the different DGs, different reporting mechanisms are developed and applied in external action and enlargement.

### ***b) Requirements for future mechanisms***

The interviewees were asked about requirements on future human rights measurements including requirements on data (qualitative and/or quantitative). The findings from the interviews with EU officials indicate the need for a system of indicators and benchmarks to allow standardised and comparative human rights measurement in the internal and the external area. The findings generally indicate that there is a strong need for reliable information and data on the human rights situation on the ground of each country in focus. Apart from this, the following requirements for a mechanism to measure human rights can be deduced.

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<sup>326</sup> Interview conducted by the ETC with an EU official from DG DEVCO (Brussels, June 2014).

<sup>327</sup> Interview conducted by the ETC and DIHR with an EU official from EEAS (Brussels and Copenhagen, June 2014).

<sup>328</sup> Interview conducted by the ETC and DIHR with an EU official from EEAS (Brussels and Copenhagen, June 2014).

<sup>329</sup> Interview conducted by the ETC with an EU official from DG DEVCO (Brussels, June 2014) and ETC Graz, Minutes Panel 3 Human Rights Indicators, Speech of Jean-Louis Ville (DG DEVCO) at the FRAME General Assembly, Leuven, June 2014.

### (1) Allow comparative and differentiated analysis

A mechanism to measure human rights is required to allow a comparative analysis of countries on the one hand, and a differentiated analysis including contextual information about each country on the other.<sup>330</sup>

The requirement of comparability refers to the need for a common methodology and comparable country data to be applied to all states.<sup>331</sup> To achieve this requirement, indicators suitable to assess a diversity of legal and political systems are needed.<sup>332</sup> These indicators should not be too context specific in order to remain comparable and applicable.<sup>333</sup>

Additionally, interviewees particularly point out the need for regularly and accurately gathered statistical data, which can be subjected to comparative analysis. Quantitative data and indicators are better suited to identify the magnitude of problems and to deduce suggestions for policies. Furthermore, only quantitative data allows comparability of results.<sup>334</sup> Identified gaps concerning quantitative data depend on the interviewees' respective body mandate and concern socio-economic rights, homophobia, racism,<sup>335</sup> and violence against women.<sup>336</sup> Regardless of the issue, interviewees identify a lack of comparative data.

On the other hand, quantitative indicators are perceived as artificially constructed, which give an aggregated picture of subjects of qualitative nature. Thus, they are rough proxies and do not allow a deeper look into more differentiated country situations.<sup>337</sup> Some interviewees identified a focus on quantitative data in current human rights measurements and perceived this as a common weakness of the instruments in use. These interviewees criticised the lack of a possibility to assess the qualitative dimension of human rights<sup>338</sup> and to integrate different country standards into analysis.<sup>339</sup> Some interviewees even stress the lacking comparability of countries and suggest a general differentiation between EU countries, candidate countries, and third countries when measuring human rights. However, if a mechanism to measure human rights would also allow a differentiated (country specific) analysis, this differentiation would not be necessary. Thus, a mechanism to measure human rights is also required in

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<sup>330</sup> This requirement is also pointed out in the 2012 annual report of the European Parliament in terms of the claim for an immediate activation of the 'new Copenhagen mechanism': European Parliament, 'Resolution on the Situation of Fundamental Rights in the European Union (2012) of 27 February 2014 (2013/2078(INI))' P7\_TA-PROV(2014)0173, pp. 15-16; Anja Mihr, *Human Rights Benchmarks for EU's External Policy* (Publications Office of the European Union 2011).

<sup>331</sup> Interview conducted by the ETC with civil servants at the Parliament's Subcommittee LIBE (Brussels, June 2014).

<sup>332</sup> Interview conducted by the ETC with an EU official from the FRA (Vienna, June 2014).

<sup>333</sup> Interview conducted by the ETC with civil servants at the Parliament's Subcommittee INTA (Brussels, June 2014).

<sup>334</sup> Telephone interview conducted by the ETC with an EU official from the Parliament's Subcommittee FEMM (Graz, May 2014).

<sup>335</sup> Interview conducted by DIHR with an EU official from DG JUST (Brussels, June 2014).

<sup>336</sup> Telephone interview conducted by the ETC with a member of the Parliament's Subcommittee FEMM (Graz, May 2014).

<sup>337</sup> Interview conducted by the ETC with an EU official from DG DEVCO (Brussels, June 2014).

<sup>338</sup> Interview conducted by the ETC with civil servants at the Parliament's Subcommittee INTA (Brussels, June 2014).

<sup>339</sup> Telephone Interviews conducted by the ETC with EU officials from DG Enlargement (Graz, June 2014).

order to facilitate the integration of contextual country information to enable treating different situations with different tools.<sup>340</sup>

Therefore, the majority of the interviewees prefer a mix of quantitative and qualitative indicators. The implementation of a standardised set of indicators and benchmarks (for comparability reasons) supplemented by qualitative indicators (for contextual information) is suggested.<sup>341</sup> An aggregated ‘one-size-fits-all’ indicator system is believed to be insufficient to meet this double requirement of comparability and differentiation.<sup>342</sup>

## (2) Consistent and broadly accepted

The issues of coherence and consistency were addressed by most of the interviewees. Particularly those working in the external area identified double standards and a lack of coherence in the EU’s internal and external human rights strategy as a weakness of current instruments.<sup>343</sup> Some of them believe that a standardised system of human rights indicators and benchmarks, implemented at European level, could help reduce incoherence. To address this issue, such a standardised tool to measure human rights is required to follow a methodology and apply a terminology that is broadly accepted by both EU Member States, and third countries. Meeting this requirement is perceived as a key challenge by some interviewees.<sup>344</sup>

The interviewed FRA member additionally stressed challenges in accessing information pertaining to the situation on the ground, and making concepts operational. According to the interviewees, a consistent human rights measurement requires an acknowledgement of the interrelated character of human rights. Therefore, a mechanism to measure human rights should not prioritise certain human rights. However, a particular focus might be chosen according to the specific topic under analysis. One interviewee pointed out that such a mechanism is also required in order to help identify the drivers for improving human rights and to provide the empirical proof for arguments related to these drivers. Additionally, human rights measurement must not be limited in its applicability to a particular geographical area. It rather needs to be generally applicable to all countries worldwide. To meet the requirement of consistency and coherence, human rights measurements must be applicable for external and internal policies.

A consistent human rights measurement is also needed to mainstream human rights within the EU. According to an interviewed member of DROI, awareness on the cross-cutting character of human rights is still low among EU bodies. In particular, EU bodies dealing with international trade relations are not aware that their work is also human rights related. As a consequence, DROI has no access to information

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<sup>340</sup> Interview conducted by the ETC with civil servants at the Parliament’s Subcommittee LIBE (Brussels, June 2014).

<sup>341</sup> Interview conducted by the ETC with civil servants at the Parliament’s Subcommittee INTA (Brussels, June 2014).

<sup>342</sup> Interview conducted by the ETC with an EU official from DG HA (Brussels, June 2014) and Interview conducted by the ETC with an EU official from the FRA (Vienna, June 2014).

<sup>343</sup> Interview conducted by the ETC with an EU official from DG DEVCO (Brussels, June 2014).

<sup>344</sup> Interviews conducted by the ETC and the DIHR with an EU official from EEAS (Graz and Copenhagen, June 2014) and interview conducted by the ETC with an EU official from the FRA (Vienna, June 2014).

about the human rights related outcomes of their policies (e.g. human rights clauses, trade of torture equipment).<sup>345</sup>

### (3) Flexible frequency of application

The interviewees' suggestions regarding the frequency of application range between more than once a year to every five years. Some interviewees believe an annual application would be ideal, but have admitted that it would be too ambitious, and so have agreed that every second year would be more realistic.

According to the FRA member, the frequency of application depends on the spectrum of rights, on the issue, and on the part (structural, process, outcome) of human rights measurement. As some of these aspects change more often than others, the frequency of applying human rights measurements is required to be flexible. This interviewee also considers survey fatigue and costs as arguments against an application that is too frequent. Generally frequency of application depends on the resources available.

### (4) Proving causality between measure and impact in project evaluation

Particularly interviewees dealing with human rights in the external area pointed out the need for an evaluation of human rights policies or projects. For some human rights (related) tools, such as the Human Rights Dialogues, evaluation is unscheduled (further information in section II B). Human rights measurement in policy evaluation is required in order to prove causality between measure and impact.<sup>346</sup> Thus a solid method for project monitoring and benchmarking is needed. It is doubted whether policy evaluations are human rights measurements in a narrow sense, but human rights indicators could feed into such assessments as performance indicators.

## c) Conclusion

The aim of this subchapter was to find out how human rights measurement is carried out or used by EU officials in practice and to identify requirements and needs for future human rights measurements.

The mapping shows that the majority of instruments in place support human rights related monitoring and assessing compliance with human rights standards in both the internal, and the external area. Some instruments are in place for policy planning, and only a limited number of instruments focus explicitly on policy evaluation. The newly implemented instruments within the 2014-2020 Multiannual Financial Framework indicate a trend towards a strengthened role of policy evaluation.

Also the findings of the interviews indicate that human rights measurement is mainly carried out in the course of monitoring policy implementation.

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<sup>345</sup> Interview conducted by the ETC with EU officials from the Parliament's Subcommittee DROI.

<sup>346</sup> Interview conducted by the ETC with EU officials from the Parliament's Subcommittee DROI and with an EU official from the Council's Human rights Working Group COHOM (Brussels, June 2014).

Apart from the FRA, the interviewed EU bodies do not explicitly measure human rights in the sense of developing and applying human rights indicators, which are then populated with current and comparable country data. The methodology applied by the majority of the interviewed EU officials is secondary analysis of reports, and existing data and political reporting. While within the former, indicators are indeed applied, the latter sector uses mainly guidelines and checklists.

Furthermore, human rights measurement is strongly related to the interviewed bodies' mandate. Apart from FRA, EEAS, COHOM and DROI, the bodies' mandates do not deal with the entire human rights system, but rather with certain areas of or with specific human rights. These are for example social protection, gender equality, child protection, or the rule of law. The measurements currently applied (Gender Equality Index, Joint Assessment Framework) reflect this specialisation.

The understanding of what 'measuring human rights' can actually denote, is quite diverse among the interviewed officials and the bodies they represent. Although they repeatedly stress that human rights are a core value of the EU, which must be followed coherently and consistently, it can be assumed that the initiatives for measuring human rights have not all been developed to their full potential. Some interviewees realised only in the course of the interview that human rights measurement could be important for their work.

Thus, it can be concluded that there is no systematic approach by the EU to measure human rights; there is not even a systematic cooperation or collaboration of EU bodies when measuring or assessing human rights. The findings of the interviews indicate a need for human rights measurement among EU bodies and officials.

### III. Refining the European Union's approach to measuring human rights

Section II of this report revealed that human rights measurements are beneficial for EU bodies at all stages of the policy cycle, namely policy planning, implementation and monitoring, as well as evaluation. It was further found that three types of human rights measurements are currently applied by EU bodies during these stages, as in practice these measurements take the form of human rights research, human rights assessments, as well as impact assessments of legislative proposals. Although these measurement activities are done by different stakeholders and despite the fact that they are very different in nature, they all share a simple, albeit essential common denominator: they necessitate accurate and reliable information on human rights situations.

The strife for information on human rights situations is shared by many stakeholders beyond the EU institutions and bodies. Over the recent years, human rights measurements have increasingly attracted the attention of academic experts, international, regional and local organisations, states, human rights monitoring bodies, human rights activists, NGOs and further civil society actors. Depending on the conception and purpose of the measurement, different methodologies and tools were used to analyse either the overall situation in terms of general trends within a country or to determine the performance of a specific government, or the practical situation on the ground.<sup>347</sup> As a matter of fact, the target groups and purposes, the substantive human rights measured, as well as the geographical area of interest vary considerably from one measurement model to another.

The development of a tool to measure human rights, therefore, is everything but a new endeavour for many human rights stakeholders. As numerous approaches to measuring human rights have been proposed on the international, regional, national and local levels, the EU bodies do not necessarily have to reinvent the wheel, but are well advised to take account of this existing work on human rights measurements when refining their tools for human rights measurements. This section therefore aims to elucidate key findings of an analysis of the diverse existing approaches to measure human rights. This is done with a view to propose applicable measurement tools that meet both, the quality standards of the state of human rights measurement and the requirements identified by EU officials.

#### A. Review of existing approaches in measuring human rights

A review of existing attempts to develop indicator-based human rights measurements is an indispensable starting point for the selection of appropriate human rights measurement tools. Hitherto prominent

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<sup>347</sup> Todd Landman and Julia Häusermann, 'Map-Making and Analysis of the Main International Initiatives on Developing Indicators on Democracy and Good Governance' (Human Rights Centre of the University of Essex 2003), < [http://www.humanrightsimpact.org/resource-database/publications/resources/view/84/user\\_hria\\_publications/](http://www.humanrightsimpact.org/resource-database/publications/resources/view/84/user_hria_publications/) > accessed 4 March 2015, pp. 3-4.

stock-takings of human rights measurements have been made by Malhotra and Fasel<sup>348</sup> in the course of the development of indicators for the United Nations Office of the High Commissioner for Human Rights, by Payne and Schaefer<sup>349</sup> in the course of the development of a human rights measurement framework for the Equality and Human Rights Commission (EHRC) and the Scottish Human Rights Commission (SHRC), and by Landman<sup>350</sup> in a broader study commissioned by EUROSTAT.<sup>351</sup>

However, a mapping that takes into account the particular requirements of the EU bodies has not been conducted so far. Therefore, an up-to-date, yet non-exhaustive mapping of human rights measurement tools and related initiatives (partly) resorting to (human rights related) indicators was completed for this report in the course of the FRAME project. Classification criteria that are of particular relevance for human rights measurement systems for the EU have been identified. The actual mapping exercise was then conducted by way of desk research. In the following, an overview of the mapping criteria applied is given with a short explanation of the respective guiding questions.

Mapping criterion	Guiding questions
Type of actor	For and by which type of actor has the indicator system been developed? Was it, for instance, an international or regional organisation, a state, an NGO, or a monitoring body?
Thematic context	What is the thematic context in which the measurement system has been developed? Was it, for instance, development aid, rule of law, or discrimination?
Rationale and purpose	What is the rationale and purpose of the indicator scheme? Is it, for instance, monitoring, situational analysis, informing public policy, measuring progress or implementation, identifying violations of state obligations, early warning, etc.?
Users and target group	Who are the users and the target group of the indicators? Are these, for instance, researchers, the civil society, politicians, monitoring bodies, media, etc.?

<sup>348</sup> Rajeev Malhotra and Nicolas Fasel, 'Quantitative human rights indicators: A survey of major initiatives' (Nordic Network Seminar in Human Rights Research, Åbo, 10–13 March 2005).

<sup>349</sup> Anne Maree Payne and Laura Schaefer, Human Rights Measurement Framework: EHRC/SHRC Specialist Consultation on Selection of Indicators, Long-list of Indicators and Measures' (2010), <[http://personal.lse.ac.uk/prechr/hrmf/HRMF\\_longlist\\_of\\_indicators\\_and\\_measures.pdf](http://personal.lse.ac.uk/prechr/hrmf/HRMF_longlist_of_indicators_and_measures.pdf)> accessed 4 March 2015.

<sup>350</sup> Todd Landman and Julia Häusermann, 'Map-Making and Analysis of the Main International Initiatives on Developing Indicators on Democracy and Good Governance' (Human Rights Centre of the University of Essex 2003), <[http://www.humanrightsimpact.org/resource-database/publications/resources/view/84/user\\_hria\\_publications/](http://www.humanrightsimpact.org/resource-database/publications/resources/view/84/user_hria_publications/)> accessed 4 March 2015.

<sup>351</sup> See also the study on human rights benchmarks for the European Parliament's Subcommittee on Human Rights: Anja Mihr, Human Rights Benchmarks for EU's External Policy (Publications Office of the European Union 2011).

Reference to human rights	Do the indicators explicitly refer to human rights? In case human rights are addressed only implicitly: Is the indicator scheme expected to yield results that could be used for measuring human rights?
Human rights covered	What (areas of) human rights are covered by the measurement system?
Number of indicators	Are indicators used for the measuring system? How many indicators form the measurement system?
Types of indicators	Does the measurement system comprise quantitative (i.e., numbers, statistics and tables) or qualitative (i.e. based on narratives, estimates, assessments) indicators, or both?
Geographical area covered	What geographical area is covered by the indicators? Are they measuring human rights at the local, regional, national, or international level? Are they restricted to a number of specific countries, etc.?
Methodology applied	What methodology has been applied for the development of indicators? Have there been, for instance, participatory approaches, expert consultations, etc.?
Data sources	What data sources are to be used for populating the indicators? Do the indicators require data from official statistics, questionnaires, or interviews with officials, professionals, activists, etc.?
Quality of data providers and processors	What information is available on the (requirements for the) quality of data providers and processors for the measurement system?
Presentation of results	How are the indicator results presented? Are the results, for instance, scores on a numerical scale or colours on a traffic light system?
Comparability	Is a comparison of the indicator results possible and/or intended across different countries or regions, as well as across different timeframes?
Frequency of application	How often is the measurement system supposed to be applied? When was the measurement system applied for the first time and how often has it been applied since?

Status of application	What is the current status of the measurement system? Has, for instance, only the theory or methodology been developed so far, has it been (regularly) applied already, or has it even been abandoned?
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As it can be seen from these classification criteria, a broad understanding of ‘measuring human rights’ was chosen for this mapping exercise. This intentional choice was made in order to grasp the wide range human rights measurement systems may have. In total, more than 130 human rights measurement systems, tools, or related initiatives have been identified during the mapping. Each measurement scheme identified was examined and described with regard to each of these sixteen criteria in factsheets. A description of 50 relevant schemes identified in the mapping is attached to this report in Annex I.

When looking at the mapping results, a number of key findings emerge, which are presented below.

### 1. Some measuring schemes stand out

During the desk research it became apparent that some instruments were more prominent in the human rights indicator’s discourse than others. The analysis of the interviews conducted with EU officials came to the same results: the Office of the High Commissioner for Human Rights system, the UN and CoE treaty body’s reports, the UN Universal Periodic Review (UPR), World Bank Indicators (on development and governance), Indicators on Gender Equality developed by the OECD, OECD Social Expenditure Index, Bertelsmann Stiftung’s Transformation Index, Freedom House Index and the Millennium Development Goals were mentioned as valuable tools for assessing the human rights situation in any given country.

The analysis of these instruments showed that their importance was mainly to be attributed to their practical application as well as to the frequency of their application, which makes them useful tools in the hand of policy makers. The process for the development of human rights indicators is complex: as stated by Engle Merry, indicators should be able to ‘convert complicated, contextually variable phenomena into unambiguous, clear, and impersonal measures’.<sup>352</sup> In the development of indicators, the search for appropriate data to populate those indicators is also challenging.<sup>353</sup> Thus, some of the instruments mapped did not even reach the stage of practical application.<sup>354</sup> Moreover, many initiatives that were applied in practice are either one-off activities or their application was ended soon after a few attempts.<sup>355</sup> While the reasons for non-continuation are not always clear, lack of funding and difficulty in gathering the necessary data seems to play a crucial role in this regard.

<sup>352</sup> Sally Engle Merry, ‘Measuring the World: Indicators, Human Rights, and Global Governance’ (2011) 52 *Current Anthropology* S3 (Supplement to Number 3), p. 84.

<sup>353</sup> United Nations Development Programme, *Human Development Report 2000* (UNDP 2000), p. 90.

<sup>354</sup> See for example the UN Housing Rights Programme, which tried to develop indicators for the right to housing.

<sup>355</sup> See for example, the ‘Torture Scale’ Index developed by Hathaway to measure with a large-scale quantitative analysis how human rights treaties affect countries’ human rights practices. The index was published in 2002 and never used again. Oona Hathaway, ‘Do Human Rights Treaties make a Difference?’ (2002) 111 *Yale Law Journal*.

A further key element of those instruments is the nature of the actors involved in developing the tool. It became apparent that human rights measurement tools developed by international organizations are more prone to be used compared to those developed in the academic community or by NGOs. Indeed, measurement tools developed by NGOs may be perceived as being less objective and more biased compared to those developed by international organizations. However, this is not to argue that well known or more prominent indicator models automatically have a better quality or are more useful. It certainly has to be acknowledged in this context, that potent actors might also have more budgets for promotion of their work. However, it should also be borne in mind in this context that the Freedom House Index has long been criticised for reflecting the foreign policy interests of the United States, and offering a source for their legitimacy and validation.<sup>356</sup> Yet, irrespective of the criticisms raised, the index is widely recognised and used to assess and compare political rights and civil liberties worldwide.

Other issues that seem to play a role in these cases are the quality of the methodology developed, and the user-friendliness of the results, which often synthesise very complex issues in a very immediate result.

## 2. No consensus on appropriate methodology

A comparison of these attempts to develop human rights measurement models reveals considerable discrepancies in the overall approaches. Generally, a distinction is to be made between ready-made indicator systems and methods to develop indicator models.

The broad range of human rights measurement tools indicates that there is no consensus on the most appropriate tool for measuring human rights among the different stakeholders. This holds even true for the measurement models that stand out. Instead, a variety of methodological approaches is suggested and sometimes applied in practice with the aim to grasp the complex nature of the progressive realisation of human rights in different settings. Consequently, understanding the process leading to measurement initiatives, and reflecting on, for instance, why they are needed, what to expect from them, and how to use what data, is key.

Moreover, numerous measurement systems have been identified that do not cover human rights directly, but assess factual situations that are of indirect relevance for human rights. In this vein, assessments of the economic situation or the demographic development deserve mentioning, which may provide country-specific information that may well be relevant for a deeper understanding of a country's efforts in the realisation of human rights. It is important to note, however, that it is not the prime purpose of the tool to measure human rights.

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<sup>356</sup> On this issue see for example Edward S. Herman and Noam Chomsky, 'Manufacturing Consent: The Political Economy of the Mass Media' (Pantheon Books 1988); Scott Mainwaring and others, 'Classifying Political Regimes in Latin America, 1945-1999' (2001), Kellogg Institute for International Studies Working Paper 280, <<https://www3.nd.edu/~kellogg/publications/workingpapers/WPS/280.pdf>> accessed 4 March 2015; Philip Alston, 'Richard Lillich Memorial Lecture: Promoting Accountability of Members of the New UN Human Rights Council' (2005) 15 *Journal of Transnational Law and Policy* 49; Diego Giannone, 'Political and Ideological Aspects in the Measurement of Democracy: The Freedom House Case' (2010) 17 *Democratization* 68.

### 3. Indicators are indispensable

Although the existing initiatives to measure human rights are very different in nature, it is widely accepted among human rights researchers and practitioners developing such systems that human rights indicators are an indispensable mean to gain meaningful information. Generally, indicators describe and compare situations that exist. Indicators can be used to monitor compliance with obligations and objectives to be achieved. Furthermore, indicators are a planning tool and can be used to assess progress towards specific goals, to track changes over time and to draw comparisons between places. Yet, depending on the policy area addressed or the field of application, the definition of the term 'indicator' may vary. As discussed by McInerney-Lankford and Sano, human rights indicators 'link the conceptual discussion about human rights compliance to implementation practices. They link the normative level of international legal obligation with the practical level of empirical data.'<sup>357</sup> In the glossary of key terms the OECD Development Assistance Committee defines an indicator as a '[q]uantitative or qualitative factor or variable that provides a simple and reliable means to measure achievement, to reflect the changes connected to an intervention, or to help assess the performance of a development actor'.<sup>358</sup>

According to the definition of the United Nations Development Programme, indicators are a 'device for providing specific information on the state or condition of something.'<sup>359</sup> In the guidelines for defining indicators for human rights of the Danish Institute for Human Rights the authors opt for a broader definition of the term. According to their definition, indicators are seen to capture more than a particular trait of social reality:

Indicators are data used by analysts or institutions and organizations to describe situations that exist or to measure changes or trends over a period of time. They are communicative descriptions of conditions or of performance that may provide insights into matters of larger significance beyond that which is actually measured.<sup>360</sup>

Also, the Office of the United Nations High Commissioner for Human Rights applies a similar broad definition of the term in its Guide to Measurement and Implementation of Human Rights Indicators.<sup>361</sup>

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<sup>357</sup> Siobhán McInerney-Lankford and Hans-Otto Sano, 'Human Rights Indicators in Development' (World Bank 2010), p. 14.

<sup>358</sup> Development Assistance Committee (DAC) Working Party on Aid Evaluation, 'Glossary of Key Terms in Evaluation and Results Based Management' (OECD 2002), <<http://www.oecd.org/dac/evaluation/2754804.pdf>> accessed 4 March 2015, p. 25.

<sup>359</sup> United Nations Development Programme (UNDP), 'Indicators for Human Rights Based Approaches to Development in UNDP Programming: A User's Guide' (UNDP 2006), <<http://gaportal.org/sites/default/files/HRBA%20indicators%20guide.pdf>> accessed 4 March 2015, p. 21.

<sup>360</sup> Erik André Andersen and Hans Otto Sano, 'Human Rights Indicators at Program and Project Level: Guidelines for Defining Indicators, Monitoring and Evaluation' (Danish Institute for Human Rights 2006), p. 11.

<sup>361</sup> United Nations Office of the High Commissioner for Human Rights, 'Human Rights Indicators: A Guide to Measurement and Implementation' (United Nations 2012), p. 16.

The OHCHR further stresses that indicators need to be explicitly and precisely defined and should be based on an acceptable methodology of data collection and presentation.<sup>362</sup>

Generally, indicators can either be quantitative or qualitative.<sup>363</sup> Quantitative indicators are equivalent to statistics and can be expressed in numbers, percentages or proportions; while qualitative indicators cover any narrative or categorical form of information.<sup>364</sup> Compared to quantitative data, qualitative indicators are often criticised for a lack of reliability and comparability. Still, they can be applied to measure complex concepts where purely quantitative indicators often miss the broader context.<sup>365</sup> In the broader fields of human rights, democracy and the rule of law the information covered by indicators often goes beyond pure statistics. Qualitative information coming from checklists or interview guidelines can be used to complement the interpretation of quantitative indicators. Questionnaires are mostly used for quantitative research; interviews are typical for qualitative methods. In this context, specific target groups (traumatised refugees, women etc.) may bring specific challenges (including costs), e.g. interviewing children may raise issues of ethics, parental consent, and appropriate interview settings. Reciprocally, quantitative indicators can elaborate qualitative evaluations by providing statistical information.<sup>366</sup>

#### 4. Miscellaneous data sources are used

There is a variety of data sources used for human rights measurement tools. The most commonly used data sources and data collecting methodologies range from reviews of legislation and other documents, via administrative data and public or expert surveys, to event-based data. Depending on the scope of the human rights to be measured, it may be appropriate to rely on greater or smaller numbers of data sources. However, drawing wide-reaching conclusions based on data from a single source might lead to systematic misinterpretations and the underlying concepts may be misrepresented. The use of diverse data sources usually makes indicators more robust and able to yield to a more nuanced and complete picture, as the measures or a variety of sources are compiled.<sup>367</sup> On a more general level, it has to be noted that the time-lapse between when data on indicators is gathered and when the final results can be presented might constitute a challenge to the usability of indicators. In practice there might be a time-lapse of more than

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<sup>362</sup> United Nations Office of the High Commissioner for Human Rights, 'Human Rights Indicators: A Guide to Measurement and Implementation' (United Nations 2012), p. 44.

<sup>363</sup> On the use of quantitative methods in human rights measurement see: Malcolm Langford and Sakiko Fukuda-Parr, 'The Turn to Metrics' (2012) 30 *Nordic Journal of Human Rights* 222.

<sup>364</sup> United Nations Office of the High Commissioner for Human Rights, 'Human Rights Indicators: A Guide to Measurement and Implementation' (United Nations 2012), p. 16.

<sup>365</sup> United Nations Development Programme, 'Human Development Report 2000' (UNDP 2000), p. 90; Hague Institute for the Internationalisation of Law (Hiil) in collaboration with the European Union Agency for Fundamental Rights, 'Measuring the Rule of Law, Justice and Fundamental Rights' (Hiil 2013) <<http://fra.europa.eu/sites/default/files/concept-paper-on-the-rule-of-law-hiil-fra.pdf>> accessed 4 March 2015, p. 17.

<sup>366</sup> Rajeev Malhotra and Nicolas Fasel, 'Quantitative human rights indicators: A survey of major initiatives' (Nordic Network Seminar in Human Rights Research, Åbo, 10–13 March 2005), p. 2.

<sup>367</sup> See also Jim Parsons, 'Developing Clusters of Indicators: An Alternative Approach to Measuring the Provision of Justice' (2011) 3 *Hague Journal on the Rule of Law* 170, p. 172.

one or two years which makes it difficult to use the indicator results directly in a policy context. In the following sections the advantages and drawbacks of the most commonly used data sources are described.

### *a) Document review*

One method of data generation is the review of legislation and other documents, including rulings and decisions of judicial institutions, such as courts or prosecutors, customary justice rules, administrative acts, and reports from international organisations. By conducting document review, the legal and legislative commitment of the state and its authorities with regard to human rights are assessed. In this way, document reviews typically focus on the existence of laws, treaties and legislative agreements, rather than the practical implementation of them.<sup>368</sup> The gap between the law on paper and the law in practice can only be detected by reviewing such documents, describing the use of resources and public spending, as well as (NGO) reports of problems or abuses.<sup>369</sup>

### *b) Administrative data*

Administrative data can provide an important source of quantitative information. These datasets are routinely collected and compiled by the state through government authorities and may be stored as hard copies or computerised. They refer to national registers and administrative records, using standardised methodologies to collect information, usually with reasonable reliability and validity. Administrative data captures a large amount of information related to administrative action and, therefore, is of prime importance to the measurement of the fulfilment of obligations by the state. They can be applied for tracking institutional progress over time and for holding the state accountable.<sup>370</sup> Analysing the administrative data generated by state institutions can often lead to straightforward conclusions, if the records are complete and accurate. The accuracy of administrative data depends on the resources provided to the agencies for maintaining this data, and other factors that could lead to fluctuations in the generated data over time. Another factor leading to possible bias in reporting is that administrative records do not measure the actual prevalence rate but only capture the officially registered cases. Furthermore, there might be incentives to underreport certain activities or events that would negatively influence the performance record.

### *c) Survey-based data and census*

Survey-based data can be generated by population surveys or by expert surveys. Population surveys are means of data generation that identify perceptions and experiences, and can be used to check the credibility of administrative data. While population surveys collect direct quantitative or qualitative

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<sup>368</sup> United Nations Office of the High Commissioner for Human Rights, 'Human Rights Indicators: A Guide to Measurement and Implementation' (United Nations 2012), p. 24.

<sup>369</sup> Jim Parsons, 'Developing Clusters of Indicators: An Alternative Approach to Measuring the Provision of Justice' (2011) 3 Hague Journal on the Rule of Law 170, pp. 174-75.

<sup>370</sup> United Nations Office of the High Commissioner for Human Rights, 'Human Rights Indicators: A Guide to Measurement and Implementation' (United Nations 2012), p. 56 seq.

information from a selected subset of the population, a census is a complete record of all members of the population. A census provides baseline data on key characteristics of the population and allows for a highly disaggregated statistic. Therefore, census data can also be used for generating well-structured samples for public surveys, where complete enumeration is impracticable.<sup>371</sup> Population surveys are usually designed to produce findings that can be generalised. Large samples of the population are necessary to gather representative data, and this is what makes the implementation of population surveys expensive.<sup>372</sup> Expert surveys typically gather information from key informants that have specific experience or hold a professional position in the specific field of interest. Therefore, these surveys are suitable data sources for topics where specialised knowledge is required and shall reflect the expert understanding of a situation, rather than the personal experience of the respondents. The advantage of expert surveys is that conclusions can be drawn based on relatively small samples, meaning expert surveys are often less resource intensive than other survey methods.<sup>373</sup> The results of population and expert surveys are very much dependent on the sample characteristics. The selection criteria for key informants in expert surveys strongly influence validity and reliability. The data gathered through expert surveys might not sufficiently represent experiences and priorities of marginalised or vulnerable groups, who are most likely to, for example, experience problems in accessing justice, and lacking equality and fairness in the system as a whole. With regard to this, population surveys are particularly relevant as they directly capture the respondents' views and provide an assessment of public opinion and perception. Through a systematic combination of data from expert evaluations and population surveys, a cross-examination of all relevant witnesses can be achieved. Each group has a specific perspective (insider versus outsider) with a varying degree of technical knowledge. By combining the data, conflicting opinions of experts and the general public can be revealed and more reliable results can be achieved.<sup>374</sup>

#### *d) Event-based data*

Event-based data refers to qualitative and quantitative data resulting from counting specific events that promote or impede specific rights. The events used to collect such data are usually divided between positive and negative occurrences. These events reflect improvements and achievements in the fulfilment of a right, and individual or collective violations of a right. There is a variety of sources for events-based data, including information provided by the media, reports from states, civil society organisations and NGO information networks, business monitoring of government performance, and testimonies of victims

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<sup>371</sup> United Nations Office of the High Commissioner for Human Rights, 'Human Rights Indicators: A Guide to Measurement and Implementation' (United Nations 2012), pp. 59-65.

<sup>372</sup> Jim Parsons, 'Developing Clusters of Indicators: An Alternative Approach to Measuring the Provision of Justice' (2011) 3 Hague Journal on the Rule of Law 170, pp. 176-78.

<sup>373</sup> United Nations Office of the High Commissioner for Human Rights, 'Human Rights Indicators: A Guide to Measurement and Implementation' (United Nations 2012), p. 24.

<sup>374</sup> José Juan Toharia, 'Evaluating Systems of Justice through Public Opinion: Why, What, Who, How and What For?' in Erik G. Jensen and Thomas C. Heller (eds), 'Beyond Common Knowledge: Empirical Approaches to the Rule of Law' (Stanford University Press 2003), p. 35.

or witnesses.<sup>375</sup> Compared to other categories of data, indicators derived from event-based data are more concrete in terms of demonstrating compliance or non-compliance with specific rights. The use of events-based data has initially been confined to monitoring civil and political rights. The usefulness of the methodology for gathering evidence in support of the administration of justice has also been demonstrated. However, the indicators derived from this kind of data suffer from shortcomings in terms of reliability and validity, as the data collection methodology is not statistically representative and may underestimate the incidence of violations. Still, the information compiled through event-based data can complement information captured by other data.<sup>376</sup>

## **B. Definition and application of selection criteria**

While building to a large extent on the information provided by the dedicated bodies of the CoE and UN, most EU bodies appreciate the further development or refinement of the EU tools to measure human rights. Yet, developing a measuring system that meets the EU bodies' diverse requirements is certainly an enormous, and maybe even an impossible task. It even may be argued that this is not necessary, as long as the responsibilities are clear, structures are in place, the results are transparent and the results are also utilised. In fact, the review of existing approaches in measuring human rights revealed that there is currently no suitable single human rights measurement tool in application which could be used as a measurement model for the diverse purposes of the EU bodies. Taking a close look at the mapping results, it seems unlikely that a ready-made one-size-fits-all model is capable of producing satisfactory and appropriate results. Even those monitoring schemes that stand out (as discussed in subchapter III.A.1.) are not necessarily suitable or sufficient as a ready-made tool. Given the manifold endeavours to measure human rights and the huge amount of human rights related data available, the refinement of the EU's approach to measure human rights necessitates meaningful criteria that can guide the revision or the enhancement of human rights measurement tools for the EU.

For this reason, important selection criteria are suggested below, in a three-step approach: Firstly, a number of quality criteria for human rights indicators that have emerged in what can be called the state of the art in human rights measurement are presented. Secondly, three pragmatic criteria are discussed, which are required to safeguard the feasibility of human rights measurements. Finally, the key requirements of the diverse bodies of the EU that have emerged in the course of the desk research and the interviews with key officials of the EU are presented.

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<sup>375</sup> Todd Landman and Julia Häusermann, 'Map-Making and Analysis of the Main International Initiatives on Developing Indicators on Democracy and Good Governance' (Human Rights Centre of the University of Essex 2003), < [http://www.humanrightsimpact.org/resource-database/publications/resources/view/84/user\\_hria\\_publications/](http://www.humanrightsimpact.org/resource-database/publications/resources/view/84/user_hria_publications/) > accessed 4 March 2015, p. 5.

<sup>376</sup> United Nations Office of the High Commissioner for Human Rights, 'Human Rights Indicators: A Guide to Measurement and Implementation' (United Nations 2012), pp. 54-56.

## 1. Selection criterion 1: Established quality criteria for the identification of human rights indicators

From an analysis of the mapping results it can be concluded that indicators are the most appropriate instrument for meaningful human rights measurements. Therefore, it may be very well argued that human rights measurements by EU bodies, likewise, have to be indicator-based. Yet, for the identification of appropriate human rights indicators, a sharp distinction has to be made between ‘human rights measurements’ and ‘human rights-related measurements’. Practically, this means that any indicator used for the measurement of a human rights situation in the EU or beyond its borders must: (1) be rooted in a clearly identified human rights standard, and (2) indicate the extent to which a human right is respected, protected and/or fulfilled. Human rights-related measurements – measurements drawing arbitrarily on data that is merely related to human rights – are not appropriate tools for informing evidence-based decision making in the area of human rights. The use of proxy indicators can lead to less validity, since there might be a gap between the concept being measured and the indicators used to measure it.<sup>377</sup>

Moreover, the selection of human rights indicators must be based on established quality criteria. Depending on the information content of the source of data, indicators can be categorised either as fact-based, objective indicators, or as judgement-based, subjective indicators. Objects, facts or events that can be directly observed or easily verified are categorised as objective indicators. Subjective indicators are based on opinions, perceptions, assessments or judgements expressed by individuals.<sup>378</sup> They are therefore often considered key for qualitative assessments. However, also in the category of objective indicators, elements of subjectivity cannot be fully excluded, as the selection of the indicators and consequently the indicator results are already based on subjective assumptions and choices. Therefore, the use of clear, specific and universally recognised definitions is of great importance for the identification and the design of any type of indicator. Moreover, the methodology and criteria applied for the identification of indicators must be transparent and well documented.<sup>379</sup> Subjective indicators applied for the purpose of measuring human rights are sometimes considered to be prone to concerns of validity and bias, as they do not necessarily capture the underlying reality but are representing the perception of a specific group of respondents.<sup>380</sup> However, this certainly depends on the quality of the empirical research, e.g. the number of interviews, the selection criteria, cross checking with other data etc.

When developing indicators, it is widely agreed that certain criteria must be taken into consideration to ensure quality in measurement. Based on the ‘SMART’ criteria, indicators must be specific, measurable,

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<sup>377</sup> Linn Hambergren, ‘Indices, Indicators and Statistics: A View from the Project Side as to Their Utility and Pitfalls’ (2011) 3 Hague Journal on the Rule of Law 205, p. 307.

<sup>378</sup> United Nations Office of the High Commissioner for Human Rights, ‘Human Rights Indicators: A Guide to Measurement and Implementation’ (United Nations 2012), p. 17.

<sup>379</sup> Markus Möstl and others, ‘Monitoring Racism and Discrimination at the Local Level’ (ETC Graz 2013), <[http://www.etc-graz.at/typo3/fileadmin/user\\_upload/ETC-Hauptseite/themen/ECAR/ECAR\\_Monitoring\\_Manual\\_ETC.pdf](http://www.etc-graz.at/typo3/fileadmin/user_upload/ETC-Hauptseite/themen/ECAR/ECAR_Monitoring_Manual_ETC.pdf)> accessed 4 March 2015, p. 9.

<sup>380</sup> This argument was made for rule of law indicators by Tom Ginsburg, ‘Pitfalls of Measuring the Rule of Law’ (2011) 3 Hague Journal on the Rule of Law 269, p. 275.

attainable, relevant and time-framed.<sup>381</sup> For indicators to be specific and measurable, it is necessary that they are precisely defined and verifiable. The collection and measurement of the required data must be attainable, and the indicators must provide information relevant to the specific goal of the measurement. For an indicator to be time-framed, it must be clearly indicated, when and how often the indicator shall be reported, and when change is expected. Not all of these requirements are always respected in practice and depending on the type of indicator, certain criteria can be neglected. The use of qualitative indicators in some cases implies less restrictive requirements in terms of measurement and specificity.<sup>382</sup> However, an overall good standard of indicator determination shall be respected, when developing indicators. The quality of measures with regard to statistical adequacy is evaluated in terms of validity, reliability and bias. Reliability refers to whether the estimate or the value of an indicator is consistent, if the employed data-generating mechanism is repeated. The reliability is affected by biases in the data-generating mechanism, resulting from misspecification of definitions or questions, apprehensions of the respondents or non-representativeness of the sample.<sup>383</sup> Validity refers to the truthfulness of information provided by the value or estimate of an indicator. In other words, the criterion of validity requires that the indicator effectively measures the concept, which it is supposed to measure. The notion of validity includes among other dimensions the content validity, constructive validity and predictive validity.<sup>384</sup>

However, there are also further approaches suggested to ensure the quality of human rights indicators. The OHCHR, for instance, suggests the 'RIGHTS' criteria according to which an indicator has to be relevant and reliable, independent in its data-collection from the subject monitored, global and universally meaningful but also amendable to contextualisation and disaggregation by prohibited grounds of discrimination, human rights standards-centric – anchored in the normative framework of rights – transparent in its methods, timely and time-bound, simple and specific.<sup>385</sup>

## 2. Selection criterion 2: Three pragmatic criteria

### a) *Already used in practice*

Human rights measuring systems have a starting point, then they can either be abandoned or continue running. The mapping of existing measurement tools revealed that for some schemes, only the theory or methodology has been developed so far, while others have already been applied regularly. Those

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<sup>381</sup> For more details on the application of the SMART criteria in the context of human rights indicators see Andersen E. A. and Sano H.-O., Human Rights Indicators at Program and Project Level: Guidelines for Defining Indicators, Monitoring and Evaluation (Danish Institute for Human Rights 2006), p. 12.

<sup>382</sup> Erik André Andersen and Hans Otto Sano, 'Human Rights Indicators at Program and Project Level: Guidelines for Defining Indicators, Monitoring and Evaluation' (Danish Institute for Human Rights 2006), pp. 12-14.

<sup>383</sup> Rajeev Malhotra and Nicolas Fasel, 'Quantitative human rights indicators: A survey of major initiatives' (Nordic Network Seminar in Human Rights Research, Åbo, 10–13 March 2005), p. 5.

<sup>384</sup> Juan Carlos Botero and others, 'Indices and Indicators of Justice Governance and the Rule of Law: An Overview' (2011) 3 Hague Journal on the Rule of Law 153, p. 156.

<sup>385</sup> United Nations Office of the High Commissioner for Human Rights, 'Human Rights Indicators: A Guide to Measurement and Implementation' (United Nations 2012), p. 50.

measuring schemes that are in use over time can be refined based on the practical experience gathered during the application. This way potentially weak spots of the model can be identified and overcome. Therefore, the refinement of EU human rights measurements should pay particular attention to indicator models or methods to develop a system of indicators that has been tested in practice and is still followed.

#### *b) Data availability*

Data availability is of utmost importance for all human rights measurement models. The mapping revealed that for some measuring models, the data might be easy to collect, while for other indicators the information required is not available and cannot realistically be generated. In case indicators cannot be populated with adequate data, empty spots remain which render the measurement model less meaningful. Therefore, any refinement of the EU human rights measurements should be careful not to be too demanding with regard to data. It should be realistically possible to populate the indicators with appropriate data. If data is not yet available, the question whether it may realistically be collected in future must be addressed, for instance in a feasibility study. There are good reasons not to limit oneself to available data. It is one of the intrinsic features of human rights that it concerns issues which are often neglected or ignored. The lack of political will could result in a situation where there is no data available on purpose. However, a rights-based measurement must not be restricted by the mainstream political will and therefore there are good reasons to find ways to generate new data. Moreover, the intricate issue of disaggregation must be taken into consideration for the refinement in a practical and feasible manner.

#### *c) User-friendliness*

Any refinement of the EU's approach to measure human rights should consider how easy or difficult it is to apply the system in practice. Human rights measurements may be highly complex endeavours requiring knowledge and expertise in diverse fields, such as law or statistics. Yet, any refinement of existing EU human rights measurements must ensure that the measurement tools remain applicable in practice by the EU stakeholders involved. The imperative of user-friendliness, however, might necessitate a certain balancing act between over-simplification and the negligence of due complexity. Linked to this is the question of training. Any serious measurement effort needs a training strategy (and budget), irrespective of the indicators used.

### **3. Selection criterion 3: Four criteria guided by requirements of the EU bodies**

#### *a) Allow for a comparative and differentiated analysis*

The issue areas relevant for human rights are manifold, often complex and usually cannot be comprehensively measured with one indicator alone. In order to provide a comprehensive picture of a human rights situation (including the progress made in respecting, protecting and fulfilling human rights), various components have to be considered by cross-checking several indicators in order to reduce ambiguity. Evidence-based decision making necessitates a differentiated measurement of qualitative and

quantitative aspects. This requirement is of direct relevance for the presentation of the results of the human right measurement system. Any refinement of the EU's human rights measurement tools should first and foremost aim at the provision of specific and relevant evidence for the EU policy at stake. Consequently, the indicator result should not necessarily be presented in an aggregated score, but should provide for a differentiated analysis of the respective human rights situation that can be used for evidence-based decision making. This holds especially true for different target groups and disaggregation according to age or gender.

However, some EU policies might require or benefit from a comparative analysis of the human rights situation across different countries. Despite the prime effort to provide a differentiated analysis of the human rights situation in a given country, the refinement of the EU bodies' human rights measurements should thus be flexible enough to allow for the assessment of different legal and political systems. While it might be easier to compare statistical data, the widely welcomed comparison of qualitative data is more demanding and requires at least a commonly agreed methodology that is applicable for the different states under scrutiny.

### *b) Consistent and broadly accepted approach*

It was repeatedly stressed in the interviews with key EU officials that human rights are a core value of the EU, which have to be followed consistently. This firm conviction has important implications for the development or identification of appropriate human rights measurement systems for the EU.

Firstly, understanding human rights as a core value of the EU implies that a systematic approach that takes into account all human rights on an equal footing is required. It has to recognise that human rights are indivisible, interdependent, and inter-related. Therefore, a mechanism to measure the dimensions of human rights should not prioritise certain human rights over others. However, a particular focus might be chosen for measurements according to the specific EU policy or decision to be made. Thus, a mechanism requires enough flexibility to allow for such focusing.

Secondly, consistency implies that measurements of the protection, promotion and fulfilment of human rights are not limited to a particular geographical area, but are generally applicable to all countries worldwide. More specifically, the requirement of consistency also implies that a human rights measurement system must be applicable for all external and internal policies of the EU alike, or at least the principles applied must be consistent.

Thirdly, the methodology for providing evidence for decisions has to be authoritative and ideally, broadly accepted by both, EU Member States and third countries alike. This requirement is, to a large extent based on the fact that the decisions taken by EU bodies on the basis of the results of the human rights measurement tool might have serious consequences and implications for Member States and/or third countries. Only broadly accepted measurement tools enjoy the authority that is required to back the EU bodies' decisions with the legitimacy required. This further implied that such tools must be well communicated and transparent.

### *c) Flexible frequency of application*

Human rights measurements may generally provide information on the current state of human rights or trace trends across a certain period of time. Depending on the EU policy at stake, the required frequency of the assessments may vary between one to five years. Any refinement of the EU bodies' human rights measurement model should consider how to best ensure such a flexible application. Still it has to be kept in mind that human rights measurements using indicators can never act as an early warning tool capable of continuously providing information at short or even instant notice.

### *d) Proving causality between measure and impact in project evaluation*

Some representatives of EU bodies claimed that a measurement tool that is able to establish the causality between an EU measure taken and the progress or impact of that measure is required. If human rights related policies are to be assessed, a human rights measurement tool would be indispensable for that purpose. However, if the measurement of human rights achievements is merely a means for another purpose, then providing this causality is not obviously achievable by way of a human rights measurement. Instead, recognized project management tools, like the Logical Framework Matrix used by the World Bank, could be used to establish this causality. However, the results of human rights indicators might feed into such project assessments. Therefore, the refinement of the EU bodies' approach to measure human rights should include indicators that may serve as performance indicators for established project assessment tools.

## **C. Conclusion: Suggestion of a two-pronged approach**

The desk research and the interview findings revealed that there is no systematic approach followed by the EU bodies to measure the state of, or progress made in respecting, protecting and fulfilling human rights. Currently, there is also an insufficient systematic cooperation and information exchange among the EU bodies on human rights data. The interviews with key EU officials revealed that their initiatives for gaining information on the relevant human rights situations are not always developed to their full potential yet.

While building to a large extent on the information provided by the dedicated bodies of the CoE and the UN, most EU bodies appreciate the refinement of the tools currently applied by EU bodies to measure human rights, and name highly specific requirements for that purpose. When asked about possible reforms and the possible future mechanisms for measuring human rights, numerous specific requirements have been identified.

In addition to these practical requirements, there are subject-specific requirements that a reliable and meaningful measurement system must fulfil. Most prominently, the normative framework of human rights requires that only those indicators are used, which are rooted in a clearly identified (international)

human rights standard and measure the extent to which a human right is respected, promoted, protected and/or fulfilled.

A review of more than 130 existing human rights measurement schemes revealed that there is no single, or readymade measuring system that meets all the requirements identified in the course of this paper by the interviewed EU officials and the researchers. In practice, the existing measuring systems often produce aggregated results, end after the completion of the conceptual work or are limited in their practical application. While numerous specific human rights measurement instruments using indicators and manifold human rights-related indicators have been identified, there are only two indicator systems (OHCHR and CIRI) that may be regarded as general human rights measurement instruments using indicators.

Thus, there is a lack of a commonly agreed measurement tool for the provision of relevant, reliable and meaningful information on the state of human rights. Consequently, a two-pronged approach appears to be the most meaningful proposal that could guide the refinement of the EU's approach to measure the dimensions of human rights.

On the one hand, a common methodology for developing meaningful human rights indicators addressing the need for human rights measurements can be proposed. The desk research and the interviews, as well as an overview of academic literature give strong indications that the approach developed by the OHCHR provides the most appropriate framework for further developing indicators for human rights measurements. More specifically, the mapping revealed that the OHCHR approach is currently the only general human rights measurement instrument that uses indicators and at the same time addresses the human rights dimensions by measuring the respect, protection, fulfilment and promotion of human rights in a given context. Indeed, a closer review of the approach suggested by the OHCHR reveals that this system fulfils all the selection criteria identified above.

- The OHCHR approach and selection criterion 1: The OHCHR-system suggests quality criteria that put an explicit focus on a rights-centric approach. It therefore acknowledges the key requirement that human right indicators have to be rooted in a clearly identified human rights standard and have to indicate the extent to which a human right is respected, protected and/or fulfilled. More specifically, the approach suggests a procedure guiding the identification of relevant attributes of a human right, which aims to ensure that indicators are anchored in human rights.
- The OHCHR approach and selection criterion 2: The conceptual and methodological approach suggested by the OHCHR is already used in practice by states like Brazil, Bolivia, Ecuador, Mexico, Paraguay, Philippines, Kenya, Portugal, and the United Kingdom,<sup>386</sup> and most

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<sup>386</sup> United Nations Office of the High Commissioner for Human Rights, 'A best-seller: the users' manual for implementation of human rights indicators' See more at:

importantly by the FRA. The framework suggests the use of qualitative and quantitative indicators, and further addresses the issue of data availability. Moreover, the OHCHR addresses concerns of user-friendliness, as it published a comprehensive “Guide to Measurement and Implementation” describing the conceptual and methodological framework to identifying indicators for monitoring.

- The OHCHR approach and selection criterion 3: The OHCHR-system allows for a differentiated measurement and suggests the use of structure, process and outcome indicators to measure the human rights commitments and efforts in implementing relevant administrative, regulatory and judicial policies, and results. Structural indicators reflect the ratification and adoption of legal instruments in national law, as well as the allocation of necessary resources and existence of institutional mechanisms to assist the realisation of the right concerned. In this way structural indicators measure the *de jure* protection of specific rights and thus, they give information on the commitment of a state or government. Process indicators measure how policies contribute to a specific objective and can be defined in terms of concrete cause-and-effect relationships. Process indicators relate policy instruments with milestones that cumulate into outcome indicators, measuring the attainment of an objective and *de facto* realisation of a right. Outcome indicators are used to measure the results and, therefore, are determined by a combination of structural and process indicators. The outcome indicators might feed into project management tools that aim to establish the causality between EU measures and their impact. Albeit the methodology proposed by the OHCHR does not (yet) provide for indicators for all human rights, it provides a common approach to develop indicators for civil and political rights, and economic, social and cultural rights that may be applied and contextualised at national level allowing for a temporal and spatial comparison.<sup>387</sup> The fact that it is a methodology to develop concrete indicators provides for the opportunity to take into account all human rights on an equal footing and is in principle applicable to all countries worldwide. For the same reason, the approach suggested by the OHCHR provides for the flexibility in the frequency of application and a particular focus might be given for human rights measurements in a specific area of interest.

The OHCHR system is therefore proposed as common methodology for refining the EU institutions’ approach to collecting relevant information on human rights, as it is deemed to fulfil the main requests identified during desk research and the interviews with officials.

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<<http://www.ohchr.org/EN/NewsEvents/Pages/HumanRightsIndicators.aspx#sthash.J7TJN0iZ.WR9iZHOH.dpuf>>, accessed 4 March 2015.

<sup>387</sup> The FRA child rights indicator study also used the OHCHR model; see 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.

On the other hand, an ‘instant information tool’, i.e. an information database on compliance including a compilation of existing indicators and related data sets could be established. This would take account of the manifold efforts made by various (international) organisations, NGOs and academia to make the realisation of human rights more transparent and accessible. Although many of these existing tools do not necessarily build on human rights indicators, they are able to provide insightful data that is at least related to the human rights situations in countries all over the world.

A key benefit of such an instant information tool is that it could provide useful information on the basis of already existing data and could be quickly accessed by interested EU bodies. In that sense such a tool addresses the gap between qualitative information provided by treaty-bodies, monitoring bodies or other reports, which were declared as most relevant by the interviewed EU officials, and quantitative information systems, mostly based on statistical data. Indeed, an instant information tool could pool existing data, and information structured according to specific issue areas that are relevant for human rights. Particular measurement schemes meeting certain selection criteria, such as relevance, reliability, availability, accuracy, or being up-to-date, could therefore be compiled and made available in an adequate manner in the instant information tool. Certainly, the data included in such a tool would also have to pass a reliability test as well, for instance by way of a thorough assessment of the underlying methodology, the data producers and the data sources.

## D. The way forward

As a result of the findings presented in this report, two complementary tracks may be suggested for the future refinement of the EU's approach to measure human rights.

On the one hand, the OHCHR-system could be contextualised for the requirements of the EU bodies in order to develop and test appropriate indicators for selected policy areas of the EU. The OHCHR proposed a sound conceptual and methodological framework for measuring human rights, which does, however, not provide for a ready-made system of human rights indicators that may be applied by the EU bodies for their specific purposes. Therefore, it is suggested that a pilot application of the OHCHR-system is made for selected policies in the internal, external and the enlargement area of the EU. This step would also act as a feasibility check of the application of a measurement system building on the OHCHR-system in the context of the EU.

On the other hand, preparatory work for an 'instant information tool' would be required in order to establish an information database, including a compilation of existing indicators and related data sets. For this endeavour, the detailed specifications and quality requirements would have to be defined and agreed in cooperation with EU bodies.

It is suggested to follow both tracks of this two-pronged approach in the course of Work Package 13 of the FRAME project. Overall, the work on the refinement of the human rights measurement tools of the EU bodies also aims to sensitise EU stakeholders to the potential and the limits of human rights measurements and should be undertaken in close cooperation with key EU stakeholders.

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## **Annex I – List of Indicator Schemes and Human Rights Measurement Instruments**

See end of document.

## Annex II - Case studies on the use of rule of law indicators in the EU enlargement process: Bulgaria, Croatia and Montenegro<sup>388</sup>

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## List of abbreviations

AG	Advocate General
Art.	Article
CARDS	Community Assistance for Reconstruction, Development and Stabilisation
CEPEJ	European Commission for the Efficiency of Justice
CoE	Council of Europe
CVM	Mechanism for Cooperation and Verification
DG	Directorate General
DPKO	Department of Peacekeeping Operations
EC	European Community
ECHR	European Convention for Human Rights
ETC	European Training and Research Centre for Human Rights and Democracy
EU	European Union
FRA	European Union Agency for Fundamental Rights
GDP	Gross Domestic Product
HiiL	Hague Institute for the Internationalisation of Law
ICTY	International Criminal Tribunal for the former Yugoslavia
IPA	Instrument for Pre-Accession Assistance
NGO	Non-governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
OJ	Official Journal
para.	Paragraph
PHARE	Poland and Hungary Aid for Restructuring of the Economies
SAA	Stabilisation and Association Agreements
SAP	Stabilisation and Accession Process
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNDP	United Nations Development Programme
WGI	Worldwide Governance Indicators

## IV. Introduction

The rule of law is seen as a precondition and as a basis for respecting human rights, promoting democracy and also for a smooth economic development in states around the world. Therefore, promoting the rule of law has become a main subject in peace building, transitional justice and development programmes of many international organisations. It is regarded as a core mission by the United Nations (UN), the Council of Europe (CoE) and the European Union (EU). The quality of law making, access to justice and the independence and accountability of the judiciary are considered as key elements of the rule of law.

The rule of law is laid down as one of the foundational principles of the EU in the Treaty on European Union (TEU) and according to Art. 21 TEU it is one of the main priorities for the Union's external relations. As one pillar of the Copenhagen political criteria, the rule of law is now at the heart of the EU enlargement process and is referred to as a key principle in the European Commission's Enlargement Strategy. The EU has set strict requirements and has established a monitoring system for measuring the rule of law in enlargement countries. Countries aspiring to join the EU need to secure the rule of law by establishing core institutions and promoting judicial reforms, ensuring the independence, impartiality, efficiency and accountability of judicial systems. In many enlargement countries, the requested reforms also include the fight against corruption and organised crime. International organisations, like the UN, the CoE and the World Bank, have developed monitoring mechanisms for measuring the impact of their rule of law policies and actions. With regard to measuring the rule of law in the candidate and potential candidate countries, the EU has made use of the monitoring instruments of these organisations and has continuously improved its own assessment tools.

This paper deals with the question of how to measure the rule of law in the EU enlargement processes. To answer this question, the assessments of the rule of law in the three EU enlargement countries Bulgaria, Croatia and Montenegro are analysed. This analysis is conducted on the basis of the theoretical discourse on the rule of law as a principle in the EU internal and external policy in Chapter V. Furthermore, existing monitoring mechanisms developed by international organisations like the World Bank, the CoE, the UN and the EU are investigated in order to identify basic principles for the use of indicators in rule of law measurement in Chapter VI. Based on this theoretical background, the mechanisms and indicators applied by the Commission to measure the rule of law in the EU accession process are examined in three case studies of the enlargement countries Bulgaria, Croatia and Montenegro in Chapter VII. These three cases were selected for examination, as they reflect three different periods in the EU enlargement policy and they show the consistent further development of the Enlargement Strategy that is guiding the accession negotiations. The progress assessments conducted by the Commission are investigated with regard to the application of indicators for measuring the independence and accountability of the judiciary and access to justice in the accession process of these three countries. Based on the findings of the case studies, general implications are derived for the use of indicators in the EU enlargement policy. In the final Chapter V, overall conclusions are drawn and an outlook is given on the application of rule of law indicators in the EU enlargement processes, as well as for the promotion of the rule of law in the EU Member States.

## V. Rule of law as a principle in the EU

The EU is based on the adherence to fundamental rights, democracy and the rule of law. These principles are inherent to many of the legal texts and documents of the Union. The rule of law is a complex concept. A variety of theoretical formulations can be identified in academia and among practitioners of different legal traditions. In scholarly literature, the notion of rule of law is explained basically through formal and “thin” conceptions or through substantial and “thick” conceptions.<sup>389</sup> In fact, these two categories are broad differentiations and there is a spectrum of alternative formulations, with fewer or more conditions and requirements.<sup>390</sup> The formal conceptions of rule of law impose requirements only with regard to the form of legality the law must take and in terms of procedural law. However, they say nothing about the actual content of the law itself.<sup>391</sup> Substantive theories include various specifications on the content of the laws that are added to the formal elements and include versions with different amounts of substantive elements.<sup>392</sup>

Various formulations of the rule of law can not only be found in academia, but also in the legal texts of international organisations active in promoting the rule of law. These conceptions reflect the different mandates or purposes of the organisations at the international level.<sup>393</sup> The EU has determined the rule of law as an essential principle and foundational value, nevertheless, no uniform definition of the notion is given in its legal documents. Similarly, the UN and the CoE have issued different rule of law conceptions within their documents and legal texts that range from formal to substantive notions.<sup>394</sup>

The European Commission for Democracy through Law (Venice Commission) at the CoE adopted a consensual definition of the rule of law that should allow a practical application and expanded the formal conception of the rule of law by several other elements. The substantial definition of the rule of law provided by the Venice Commission includes ‘(1) Legality, including a transparent, accountable and democratic process for enacting law (2) Legal certainty (3) Prohibition of arbitrariness (4) Access to justice before independent and impartial courts, including judicial review of administrative acts (5) Respect for human rights (6) Non-discrimination and equality before the law.’<sup>395</sup> In its Communication ‘on a new EU Framework to strengthen the Rule of Law’, the European Commission makes reference to this definition that reflects the ‘important but not exhaustive common and generally shared traits of the rule of law’ in the Union.<sup>396</sup>

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<sup>389</sup> Ronald Janse, Maria D Sanchez Galera and Rain Liivoja, ‘Rule of Law Inventory Report: Academic Part’ (Hiil, 2007) 9-11.

<sup>390</sup> Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 91.

<sup>391</sup> Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] *Public Law* 466, 467.

<sup>392</sup> Tamanaha (n 390) 91.

<sup>393</sup> Janse, Sanchez Galera and Liivoja (n 389) 28.

<sup>394</sup> Laurent Pech, ‘Rule of Law as a Guiding Principle of the European Union’s External Action’ (2012) 3 *CLEER Working Papers* <[http://www.asser.nl/upload/documents/2102012\\_33322cleer2012-3web.pdf](http://www.asser.nl/upload/documents/2102012_33322cleer2012-3web.pdf)> accessed 13 January 2014, 29-31.

<sup>395</sup> European Commission for Democracy Through Law, ‘Report on the Rule of Law’ CDL-AD (2011) 003rev, para. 41.

<sup>396</sup> European Commission, ‘A new EU Framework to Strengthen the Rule of Law’ (Communication) COM (2014) 158 final, Annexes, 1-2.

This paper follows this definition of the rule of law, comprising the elements as described above. However, the limited scope of the paper does not allow for a comprehensive examination of the use of indicators to measure all the rule of law elements inherent to this substantial conception. Therefore, the analysis is rather focused on the measurement of the judicial system as a core element of the rule of law and, in particular, the independence and accountability of the judiciary and access to justice.

### A. The rule of law as an internal principle of the EU

The rule of law as an internal principle of the EU derives from the law of the EU, from the jurisdiction of the Court of Justice of the EU and from national doctrines. Based on these sources, there appears an EU supranational concept of the rule of law that can be described ‘as a constitutional principle of the European Union’.<sup>397</sup> Initially, the EU primary law did not contain any explicit reference to the rule of law.<sup>398</sup> The concept was first mentioned by the Court of Justice in the judgment ‘*Les Verts*’, where the rule of law was determined as one of the fundamental principles of the constitutional framework of the European Community (EC).<sup>399</sup>

The treaty amendments following this judgement – the Maastricht Treaty of 1992,<sup>400</sup> the Amsterdam Treaty of 1997<sup>401</sup> and the Nice Treaty of 2001<sup>402</sup> – have led to the inclusion of multiple references to the rule of law in the EU’s primary law. The rule of law was referred to in the Preamble of the TEU as one of the common principle of the contracting parties. With the Treaty of Amsterdam, an important provision was inserted into the new Art. 6 TEU, which provided that the Union is founded on the rule of law, a principle that is common to the Member States. According to the European Court, this principle is, therefore, a criterion for assessing the legality of the actions of its institutions and of the Member States in matters for which the Union has jurisdiction.<sup>403</sup> The Treaty of Amsterdam has also introduced the development of the Union as an ‘area of freedom, security and justice’, where mutual recognition and mutual trust evolved as the main principles in order to guarantee the protection of individual rights and to enhance judicial cooperation. EU policies in the area of the rule of law, democracy and fundamental rights were aimed to maintain and further develop the Union as an area of freedom, security and justice. This objective became the framework for the EU action in the field of justice and home affairs.<sup>404</sup>

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<sup>397</sup> Laurent Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’, (2009) 4 Jean Monnet Working Paper <<http://www.jeanmonnetprogram.org/papers/09/090401.pdf>> accessed 15 January 2014.

<sup>398</sup> The Treaty establishing the European Economic Community, signed in Rome, 25 March 1957 did not mention the rule of law as an underlying principle.

<sup>399</sup> see Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, para. 23.

<sup>400</sup> Treaty on European Union [1992] OJ C191/01 (TEU).

<sup>401</sup> Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ C340/01 (Treaty of Amsterdam).

<sup>402</sup> Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [2001] OJ C 80/01 (Treaty of Nice).

<sup>403</sup> see Case C-345/04 P *Gestoras Pro Amnistia and Others v Council* [2007] ECR I – 1631, Opinion of AG Mengozzi, para. 77.

<sup>404</sup> Marloes Spreeuw, ‘Double Standards in the Application of the EU Values and Principles: Member States versus Potential Candidate and Candidate Countries’ (2012) <[http://www.pravo.unizg.hr/\\_download/repository/Paper\\_M.\\_Spreeuw.pdf](http://www.pravo.unizg.hr/_download/repository/Paper_M._Spreeuw.pdf)> accessed 6 April 2014, 2.

Furthermore, the Amsterdam Treaty has led to the inclusion of a provision that allows for sanctions against a Member State in case of a serious and persistent breach of the values laid down in former Art. 6 TEU. The entry into force of the Nice Treaty also gave the Union the capacity for preventive action in the event of a clear threat of a serious breach. Art. 7 TEU still constitutes one of the core legal instruments for such situations. Not only member states' actions when implementing EU law are covered by Art. 7, but also areas, where member states act autonomously. The European Commission, the European Parliament and the Member States are conferred the power to monitor the rule of law in the EU and identify potential risks.<sup>405</sup> The EU institutions are supported in their duty to monitor fundamental rights and the rule of law by the European Union Agency for Fundamental Rights (FRA), founded in 2007.<sup>406</sup> The mechanism of Art. 7 is based upon political persuasion, but also has a punitive dimension. Possible sanctions foreseen within the Art. 7 mechanism involve the suspension of certain rights, such as the voting rights of the representatives in the Council.<sup>407</sup> In its Communication of 2003, the European Commission as the guardian of the Treaties stated its intention 'to exercise its new rights in full and with a clear awareness of its responsibility.'<sup>408</sup> However, as the Commission did not establish any centralised monitoring tools to evaluate respect of human rights or rule of law, there was no clarity, on how to make the Art. 7 mechanisms operational. So far, Art. 7 has never been used in practice and the mechanism is considered as a last resort solution<sup>409</sup> by EU policy-makers.

With the entering into force of the Lisbon Treaty on 1 December 2009,<sup>410</sup> the reference to the rule of law as foundational principle of the Union was included in Art. 2 TEU, which provides that

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

Even though multiple references to the rule of law can be found in the Treaties, the term is nowhere defined in the EU primary law. Art. 2 TEU includes an explicit linkage of the EU's constitutional system with the traditional values of the Member States. In this system, the rule of law is presented as a value that is common to the EU Member States. Despite the constitutional traditions and the persistence of

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<sup>405</sup> Sergio Carrera, Elspeth Guild and Nicholas Hernanz, *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism* (CEPS Paperbacks 2013) 5-6.

<sup>406</sup> European Union, 'The European Union Agency for Fundamental Rights' (16 July 2013) <[http://ec.europa.eu/justice/fundamental-rights/agency/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/agency/index_en.htm)> accessed 2 May 2014.

<sup>407</sup> Carrera, Guild and Hernanz (n 405) 7.

<sup>408</sup> European Commission, 'On Article 7 of the Treaty on European Union: Respect for and Promotion of the Values on which the Union is Based' (Communication) COM (2003) 606 final, 3.

<sup>409</sup> In his speech on the State of the Union on 11 September 2013 Commission President José Manuel Barroso called the Article 7 mechanism a "nuclear option".

<sup>410</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C306/01 (Treaty of Lisbon).

some significant differences, these national interpretations can be a useful guidance to identify a European meaning of the rule of law.<sup>411</sup>

The EU assumes a rather substantive conception of the rule of law, as in the EU's constitutional framework the rule of law is always mentioned in conjunction with the principles of democracy and respect for fundamental rights. The 'renewed EU fundamental rights framework'<sup>412</sup> that has been introduced with the entering into force of the Treaty of Lisbon constitutes a new reference point for a substantive meaning and the content of the rule of law in the EU. The new Art. 6 TEU gives the Charter of Fundamental Rights of the European Union<sup>413</sup> the same legal value as the Treaties establishing the European Union and makes reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The rule of law and the right to a fair trial are enshrined in Art. 6 of the ECHR and in Art. 47 of the Charter of Fundamental Rights of the European Union. Based on the provisions of these Articles, the judiciary must be independent and impartial and everyone shall be entitled to fair and public hearings within a reasonable time. The guarantee of legal aid shall ensure effective access to justice. Art. 6 in connection with Art. 14 of the ECHR and Art. 47 in connection with Art. 21 of the Charter of Fundamental Rights of the European Union also provide for equal treatment and fair trials free from discrimination, applicable to both, civil and criminal procedures. The equal treatment imperative requires formal equality in the access to justice, in front of the law and through the law and, therefore, is binding on the jurisdiction and on the legislation.<sup>414</sup>

## B. The rule of law as criterion for the accession of new Member States

The principles of democracy and respect for fundamental rights have always been decisive elements for accession to the EC and later to the EU.<sup>415</sup> Together with the willingness to accept the fundamental objectives of the Union and the capacity to adopt the entire body of legislation (*acquis communautaire*), these principles were at the heart of the conditions imposed on new Member States in the first enlargement rounds. The end of the Cold War opened up new perspectives for enlargement to the post-communist countries of Central and Eastern Europe. This was the first time that immediate accession was denied to applicant countries due to an insufficient level of development and capacity to implement the *acquis*.<sup>416</sup> There were heavy concerns, as the functioning of the internal market and mutual trust among Member States rely on the compliance with the rules and credible commitments of all members. These concerns led to imposing strict conditions for EU accession. Therefore, the EU policy towards the Central and Eastern European countries is commonly described as a policy of conditionality. The desire of these countries to join the EU in combination with a need for effective solutions to domestic policy challenges

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<sup>411</sup> Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (n 397) 41.

<sup>412</sup> Carrera, Guild and Hernanz (n 405) 1.

<sup>413</sup> Charter of Fundamental Rights of the European Union [2010] OJ C83/389.

<sup>414</sup> Anke Sembacher and Klaus Starl, 'Anti-Discrimination for Judges and Prosecutors: General Part', (ETC Graz 2006) <[http://antidiscrimination.etc-graz.at/cms/fileadmin/user\\_upload/Projekte/laufend/ADTJ/English/manual\\_english\\_090606.pdf](http://antidiscrimination.etc-graz.at/cms/fileadmin/user_upload/Projekte/laufend/ADTJ/English/manual_english_090606.pdf)> accessed 24 June 2014, 1-7.

<sup>415</sup> See e.g. European Commission, 'Solemn Declaration on European Union' (1983) 6 Bulletin of the European Communities.

<sup>416</sup> Viljar Veebel, 'European Union's Positive Conditionality Model in Pre-accession Process' (2009) 13/3 TRAMES 207, 212 and 220-21.

have provided strong incentives for the target governments to comply with the imposed obligations.<sup>417</sup> Contrary to the former accessions, the candidate countries of the fifth enlargement round were not granted the right to opt-out from any EU policy.<sup>418</sup>

With the establishment of the EU by the Treaty of Maastricht, it became necessary to identify general criteria that have to be fulfilled by countries in order to be eligible for EU accession.<sup>419</sup> At the Copenhagen meeting in 1993, the European Council has agreed on objective criteria required for EU membership – the so called ‘*Copenhagen Criteria*’. The guarantee of the rule of law is one of the key elements identified as the political criterion for EU accession. Besides the economic criteria and the criteria concerning the adoption of the *acquis communautaire*, membership requires that the candidate country has achieved ‘stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities’.<sup>420</sup> The formal use of the rule of law as a principle in EU accession was brought about by the Treaty of Amsterdam. Art. 49 TEU constitutes the legal basis for any accession of new Member States. According to Art. 49 TEU, all European countries can apply for membership of the EU. However, the applicant country must adhere to the values referred to in Art. 2 TEU (former Art. 6 TEU) in order to join the EU. Even though the Copenhagen criteria are not explicitly mentioned, Art. 49 TEU refers to these conditions by stipulating that ‘[t]he conditions of eligibility agreed upon by the European Council shall be taken into account.’

While the association of East and Central European countries had proven to be a successful step towards integration, the EU’s relations towards Balkan countries experienced several difficulties.<sup>421</sup> The countries in the post-conflict situation experienced a range of very specific problems and were unable to develop good governance practices on their own behalf. Eliminating corruption, promoting human rights, encouraging the exercise of citizen rights and the protection of minorities are, therefore, fundamental tasks of the reform agenda in these countries. Very specific efforts are needed to establish and uphold rule of law in such settings.<sup>422</sup> The EU has become the prime state builder in the Western Balkans. The transfer of the mechanism of conditionality to state-building projects has led to tensions between the accession conditionality and the efforts to end political conflicts.<sup>423</sup> To deal with the history of ethnic antagonism, unstable economies and widespread corruption, the EU integration policy emphasized stabilisation and regional cooperation on the Balkans. The willingness to re-establish good neighbourly

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<sup>417</sup> Frank Schimmelfennig and Ulrich Sedelmeier, ‘Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe’ (2004) 11/4 *Journal of European Public Policy* 669, 670.

<sup>418</sup> Veebel (n 416) 223.

<sup>419</sup> Faton Bislimi, ‘EU Foreign Policy towards Balkans: An Opportunity or a Challenge?’ (2010) 1 *The Western Balkans Policy Review* 29, 40.

<sup>420</sup> European Council, ‘Conclusions of the Presidency’ (Copenhagen, June 1993) para. 7 (A) (iii).

<sup>421</sup> Bislimi (n 419) 40-41.

<sup>422</sup> Markus Möstl, ‘Core Tasks of Good Governance and Their Impact on Peacebuilding and Human Security’, in Wolfgang Benedek and others (eds), ‘MultiPart Thematic Paper on Multi-Stakeholder Partnerships Active in the Field of Good Governance, Democracy and Rule of Law’ (ETC Graz 2010) 53.

<sup>423</sup> Florian Bieber, ‘Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans’ (2011) 63/10 *Europe-Asia-Studies* 1783, 1791.

relations and economic cooperation with one another was a precondition for the countries to proceed in the accession progress and to access financial assistance.<sup>424</sup>

In 1999, the EU launched the Stabilisation and Association Process (SAP) as a more comprehensive and individualized framework for Balkan countries to make further progress on their way to EU membership. The instruments covered by the SAP continued to depend on compliance of each country with the general and specific conditions set out by the EU.<sup>425</sup> The importance of the Copenhagen criteria in the accession of new Member States was emphasized in the Thessaloniki Summit in 2003, where all Western Balkan countries were granted the perspective of EU membership subject to fulfilment of the necessary conditions. The use of conditionality is a very powerful tool to export the values on which the EU is founded.<sup>426</sup>

In the context of EU enlargement it is critically important for the EU institutions to have a clear idea about the status of the rule of law, justice and fundamental rights in the applicant countries.<sup>427</sup> Therefore, the fulfilment of the political criteria and the adoption, implementation and application of the *acquis* are continuously assessed during the accession negotiations, and the Commission issues regular monitoring reports on each candidate country. These continuous assessments are intended to make sure that the countries are prepared to meet their obligations as Member States, once they join the EU. The *acquis* is divided into negotiation chapters, each of which corresponds to a different area of EU legislation and policy.<sup>428</sup> EU policies aimed to maintain and further develop the Union in the area of the rule of law and democratic governance are now covered by chapter 23 (judiciary and fundamental rights), and chapter 24 (justice, freedom and security). These chapters are now at the centre of the negotiation process. Member States must ensure respect for fundamental rights and a solid legal framework, providing for reliable institutions and an independent and efficient judiciary, guaranteeing fair trial procedures. Equally, the fight against corruption and organised crime must be ensured. Together with the Copenhagen political criteria, chapters 23 and 24 are essential for safeguarding and developing the rule of law in enlargement countries.<sup>429</sup>

Most of the enlargement countries are facing a number of key challenges and need to go through major reforms, as necessary legislation and institutions have to be put in place to fully assume the obligations of EU membership. The EU has designed several instruments and programmes to support the enlargement countries in their reforms. From 2007 to 2013, the Instrument for Pre-Accession Assistance (IPA) granted funds for both, candidate countries and potential candidates to support reforms with financial and

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<sup>424</sup> Arolda Elbasani, 'EU Enlargement in the Western Balkans: Strategies of Borrowing and Inventing' (2008) 10/3 *Journal of Southern Europe and the Balkans* 293, 300.

<sup>425</sup> Florence Benoit-Rohmer and others, 'Human Rights Mainstreaming in EU's External Relations' (Study, European Parliament 2009) 81.

<sup>426</sup> Spreeuw (n 404) 8.

<sup>427</sup> Martin Gramatikov and Morly Frishman, 'Measuring the Rule of Law, Justice and Fundamental Rights' (Concept Paper, HiIL 2013) 9.

<sup>428</sup> European Union, 'The Accession Process for a new Member State' (28 February 2007) <[http://europa.eu/legislation\\_summaries/enlargement/ongoing\\_enlargement/l14536\\_en.htm](http://europa.eu/legislation_summaries/enlargement/ongoing_enlargement/l14536_en.htm)> accessed 12 April 2014.

<sup>429</sup> European Union, 'Chapters of the *Acquis*' (27 June 2013) <[http://ec.europa.eu/enlargement/policy/conditions-membership/chapters-of-the-acquis/index\\_en.htm](http://ec.europa.eu/enlargement/policy/conditions-membership/chapters-of-the-acquis/index_en.htm)> accessed 12 April 2014.

technical means, building up the capacities of the enlargement countries. IPA has replaced the former programmes as one single instrument pre-accession assistance.<sup>430</sup> Through IPA over € 800 million pre-accession assistance has been provided in the period from 2007 to 2013 to improve the justice sector, independence of the judiciary, fight against corruption and organised crime as well as border management and security. Furthermore, the functioning of institutions guaranteeing democracy has been supported by over € 30 million pre-accession assistance, as well as € 190 million to support civil society organisations.<sup>431</sup>

After the expiry of IPA in 2013, IPA II was launched as the second Instrument for Pre-Accession Assistance.<sup>432</sup> The EU Multiannual Financial Framework for 2014-2020 allocates the budget that is agreed for seven years to the EU's political priorities of the External Action Financing Instruments.<sup>433</sup> One of the main underpinning principles of the external instruments for the period is a greater focus on human rights, democracy and good governance. When it comes to allocating and disbursing funds to partner countries, the EU will take account of these values and the greater emphasis on the rule of law is represented also in the IPA II. With IPA II the EU continues to provide substantial support for the preparation of accession in order to support for political reforms in the enlargement countries, inter alia through strengthening democracy and the rule of law.<sup>434</sup>

## VI. Mechanisms for measuring the rule of law

The measurement of the rule of law has a shorter history than the measurement of democracy and human rights. It started in the 1980s with first attempts by academics to measure 'good governance' in order to classify countries according to the results obtained in this respect. These measures of good governance included civil and political liberties or political freedoms as proxy measures for the rule of law. One of the first works was Freedom House's 'Freedom in the World' that used so-called proxy measures of the liberties and freedoms of political and legal institutions to approximate rule of law and governance.<sup>435</sup>

In the early 1990s the debate moved from scientific journals to international discussion as international organisations, like the World Bank and the International Monetary Fund, started to consider the ways, in which good governance influenced the economic performance of countries in their development assistance.<sup>436</sup> World Bank researchers emphasized that only in well-governed countries foreign aid could

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<sup>430</sup> European Union, 'IPA' (7 September 2012) <[http://ec.europa.eu/enlargement/policy/glossary/terms/ipa\\_en.htm](http://ec.europa.eu/enlargement/policy/glossary/terms/ipa_en.htm)> accessed 12 April 2014.

<sup>431</sup> European Commission, 'Enlargement Strategy and Main Challenges 2013-2014' (Communication) COM (2013) 700 final, 7-9.

<sup>432</sup> Regulation (EU) 231/2014 of the European Parliament and of the Council of 11 March 2014 Establishing an Instrument for Pre-Accession Assistance (IPA II) [2014] OJ L77/11.

<sup>433</sup> European Union, 'Memo: The Multiannual Financial Framework: The External Action Financing Instruments' (11 December 2013) <[http://europa.eu/rapid/press-release\\_MEMO-13-1134\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-1134_en.htm)> accessed 14 April 2014.

<sup>434</sup> Reg 231/2014, Art. 2 (1) (a) (i).

<sup>435</sup> Todd Landman, 'Map-Making and Analysis of the Main International Initiatives on Developing Indicators on Democracy and Good Governance' (Human Rights Centre, University of Essex 2003) 28.

<sup>436</sup> Robert Cécile and Jurine Magalie, 'Human Rights and Democracy Indicators: Definition and Implications' (Study, European Parliament 2006) 6.

be used effectively and called attention to the institutional prerequisites for economic growth. The rule of law has been regarded as a basis to provide a secure environment for contracts, investments and market transactions and for a functioning market economy. In that way, good governance became both, 'a means of achieving development and a development objective in itself.'<sup>437</sup>

Also other international organisations, like the UN and the EU, have imposed the protection of the rule of law as a condition for the provision of financial assistance on recipient countries.<sup>438</sup> In response to the growing demand, international organisations started to work on quantifiable indicators and benchmarks. A number of aggregate governance and rule of law indicators have been produced. However, these first attempts of international organisations to measure a country's adherence to the rule of law did not escape criticism as methodological problems were debated among the scientific community.<sup>439</sup>

### **A. Major initiatives for measuring the rule of law by international organisations**

There have been many attempts to develop mechanisms for measuring the rule of law by academia, states, intergovernmental organisations and NGOs. Three major initiatives by the World Bank, the CoE and the UN have been selected to show different approaches for measuring the rule of law that are of specific relevance also in the EU. These three initiatives have to be regarded as a non-exhaustive selection of relevant mechanisms that exist on the international level.<sup>440</sup> Based on the analysis of these three initiatives, basic principles for the development and use of indicators to measure the rule of law are identified in the last section of this Chapter.

With the initiation of the Worldwide Governance Indicators (WGI) project, the World Bank has been at the forefront in developing measurement tools to monitor the performance of national politico-legal systems over time. The rule of law is defined as one of the six dimensions of governance by the WGI project. The data for the WGI are gathered from 35 data sources provided by 33 different organizations, including commercial survey institutes, think tanks, non-governmental organizations, international organizations and private sector firms. 25 of these different data sources are used by the WGI project to produce the rule of law index. These data sources capture a mixture of rule of law elements, like strength and impartiality of the legal system, independence of the judiciary, trust in judicial accountability and law enforcement but also other elements, like confidence in police force, which are usually not included in the rule of law conceptions illustrated in Chapter V. Further elements usually assigned to the rule of law can be found in other dimensions defined by the WGI project.<sup>441</sup> The indicators combine the views provided by a large number of expert survey respondents from the public and private sector, NGOs, enterprises and citizens in industrial and developing countries. As a result of this sort of data collection, the indicators do not reflect an objective measurement but rather the perceived level of the rule of law based on the

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<sup>437</sup> Melissa Thomas, 'What Do the Worldwide Governance Indicators Measure' (Johns Hopkins University 2006) 2.

<sup>438</sup> Landman 'Map-Making and Analysis' (n 435) 2.

<sup>439</sup> Cécile and Magalie (n 436) 6.

<sup>440</sup> A mapping of main international initiatives on developing indicators for rule of law can be found in Landman 'Map-Making and Analysis' (n 435).

<sup>441</sup> Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, 'Governance Matters VIII: Aggregate and Individual Governance Indicators, 1996-2008' (2009) World Bank Policy Research Working Paper No. 4978, 77-78.

subjective opinions of survey respondents. Therefore, the WGI project is representing the ‘demand side’ of the rule of law and does neither measure the rule of law from an institutional point of view, nor pays attention to what is thought of as the law in the books.<sup>442</sup>

The European Commission for the Efficiency of Justice (CEPEJ), established by the CoE, conducts regular evaluations of the judicial systems of the CoE member states to measure the rule of law from an institutional perspective.<sup>443</sup> These evaluations are based on the ‘Pilot Scheme for Evaluating Judicial Systems’,<sup>444</sup> an instrument developed by the CEPEJ in 2003. The scheme is meant to gather qualitative and quantitative information on the daily functioning of judicial systems based on reports by member states and national correspondents, appointed by the states.<sup>445</sup> The pilot scheme is a set of originally 108 questions, categorized by ten topics related to access to justice, functioning and efficiency of justice, fair trial as well as enforcement of court decisions in both criminal and civil cases. The CEPEJ study is based on data gathered from judicial institutions, governmental agencies in the justice sector and legal professionals that represent the ‘supply side’ of judicial systems. This way, the evaluation scheme is based on an institutional conception of the rule of law by assuming that the availability of certain guarantees, proceedings and legal institutions assure adherence to the rule of law. The correspondents are also delivering replies to questions concerning the rights and position of the ‘users’ of the justice systems. However, the evaluation scheme does neither include questions regarding the quality standards of law practices, nor the level of satisfaction in the society and public trust in judicial systems, as these areas are falling in the responsibility of other institutions within the CoE.<sup>446</sup>

The UN launched a Rule of Law Indicators Project in 2008 as a joint initiative of the Department of Peacekeeping Operations and the Office of the High Commissioner for Human Rights. The UN Rule of Law Indicators were prepared by experts from the Vera Institute of Justice in collaboration with other members of the Altus Global Alliance and consultants from academia. The primary objective of the initiative is to provide an empirically based approach for measuring the strengths and challenges of the rule of law sector in a given country in order to assist both, international donors and national authorities in their rule of law reform efforts. It has to be noted, however, that the UN Rule of Law Indicators form a tool for assessing the rule of law in post-conflict situations. The set of indicators is designed to obtain information on successes and shortcomings among the law enforcement agencies, the judicial system and the prison system and to monitor performance of institutions within a country over time. The UN Rule of Law Indicators Project is not designed to produce a single rating for a country or to rank and compare countries in terms of their rule of law performance.<sup>447</sup> The indicators shall be rated or measured on the

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<sup>442</sup> Pim Albers, ‘How to measure the rule of law: a comparison of three studies’ (2007) <<http://www.coe.int/t/dghl/cooperation/cepej/events/onenparle/Albers251007.pdf>> accessed on 20 April 2014, 2-3.

<sup>443</sup> CEPEJ, ‘Evaluation of European Judicial Systems’ <[http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default\\_en.asp](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp)> accessed on 20 April 2014.

<sup>444</sup> CEPEJ, ‘Pilot-Scheme for Evaluating Judicial Systems’ <[http://www.coe.int/t/dghl/cooperation/cepej/Source/GrillePilote\\_en.doc](http://www.coe.int/t/dghl/cooperation/cepej/Source/GrillePilote_en.doc)> accessed on 20 April 2014.

<sup>445</sup> CEPEJ, ‘European Judicial Systems’ (Council of Europe Publishing 2012) 5-6.

<sup>446</sup> Albers (n 442) 10.

<sup>447</sup> UN, ‘The United Nations Rule of Law Indicators Project: Frequently Asked Questions’ (07 October 2008) <<http://en.unrol.org/files/FAQ%20-%207%20Oct%202008.doc>> accessed on 11 May 2014.

basis of four main sources of data, including surveys of experts and public surveys, to a smaller extent administrative and field data, as well as the review of legal and/or administrative documents.<sup>448</sup> Similar to the WGI project, the UN Rule of Law Indicators Project focuses more on the rule of law in practice, rather than on the law in the books. In this way, the instruments measure the rule of law by performance and outcome indicators, rather than measuring in detail the institutional means in terms of legal and regulatory frameworks.<sup>449</sup> However, the UN Rule of Law Indicators try to combine multiple data sources, which shall yield a more nuanced and complete picture. Through the combination of a public survey and a survey of experts, the UN Rule of Law Indicators describe the operation of justice institutions from multiple perspectives. This shall also compensate for the weaknesses that often exist in the administrative data of states in conflict and post-conflict situations.<sup>450</sup> The UN Rule of Law Indicators and the guide for implementation follow an empirically based approach to measure the strengths and effectiveness of law enforcement, judicial and correctional institutions. So far the UN Rule of Law Indicators have only been applied in pilot implementations in Haiti and Liberia, with no publicly available results.<sup>451</sup> However, the guide for implementation provides general guidelines for developing and applying indicators to measure the rule of law.

## **B. Mechanisms for measuring the rule of law in the EU and its Member States**

As the EU applies a substantive conception of the rule of law by connecting it to democracy and fundamental rights, the monitoring of the rule of law in the EU and its Member States must equally focus on the law in the books and on the realisation of the rule of law in practice. Accordingly, the EU needs instruments to measure legal and other relevant institutional inputs as well as compliance of public institutions with the relevant norms and standards. As described in Chapter V.A Art. 7 TEU places the EU institutions under the obligation to maintain surveillance in order to detect possible risks of breaches of the rule of law in the EU Member States or by the EU itself. In monitoring the rule of law in the EU, the European Commission, so far, mainly relied on sources of information from the EU bodies, from international organisations like the CoE and civil society organisations.<sup>452</sup>

In 2013, the Commission presented the EU Justice Scoreboard as a new initiative, for evaluating the functioning of national justice systems in terms of quality, independence and efficiency.<sup>453</sup> The Scoreboard is a comparative tool, covering all Member States and is used to monitor the functioning of national justice systems over time. It focuses on civil and commercial justice, encompassing non-criminal cases, litigious civil and commercial cases as well as administrative cases. The findings are related to the efficiency and

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<sup>448</sup> DPKO and OHCHR, 'Rule of Law Indicators Implementation Guide and Project Tools' (UN 2011) 24.

<sup>449</sup> Pech, 'Rule of Law as a Guiding Principle of the European Union's External Action' (n 394) 40-41.

<sup>450</sup> DPKO and OHCHR (n 448) 1-2.

<sup>451</sup> UN, 'United Nations Rule of Law Indicators Project: Newsletter Number 2' (June 2009) <<http://www.unrol.org/files/Newsletter%20for%20United%20Nations%20Rule%20of%20Law%20Indicators%20Project%20June%202009.pdf>> accessed on 11 May 2014.

<sup>452</sup> For a detailed description of the main EU mechanisms for measuring the rule of law see Carrera, Guild and Hernanz (n 405) 4 et seqq.

<sup>453</sup> European Union 'Press Release: EU Justice Scoreboard: European Commission broadens the scope of its analysis of Member States' justice systems' (27 March 2013) <[http://europa.eu/rapid/press-release\\_IP-13-285\\_en.htm](http://europa.eu/rapid/press-release_IP-13-285_en.htm)> accessed 2 May 2014.

quality of justice systems and the independence of the judiciary. The indicators used to measure the efficiency of proceedings are the length of the proceedings, the clearance rate and the number of pending cases. Further factors, like the availability of regular monitoring systems for the courts, the use of ICT systems, the availability of Alternative Dispute Resolution methods, the training of judges and resources available for the courts, are part of the assessment.<sup>454</sup> The EU Justice Scoreboard uses different data sources. Most quantitative data were collected in accordance with the CEPEJ methodology for Evaluation of European Judicial Systems and presented in a study on the functioning of judicial systems prepared in 2012 by the CEPEJ on behalf of the Commission.<sup>455</sup> Additional sources of information were data from Eurostat, the World Bank, the World Economic Forum, the World Justice Project and the European judicial networks. The EU Justice Scoreboard makes use of benchmarking to promote a high level of the rule of law in the EU Member States and provides reliable and comparable data on the functioning of national justice systems. Furthermore, the EU Justice Scoreboard was designed to support the country specific analysis of the European Semester and to give recommendations to the Member States. However, '[i]t is not a mechanism for guaranteeing the rule of law across the EU.'<sup>456</sup>

A new debate on how to monitor and safeguard the rule of law in the EU and its Member States has started among the European institutions, when the EU has been confronted with Member States' deficiencies in protecting the rule of law on several occasions. In its Resolution of 3 July 2013, the European Parliament called on the Commission as the guardian of the Treaty to create an independent monitoring mechanism and an early-warning system.<sup>457</sup> These instruments should make sure that any potential risks of serious breach of Art. 2 TEU values are addressed at an early stage through a structured political dialogue with the relevant Member State. The need for a comprehensive monitoring tool for measuring the rule of law and human rights in the EU was repeatedly expressed by the European Parliament and the Council, making reference to the major initiatives of international organisations, such as the CoE and the UN.<sup>458</sup> Based on these requests for a collaborative and systematic method to tackle rule of law issues, the Commission has set out a 'new framework to ensure an effective and coherent protection of the rule of law in all Member States'<sup>459</sup> in 2014. Within this new framework the Commission seeks to contribute to reach the objective of safeguarding the rule of law in the EU, based on the expertise of the Venice Commission of the CoE and the FRA. This new framework shall address future threats to the

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<sup>454</sup> European Commission, 'The EU Justice Scoreboard: A Tool to Promote Effective Justice and Growth' (Communication) COM (2013) 160 final, 2-5.

<sup>455</sup> The full study prepared by the CEPEJ for the European Commission in 2012, is available on the website <[http://ec.europa.eu/justice/effective-justice/files/cepej\\_study\\_justice\\_scoreboard\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/cepej_study_justice_scoreboard_en.pdf)>.

<sup>456</sup> European Union 'Memo: Questions & Answers: EU Justice Scoreboard' (27 March 2013) <[http://europa.eu/rapid/press-release\\_MEMO-13-288\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-288_en.htm)> accessed 2 May 2014.

<sup>457</sup> European Parliament, 'Situation of Fundamental Rights: Standards and Practices in Hungary' (Resolution) P7\_TA-PROV (2013) 0315.

<sup>458</sup> The Council of the European Union underlined the importance to make full use of existing mechanisms for the assessment of the rule of law in its 'Conclusions of the Justice and Home Affairs Council Meeting' (Luxembourg, June 2013), para. 9. The European Parliament reiterated in its Resolution 'Evaluation of Justice in Relation to Criminal Justice and the Rule of Law' P7\_TA-PROV (2014) 0231, para. 6 that a mechanism for the assessment of the rule of law must seek complementarity with the work of other international institutions.

<sup>459</sup> COM (2014) 158 final, 3.

rule of law in Member States, before the conditions for activating the mechanisms foreseen in Art. 7 TEU are met and is an addition to the infringement procedures foreseen under Art. 258 TFEU.<sup>460</sup>

### C. Basic principles for the use of indicators to measure the rule of law

Based on the foregone description of existing initiatives, basic principles can be identified that need to be considered for the use of indicators to measure the rule of law in the EU accession process. A meaningful, comprehensive and acceptable approach for measuring the rule of law requires certain aspects as summarised below.

#### (1) Combining structural, process and outcome indicators

Recent research on measuring the rule of law<sup>461</sup> suggests using a mix of structural, process and outcome indicators, such as it is proposed by the UN Rule of Law Indicators Project.<sup>462</sup> As the law in the books is not necessarily always translated into practice, the rule of law cannot be measured through structural indicators only. Following a substantive conception of the rule of law, indicators should also evaluate the impact of governments' policies and the perceived level of the rule of law by individuals.<sup>463</sup> To measure the results at the level of beneficiaries and to identify any inequalities or discrimination, it makes good sense to further disaggregate data by individual characteristics, like age, gender or ethnic groups.<sup>464</sup> By combining structural, process and outcome indicators, the commitments of states can be assessed at the same time as their performance in terms of delivering justice. In this way, the indicators are complementary and can only properly reflect the realisation of rule of law standards in terms of commitment, effort and results, when taken together.<sup>465</sup>

#### (2) Combining quantitative and qualitative indicators

Creating a meaningful set of indicators requires a combination of both, quantitative and qualitative indicators. Quantitative indicators can be used, where it is possible to identify statistical information, and their numerical precision often allows for a more objective interpretation of results. In this way, quantitative indicators are usually preferable. However, qualitative indicators can supplement the numerical data with a richness of information that cannot be displayed by pure statistics.<sup>466</sup> As indicated in the previous sections, there is a series of existing mechanisms from international organisations that provide for quantitative indicators to measure the rule of law. These quantitative measures provide

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<sup>460</sup> European Parliament 'The Situation of Fundamental Rights in the European Union' (Resolution) P7\_TA-PROV (2014) 0173, para. 11.

<sup>461</sup> see Berenschot and Imagos, 'Evaluation of Governance, Rule of Law, Judicial Reform and Fight Against Corruption and Organised Crime in the Western Balkans: Lot 2 Main Report' (2012) 33.

<sup>462</sup> DPKO and OHCHR (n 448).

<sup>463</sup> Todd Landman, 'The Scope of Human Rights: From Background Concepts to Indicator' (Background paper for the UN Expert Meeting on Human Rights Indicators, Turku 2005) 13-26.

<sup>464</sup> Klaus Starl and Jennifer Pinno, 'Study on Challenges in the Development of Local Equality Indicators: A Human-Rights-Centred Model' (Study carried out by ETC Graz in the framework of the Working Group on Indicators of the European Coalition of Cities against Racism, UNESCO 2010) 28.

<sup>465</sup> Gauthier de Beco, 'Human Rights Indicators for Assessing State Compliance with International Human Rights' (2008) 77 *Nordic Journal of International Law* 23, 45.

<sup>466</sup> USAID Center for Development Information and Evaluation, 'Performance Monitoring and Evaluation Tips: Selecting Performance Indicators' (1996) <[http://pdf.usaid.gov/pdf\\_docs/PNABY214.pdf](http://pdf.usaid.gov/pdf_docs/PNABY214.pdf)> accessed 20 June 2014, 4.

valuable sources of information that can be applied also to underpin qualitative assessments of the rule of law in a specific country.<sup>467</sup>

### (3) Combining universal and country-specific indicators

Like for any other set of indicators, a balance between universally relevant indicators and country-specific indicators needs to be found. Certain elements of the rule of law, relevant across all countries, shall be measured by universal indicators. Such universal indicators allow for making comparisons of particular elements across countries. However, universal indicators do not take into account the different capacities of each individual state.<sup>468</sup> Through the creation of country specific indicators, the contextual relevance of the assessment can be increased and differences in the nature of institutions, policies and in the state priorities can be better reflected.<sup>469</sup>

### (4) Combining multiple data sources

By using multiple sources of data, the institutional perspective of the 'supply side' of the rule of law can be combined with the 'demand side', reflecting the rule of law in practice. A set of indicators combining multiple data sources must be flexible enough to cope with the different types of data but at the same time should be standardized enough to be meaningful concerning the indicator's results.<sup>470</sup> Indicators need to be clearly defined and carefully selected in order to facilitate the identification of relevant data sources. The required level of reliability of the data has to be adjusted to the purpose of measurement to allow for reasonably confident decisions. While quantitative data can be gathered by reviewing administrative documents and legislation or from statistical surveys, qualitative information can mainly be obtained from media review, public or expert surveys. The involvement of responsible authorities has proven to be crucial in selecting the most relevant indicators and accessing sensitive data sources.<sup>471</sup>

### (5) Tracking changes over time and setting benchmarks

Indicators are most useful, when the same measure can be tracked over time, as this allows identifying improvements or deteriorations in the realisation of the different rule of law elements.<sup>472</sup> A baseline assessment drawing on clear indicators is a helpful starting point for developing specific reforms. The progress achieved can then be measured against these baseline measurements. In this way, the monitoring schemes are capable of revealing continuous trends and dynamics, which can be the basis to identify feasible benchmarks.<sup>473</sup> Setting benchmarks allows for monitoring the progress towards reaching a specific target or goal. By using intermediate benchmarks, progress can be monitored on a regular basis to help states reach the obligations.<sup>474</sup> Effective benchmarking requires a clear understanding of the rule

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<sup>467</sup> see Berenschot and Imagos (n 461) 33 et seqq.

<sup>468</sup> OHCHR, 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights' (UN 2008) para. 16.

<sup>469</sup> DPKO and OHCHR (n 448) 2.

<sup>470</sup> Starl and Pinno (n 464) 27.

<sup>471</sup> Berenschot and Imagos (n 461) 16 et seqq.

<sup>472</sup> DPKO and OHCHR (n 448) 4.

<sup>473</sup> Martin Gramatikov and Ronald Janse, 'Monitoring and Evaluation of the Rule of Law and Justice in the EU: Status Quo and the Way Ahead?' (Concept Paper, HiiL 2012) 2.

<sup>474</sup> de Beco (n 465) 47.

of law and of the key features it compromises. For the development of meaningful benchmarks measurable indicators, adequate measurement methods and reliable data sources are necessary.<sup>475</sup>

## VII. Measuring the rule of law in the EU enlargement policy

Based on the presidency conclusions from the Luxembourg European Council in 1997, the EU established an evolutionary and inclusive accession process, under which all candidate countries are ‘destined to join the Union on the basis of the same criteria and [...] on equal footing.’<sup>476</sup> The rule of law forms a basic condition for EU accession as one component of the political criteria agreed in the Copenhagen European Council in 1993, namely the ‘stability of institutions guaranteeing democracy, the rule of law, human rights and the respect for and protection of minorities’. Furthermore, several elements of the rule of law are also part of the *acquis* criteria – that is the ‘ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union’.<sup>477</sup>

Acting on the mandate of the Council and the European Council, the European Commission has a key position in the assessment of the progress made by the candidate and potential candidate countries towards fulfilling the conditions of the Copenhagen criteria. Each year the Commission presents a set of documents to the Council, explaining its strategy in line with the EU enlargement policy and reporting on the progress achieved at country level. The so-called ‘Enlargement package’ adopted by the Commission includes the Progress Reports for each candidate and potential candidate country as well as the annual Enlargement Strategy Paper, taking stock of the developments in the last twelve months and setting out the way forward for the coming year.<sup>478</sup> The Council and the European Council take their decisions to move on in the accession process of a country based on the recommendations contained in the Commission’s assessments. In this way, the assessment of the progress towards the fulfilment of the membership criteria is one of the most important and powerful tools in the accession process.<sup>479</sup>

In this Chapter, the use of indicators for measuring the rule of law in the EU enlargement policy is analysed with a specific focus on the transformation of the judicial system in three case studies of the countries Bulgaria, Croatia and Montenegro. Along the three case studies, the adaptations of the EU monitoring mechanism for measuring the rule of law in terms of the independence and accountability of the judiciary and access to justice are analysed over time. The three case studies reflect three different periods in the EU enlargement policy. Three major steps, that were aimed to improve the measurement of the rule of law in the enlargement process, can be identified. The first step was the introduction of a monitoring system in the accession process of Bulgaria to overlook the progress achieved in fulfilling the Copenhagen political criteria. The second step was the establishment of a specific negotiation chapter on judiciary and

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<sup>475</sup> Raffaella Del Sarto and others, ‘Benchmarking Democratic Development in the Euro-Mediterranean Area: Conceptualising Ends, Means, and Strategies’ (EuroMeSCo Report 2006) 14-15.

<sup>476</sup> European Council, ‘Presidency Conclusions’ (Luxembourg, December 1997).

<sup>477</sup> European Council (n 60) para. 7 (A) (iii).

<sup>478</sup> European Union, ‘Strategy and Progress Reports’, (23 October 2013) <[http://ec.europa.eu/enlargement/countries/strategy-and-progress-report/index\\_en.htm](http://ec.europa.eu/enlargement/countries/strategy-and-progress-report/index_en.htm)>, accessed 10 June 2014.

<sup>479</sup> Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008) 59.

fundamental rights as an integral part of the EU *acquis* and the identification of specific benchmarks in the accession process of Croatia. Finally, the new approach to rule of law in the EU enlargement policy is guiding the accession negotiations with Montenegro and has put the rule of law at the heart of the accession process.

The case studies conducted in this Chapter are based on an analysis of the Progress and Monitoring Reports issued by the European Commission and other relevant documents related to the EU enlargement policy. Furthermore, recent research and studies conducted by different authors are considered. Background information gained through an interview conducted by the European Training and Research Centre for Human Rights and Democracy (ETC Graz) with an official from DG enlargement<sup>480</sup> is used to back the findings of the case studies and to derive general implications for the use of indicators in EU enlargement policy in the last part of this Chapter.

## A. The case of Bulgaria

The 'Europe Agreement'<sup>481</sup> has entered into force on 1 February 1995 and provided the legal basis for relations between Bulgaria and the EU (the EC at that time). Based on this framework for political dialogue and the gradual integration into the Union, Bulgaria has submitted the application for membership of the EU on 14 December 1995. At that time all together eleven applications for membership were submitted to the EU, which led to the adoption of a new strategy for enlargement by the European Council.

### 1. The new strategy for EU enlargement

With regard to the criteria adopted by the Copenhagen European Council in 1993 and on request of the Madrid European Council in 1995,<sup>482</sup> the Commission had developed a methodology for the objective assessment of applications for membership that should ensure that all candidate countries were treated on an equal basis. A composite paper on enlargement was presented as Part Two of the Agenda 2000<sup>483</sup> and explained the methodology for an assessment of applications for membership through the application of predefined accession criteria.

The methodology for the assessment of applications developed by the Commission was affirmed by the Luxembourg European Council in 1997, where two significant elements were introduced into the Enlargement Strategy. On the one hand, the European Council adopted a comprehensive enlargement framework, under which the Commission was asked to submit Regular Reports to the Council, assessing the candidate countries preparedness for accession in the light of the Copenhagen criteria. For these assessments the Council decided 'to follow the method adopted by Agenda 2000 in evaluating applicant States' ability to meet the economic criteria and fulfil the obligations deriving from accession.'<sup>484</sup> The

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<sup>480</sup> ETC Graz, Interview with an official from DG Enlargement (Brussels and Graz, 17 June 2014). The interview was conducted in the context of the FRAME research project. The project FRAME - Fostering Human Rights Among European Policies is a large-scale, collaborative research project funded under the EU's Seventh Framework Programme. The interview report is not publicly accessible but was available for the author.

<sup>481</sup> Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, Brussels, 8 March 1993 (Europe Agreement).

<sup>482</sup> European Council, 'Presidency Conclusions' (Madrid, December 1995).

<sup>483</sup> European Commission, 'Agenda 2000: For a Stronger and Wider Union' (Communication) COM (97) 2000 final.

<sup>484</sup> European Council (n 476) para. 29.

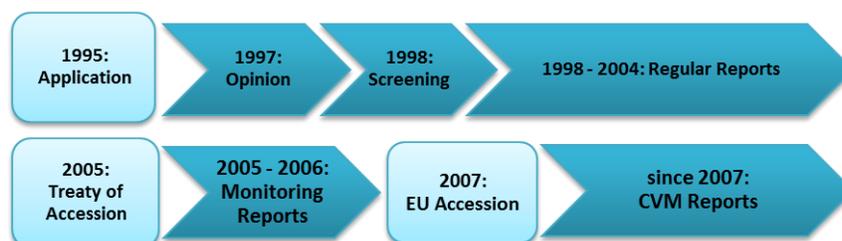
progress towards meeting each criterion was to be assessed against a standardised checklist that ensured transparency and equal treatment of all countries aspiring accession to the EU. On the other hand, the Luxembourg European Council introduced an enhanced pre-accession strategy, consisting of increased pre-accession aid and the introduction of the Accession Partnerships.

The Accession Partnerships were concluded to support the applicant countries in their preparations for membership by providing a single framework for the countries' actions, to address the priority areas identified in the Regular Reports and to target the financial assistance available from the EU. A number of financial instruments were designed for candidate and potential candidate countries to carry out the demanded reforms. The PHARE programme<sup>485</sup> was remodelled into an accession driven instrument for institution building and investment in the regulatory infrastructure to ensure compliance with the *acquis*.<sup>486</sup> The measures implemented through the EU financial assistance as well as the progress achieved through the Accession Partnerships and related National Programmes or Action Plans were to be assessed within the Regular Reports.

## 2. The monitoring mechanism applied to Bulgaria

In line with the new strategy for enlargement and the adoption of the comprehensive enlargement framework by the Luxembourg European Council in 1997, the Commission had developed a monitoring system to effectively underpin the accession negotiations of the Council and the Member States. This monitoring system is made up of several monitoring tools (as presented in Figure 1), designed to assess the priorities identified in the policy documents and reform plans.

Figure 1: The monitoring mechanism applied to Bulgaria



### a) The Opinion on the Application for Membership

On request of the Madrid European Council in 1995, the Commission conducted a baseline assessment of Bulgaria's preparedness for membership and presented an Opinion on Bulgaria's Application for Membership of the European Union in 1997.<sup>487</sup> In the light of the Copenhagen criteria, this assessment followed the threefold division into political criteria, economic criteria and the ability to assume the Union *acquis*. The extent to which democracy and the rule of law were actually operating in line with the EU was assessed under the political criteria for membership. In conducting the assessments, the Commission utilised a wide range of information coming from the Bulgarian authorities, the Member States and

<sup>485</sup> The Poland and Hungary Aid for Restructuring of the Economies (PHARE) was initially designed to support transition to democracy and the market economy in Poland and Hungary.

<sup>486</sup> European Commission, 'Composite Paper: Reports on progress towards accession by each of the candidate countries' COM (99) 500 final, 8.

<sup>487</sup> European Commission, 'Opinion on Bulgaria's Application for Membership of the European Union' DOC/97/11.

numerous international organisations. Based on the Commission's opinion and on the Presidency Conclusions from the Luxembourg European Council in 1997, the accession process with Bulgaria was formally launched by the Ministers of Foreign Affairs Council on 30 March 1998.

**b) *The Regular Reports on Bulgaria's Progress towards Accession***

The process of accession and negotiation followed the structure as introduced by the decision of the Luxembourg European Council in 1997. In April 1998, the Commission launched an analytical examination of the acquis, the so-called 'screening', with the aim to identify any possible problem areas for the adoption of the acquis. Starting in 1998, the Commission submitted annual Regular Reports on Bulgaria's progress towards accession.<sup>488</sup> The structure of these Regular Reports followed the structure of the Commission Opinion on Bulgaria's application for membership from 1997 and was based on the Copenhagen criteria. The Regular Reports presented the results of the monitoring and provided both, criticism and support for the applicant country. Furthermore, the reports were of high significance for the decisions on the opening and closing of negotiating chapters.<sup>489</sup> Starting with the Regular Report of 2000, the assessment of the acquis criteria has been restructured and the ability to assume the obligations of membership was divided into 31 negotiating chapters.<sup>490</sup> The structure of the reports was continuously improved with every reporting year, leading to higher consistency and transparency. Furthermore, the Regular Reports were gradually becoming more and more detailed, also broadening the scope of the issues assessed related to the rule of law.<sup>491</sup>

To address the deficiencies identified by the Commission in its assessments, concrete, achievable goals were formulated in the Accession Partnerships, Action Plans and in a Roadmap for Bulgaria. The Accession Partnerships with Bulgaria set out a single framework for the reforms in the priority areas identified by the Commission and for the financial assistance supporting the implementation of these reforms. The priorities were divided into short and medium term, depending on whether substantial improvement was expected within one year or more than one year to complete.<sup>492</sup> The Accession Partnerships were under regular revision to take account of the progress made and to allow for new priorities to be set.

Carrying out the assessment for the Regular Reports, the Commission collected information from a number of data sources. A main source of information was the review of legislation adopted, administrative documents as well as official statistics. The Bulgarian authorities were invited to provide information on the progress made since the publication of the last report. Various peer reviews conducted by country experts have taken place in order to assess Bulgaria's administrative capacity in a number of areas. Reports from the Commission's delegations and the Member States' embassies as well as Council deliberations and European Parliament resolutions have been taken into account for the preparation of the reports. The European Commission also used the assessments provided by the Member States with

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<sup>488</sup> European Commission, 'Regular Report on Bulgaria's Progress Towards Accession' COM (98) 707 final, 6.

<sup>489</sup> Kochenov (n 479) 245.

<sup>490</sup> European Commission, Enlargement Strategy Paper: Report on Progress Towards Accession by each of the Candidate Countries' COM (2000) 700 final, 25-30.

<sup>491</sup> Kochenov (n 479) 246.

<sup>492</sup> Council Decision (EC) 1999/857 of 6 December 1999 on the Principles, Priorities, Intermediate Objectives and Conditions Contained in the Accession Partnership with the Republic of Bulgaria [1999] OJ L335/49, Annex.

regard to the political criteria for membership. Furthermore, the rule of law measurements conducted by international organisations were important sources of information for the Commission.<sup>493</sup>

*c) Continued monitoring and the Cooperation and Verification Mechanism*

After the closing of the accession negotiations in December 2004, the Commission, as guardian of the Treaties, had the duty to monitor Bulgaria's preparation for accession in the fields, where Bulgaria had committed itself to completing specific measures by the time of accession.<sup>494</sup> The 2006 Monitoring Report on the state of preparedness for EU membership<sup>495</sup> showed that further progress was still necessary in the area of judicial reform and the fight against organised crime and corruption. The Commission established a Cooperation and Verification Mechanism (CVM) to monitor improvements in these areas after accession. Under this mechanism, Bulgaria was requested to report regularly on the progress made in addressing specific benchmarks in the field of judicial reform and the fight against organised crime and corruption. For judicial reform three benchmarks were included in the CVM.<sup>496</sup>

The monitoring method of the CVM consisted of periodic reports sent from the Bulgarian government to the Commission, giving details about the measures taken to respect the EU acquis and reforms implemented. Based on these reports and on other available sources of information, a regular evaluation of Bulgaria's progress was carried out by the Commission.<sup>497</sup> The results of the CVM mechanism were presented by the Commission in six-monthly Progress Reports that were accompanied by the Technical Reports, providing the basis for the analysis. At the end of each Progress Report, specific recommendations were given to bring forward the progress in achieving the benchmarks set.<sup>498</sup>

In drawing up these reports, the Commission relied on information received from the Commission's representation, the Member States' diplomatic missions, specialised international organisations, EU agencies and NGOs. Furthermore, the Commission was sending country experts from other Member States to on-field visits and missions in Bulgaria.<sup>499</sup> Where available, the Commission used the standards as defined by international organisations, like the CoE and the UN agencies, as points of reference for the progress made by Bulgaria. Also, the situation of other Member States was taken into account for a comparison with the situation in Bulgaria.<sup>500</sup> In 2012, the Commission requested a Flash Eurobarometer

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<sup>493</sup> COM (98) 707 final, 5 and later European Commission Regular Reports on Bulgaria.

<sup>494</sup> European Commission, 'Opinion of 22 February 2005 on the applications for accession to the European Union by the Republic of Bulgaria and Romania' COM (2005) 55 final/2, para. 9.

<sup>495</sup> European Commission, 'Monitoring Report on the State of Preparedness for EU Membership of Bulgaria and Romania' (Communication) COM (2006) 549 final, 9-10.

<sup>496</sup> European Commission, 'Establishing a Mechanism for Cooperation and Verification of Progress in Bulgaria to Address Specific Benchmarks in the Areas of Judicial Reform and the Fight Against Corruption and Organised Crime' (Decision) C (2006) 6550 final, Annex.

<sup>497</sup> Carrera, Guild and Hernanz (n 405) 8.

<sup>498</sup> cf European Commission, 'Progress in Bulgaria under the Cooperation and Verification Mechanism' (Report) COM (2012) 411 final and Commission 'Progress in Bulgaria under the Cooperation and Verification Mechanism' (Report) COM (2014) 36 final.

<sup>499</sup> European Commission, 'Bulgaria: Technical Report' (Staff Working Document) SWD (2012) 232 final, 4 and European Commission, 'Bulgaria: Technical Report' (Staff Working Document) SWD (2014) 36 final, 3.

<sup>500</sup> Carrera, Guild and Hernanz (n 405) 44.

survey to be conducted under the CVM that addressed public attitudes towards the state of the judicial system and the perception of corruption in Bulgaria and Romania.<sup>501</sup>

### 3. The indicators applied to measure the rule of law in Bulgaria

The judicial system was considered by the Commission as one of the main challenges for realising and upholding the rule of law in the enlargement countries. As there was no *acquis* in terms of substantive provisions for this area of the rule of law, the Commission assessed the progress of the enlargement countries against the standards set by international organisations, like the CoE and the UN, the case law of international courts and tribunals, and also considered the practice of the Member States.<sup>502</sup> However, in the field of the judiciary, the Western European legal systems provide for a plurality of models. Due to the lack of such a common European standard, the Commission relied on a loosely-structured set of elements for the assessment.<sup>503</sup> In its Guide to the Main Administrative Structures Required for Implementing the *Acquis*, the Commission identified the guarantee of 'sufficient human resources and qualified staff, adequate and modern equipment, acceleration of court proceedings, reduction of the number of pending cases so as to avoid unreasonable delays, measures to ensure the enforcement of judgements, and procedures to ensure ethical conduct by the judiciary and the effective access to justice'<sup>504</sup> as requirements for the establishment of an independent and efficient judicial system.

In order to measure the progress in the field of the judicial system, the Commission has used predominately structural indicators, reflecting decisions taken, legislation adopted and international conventions ratified. Process and outcome indicators were used to assess the implementation of legislation and its application in practice. The measures were mostly qualitative in nature, while quantitative indicators were used in several areas to underpin the qualitative assessments. With the CVM, benchmarks were introduced as a new tool to measure the progress in six specific areas.

#### a) The assessment of the independence and accountability of the judiciary

Strengthening judicial independence was included among the short-term and medium-term priorities of the Bulgarian Accession Partnerships. The assessment of the independence of judiciary was divided into two main components, namely the institutional independence and the personal independence of the individual judges. Judicial self-governance was viewed as one basic element to ensure institutional independence of the courts. The Commission promoted the establishment of functioning self-governance organs for the judiciary, which should at least have the competences to recommend judges for

<sup>501</sup> TNS Political & Social, 'Flash Eurobarometer 351: The Cooperation and Verification Mechanism for Bulgaria and Romania' (Survey Conducted on the Request of the European Commission, July 2012).

<sup>502</sup> see Kochenov (n 479) 249 et seqq.

<sup>503</sup> Daniel Smilov, 'EU Enlargement and the Constitutional Principle of Judicial Independence' in: Sadurski W, Czarnota A and Krygier M (eds), *Spreading Democracy and the Rule of Law?* (Springer 2006) 314.

<sup>504</sup> European Commission, 'Guide to the Main Administrative Structures Required for Implementing the *Acquis*' (Mai 2005)

<[http://ec.europa.eu/enlargement/pdf/enlargement\\_process/accesion\\_process/how\\_does\\_a\\_country\\_join\\_the\\_eu/negotiations\\_croatia\\_turkey/adminstructures\\_version\\_may05\\_35\\_ch\\_public\\_en.pdf](http://ec.europa.eu/enlargement/pdf/enlargement_process/accesion_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/adminstructures_version_may05_35_ch_public_en.pdf)> accessed 25 June 2014, 71.

appointment, to supervise the functioning of the judiciary as well as to overlook the general administration and the budget of the courts.<sup>505</sup> Therefore, the Commission welcomed the reforms of the structures of the judicial system as progress in the Regular Reports.<sup>506</sup>

Another factor to increase the institutional independence of the Bulgarian judiciary, considered as crucial by the Commission, was to ensure budgetary independence. In the Regular Reports, a clear connection was drawn between the self-governance of the judiciary and the ability to control its own budget. This included the requirement that budgeting decisions on the financing of the judiciary had to be respected by other branches of power and that the usual practice of considerable budget cuts effectuated by the Bulgarian parliament had to be abandoned.<sup>507</sup> The efforts of Bulgaria in this respect were consistently monitored throughout the Regular Reports. Furthermore, the Commission tried to quantify the progress in the institutional independence in terms of the increase of the budget for the judiciary and by comparing it to the average rate in the EU-15.<sup>508</sup>

The independence and impartiality of individual judges was measured by the Commission based on several aspects, including the procedures for appointment of judges and prosecutors, probation terms, the remuneration and allocation of cases. The standards applied by the Commission in terms of individual independence of judges were laid down in the recommendations issued by the CoE and by the UN,<sup>509</sup> however, no direct reference was made to these standards in the Regular Reports. The Commission repeatedly requested Bulgaria to assure the full independence of magistrates and judges and to apply transparent criteria and competitions for the recruitment and promotion of judges. The progress with regard to these indicators was quite consistently monitored throughout the Regular Reports.<sup>510</sup> Also the use of uniform criteria for the competitive selection of judges or to monitor the performance before granting tenure and promotion were assessed by the Commission.<sup>511</sup> In the 2003 and 2004 Regular Reports, the Commission reported on the improvement of working conditions of judges, prosecutors, investigators and judicial staff.<sup>512</sup>

Concerning the impartiality of judges, the Commission welcomed the increase of magistrates' salaries and also the system in place to ensure random allocation of cases was continuously assessed by the Regular Reports. The analysis of the Commission did not only focus on the legal framework adopted, but also on the improvement of the practical situation. In terms of accountability, the Commission assessed the

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<sup>505</sup> Kochenov (n 479) 257-59; European Commission, '1999 Regular Report on Bulgaria's Progress Towards Accession' COM (99) 501 final, 12 and 59; and European Commission, '2001 Regular Report on Bulgaria's Progress Towards Accession' SEC (2001) 1744, 18.

<sup>506</sup> European Commission, '2002 Regular Report on Bulgaria's Progress Towards Accession' SEC (2002) 1400, 23 and European Commission, '2003 Regular Report on Bulgaria's Progress Towards Accession' SEC (2003) 1210 final, 17.

<sup>507</sup> Kochenov (n 479) 275-76.

<sup>508</sup> SEC (2002) 1400, 24 and SEC (2003) 1210 final, 17.

<sup>509</sup> cf CoE Committee of Ministers, 'Recommendation on the Independence, Efficiency and Role of Judges' R (94) 12; CoE, 'European Charter on the Statute for Judges' DAJ/DOC (98) 23 and UN, 'Basic Principles of the Independence of the Judiciary' (1985).

<sup>510</sup> COM (2000) 701 final, 17; SEC (2001) 1744, 18 and SEC (2002) 1400, 25.

<sup>511</sup> SEC (2002) 1400, 25.

<sup>512</sup> SEC (2003) 1210 final, 19 and European Commission, '2004 Regular Report on Bulgaria's Progress Towards Accession' SEC (2004) 1199, 18.

provisions regulating the immunity of judicial bodies as well as the systems for monitoring in place. Several measures adopted in 2002 were aimed to establish a system of accountability of courts, prosecution offices and investigation services. Anti-corruption measures for the judiciary included mandatory property and income declarations. Also the adoption of a Code of Ethics for magistrates and administrative staff of the judiciary was regarded as a positive contribution to establish a system of accountability.<sup>513</sup>

After Bulgaria's accession to the EU, the assessment of independence and accountability of the judicial system was continued under the CVM through several benchmarks.<sup>514</sup> For each benchmark a list of qualitative indicators mostly focusing on structural reforms was designed to measure progress.<sup>515</sup> When assessing the constitutional amendments and reforms adopted to strengthen the independence, impartiality and accountability of the judiciary, as addressed by benchmark 1 and 3 of the CVM, the Commission focused on the legal framework in place to restrict the immunity of magistrates, the election process for members of the Supreme Judicial Council and the introduction of provisions on the inspectorate. The number of irregularities reported by the inspectorate and a track record of disciplinary proceedings and sanctions were applied as outcome indicators. Furthermore, the system in place to guarantee the application of objective criteria for the appointment and promotion of judges and the random allocation of cases in courts were continuously monitored under the CVM.<sup>516</sup> Through the Flash Eurobarometer survey conducted under the CVM in 2012, it was shown that there is a strong common interest in rule of law issues by the Bulgarian population. The data gathered through this survey allowed to measure the perceived level of improvements of the judicial system, the fight against corruption and organised crime on the ground, which mirrors the public confidence in the judicial system.<sup>517</sup>

Figure 2 gives an overview of structural, process and outcome indicators used in the Regular Reports and under the CVM to measure the independence and accountability of the judiciary.

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<sup>513</sup> SEC (2002) 1400, 25.

<sup>514</sup> see C (2006) 6550 final, Annex.

<sup>515</sup> European Commission, 'Report on Bulgaria's Progress on Accompanying Measures following Accession' COM (2007) 337 final.

<sup>516</sup> European Commission, 'Bulgaria: Technical Report' (Staff Working Document) SWD (2012) 232 final, 4-19 and European Commission, 'Bulgaria: Technical Report' (Staff Working Document) SWD (2014) 36 final, 3-18.

<sup>517</sup> COM (2012) 411 final, 2-3.

Figure 2: Indicators to measure the independence and accountability of the judiciary

Independence and Accountability of the Judiciary		
Structural indicators	Process indicators	Outcome Indicators
<ul style="list-style-type: none"> <li>• Legal framework in place guaranteeing self-administration and organisation of the judiciary</li> <li>• Legal framework in place guaranteeing and restricting the immunity of magistrates</li> <li>• Provisions in place for the recruitment of judicial staff and the appointment of judges</li> <li>• Provisions in place for assigning cases to individual judges</li> <li>• Codes of Ethics in place</li> <li>• Provisions in place for inspections and performance monitoring of judicial institutions</li> </ul>	<ul style="list-style-type: none"> <li>• Budget available for the judiciary</li> <li>• Salaries of magistrates and judges</li> <li>• Mandatory property and income declarations</li> <li>• Objective and transparent criteria established for the recruitment of judicial staff and for the appointment of judges</li> <li>• Application of a system for random allocation of cases to individual judges</li> <li>• Enforcement of the Code of Ethics</li> <li>• Number of inspections carried out and monitoring reports prepared on the judiciary</li> </ul>	<ul style="list-style-type: none"> <li>• Amendments to the budget proposal of the judiciary by executive bodies</li> <li>• Number of disciplinary proceedings and sanctions against judicial staff</li> <li>• Number of appointments based on transparent and objective criteria</li> <li>• Number of irregularities reported through the inspections</li> <li>• Public confidence in the judicial system</li> </ul>

### *b) The assessment of access to justice*

The Accession Partnership contained several demands with regard to judiciary reform and the Commission demonstrated quite clearly the importance of the restructuring and improvement of the efficiency of Bulgaria's judiciary.<sup>518</sup> Access to justice was measured by the functioning of the judiciary in terms of the structure of the judicial system, the qualification and training of judges, human and material resources, work load in courts and length of court proceedings. With regard to the structure of a three-tier judicial system, the Commission relied on the recommendation of the CoE and the rights granted by the ECHR.<sup>519</sup>

With regard to the efficiency of the judiciary, the Commission concentrated its assessments on issues, like the reduction of backlogs and the length of judicial proceedings and pre-trial detention as well as the improvement of quality of investigation. Emphasis was also put on the improvement of the physical infrastructure and human resources of the judiciary. Progress was measured in terms of new court buildings opened and the computerisation of the courts and equipment in terms of a unified information system. Furthermore, the Commission assessed the number of magistrates and the new administrative positions created to relieve the work of judges and to accelerate court proceedings.<sup>520</sup> The training of judges, prosecutors and administrative staff was an issue consistently monitored in the Regular Reports and was addressed as a priority in the Accession Partnerships, with the goal to ensure the proper functioning of the judicial system. The Commission's reports were very detailed in assessing the availability of training programmes for new and existing staff within the judiciary and funding of the

<sup>518</sup> Kochenov (n 479) 249-51.

<sup>519</sup> cf CoE Committee of Ministers, 'Recommendation Concerning the Introduction and Improvement of the Functioning of Appeal Systems and Procedures in Civil and Commercial Cases' R (95) 5 and Article 2 of the Protocol No. 7 to the ECHR concerning the right of appeal in criminal matters.

<sup>520</sup> SEC (2002) 1400, 23-25 and SEC (2003) 1210 final, 19.

training institution.<sup>521</sup> The Commission particularly recognised the special trainings in EU law provided to the judicial staff as an indicator to increase the professionalism and competence of the judiciary.<sup>522</sup>

Also, the complexity of legal procedures and the availability of legal aids were considered as contributing factors for access to justice. While the legal framework for legal aid was found to be adequate, the information gathered through surveys indicated that a large part of defendants did not actually have legal representation at all stages of judicial proceedings.<sup>523</sup> This was seen as an indicator for insufficient legal aid and, therefore, had to be addressed in the priorities of the Accession Partnership of 2003.<sup>524</sup>

The assessment of access to justice and efficiency of the judiciary was continued under the CVM after Bulgaria's accession to the EU. As requested under benchmark 2 and 3, Bulgaria had to ensure a more transparent and efficient judicial process and to enhance professionalism, accountability and efficiency of the judiciary. The indicators used to measure the progress in meeting these benchmarks addressed the procedural framework in place and the institutional set-up to speed up civil and criminal court proceedings and to ensure effective investigation in criminal matters. The consistency of human resource planning and the strategies to reduce the workload of judges were analysed by the Commission through process and outcome indicators. Also the quality of the trainings provided for judicial staff was assessed with regard to the embedment in the overall judicial structure.<sup>525</sup> The perceptions of judicial shortcomings at the level of the Bulgarian population could be measured based on the Eurobarometer survey conducted in 2012 and was assessed by the Commission as an outcome indicator for the judicial reforms in the CVM Progress Report of July 2012.<sup>526</sup>

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<sup>521</sup> SEC (2003) 1210 final, 19.

<sup>522</sup> SEC (2004) 1199, 18.

<sup>523</sup> SEC (2002) 1400, 25 and 30.

<sup>524</sup> Council Decision (EC) 2003/396 of 19 May 2003 on the Principles, Priorities, Intermediate Objectives and Conditions Contained in the Accession Partnership with Bulgaria [2003] OJ L145/1, Annex.

<sup>525</sup> SWD (2012) 232 final, 8-19 and SWD (2014) 36 final, 4-18.

<sup>526</sup> COM (2012) 411 final, 2-3.

Figure 3 gives an overview of the structural, process and outcome indicators that were used in the Regular Reports and under the CVM to measure access to justice and efficiency of the judiciary in Bulgaria.

Figure 3: Indicators to measure access to justice

Access to Justice		
Structural indicators	Process indicators	Outcome Indicators
<ul style="list-style-type: none"> <li>• Legal framework in place guaranteeing a three-tier jurisdiction</li> <li>• Legal framework in place facilitating quicker proceedings</li> <li>• Legal provisions in place to provide human resources to courts</li> <li>• Legal framework in place ensuring the qualification and training of judicial staff</li> <li>• Legal framework in place to guarantee legal aid</li> </ul>	<ul style="list-style-type: none"> <li>• Budget available for the judiciary</li> <li>• Speed of execution of rulings</li> <li>• Quality of investigation</li> <li>• Human resources available in courts</li> <li>• Material conditions in courts (court buildings, courts equipped with computer systems, unified information systems in place etc.)</li> <li>• Availability of trainings for the judicial staff</li> <li>• Budget available to provide free legal aid</li> </ul>	<ul style="list-style-type: none"> <li>• Length of judicial proceedings</li> <li>• Length of pre-trial detention</li> <li>• Backlog of cases</li> <li>• Transparent and efficient handling of cases</li> <li>• Number of cases sent back to investigation</li> <li>• Number of trainings attended by judicial staff</li> <li>• Number of defendants without legal representation in judicial proceedings</li> <li>• Perceptions of judicial shortcomings</li> </ul>

Judicial reform in terms of the independence and accountability of the judiciary and access to justice has proven to be one of the most difficult issues in Bulgaria's accession process.<sup>527</sup> The Commission continuously addressed these issues in the Regular Reports. Over the years, the scope of the reports was more and more broadened and the issues selected for monitoring were described in more detail. However, there was no clear list of indicators that would have allowed for consistent monitoring of these areas. Only rarely quantifiable measures were used to document progress or setbacks. The assessments conducted to measure the progress in addressing the benchmarks under the CVM did follow a standardised set of mostly structural and process indicators. The reports also made reference to the results of previous assessments. This ensured the comparability of the progress over time. In this way, the methodology applied to conduct the assessments under the CVM was more transparent and consistent than the methodology applied in the Regular Reports that were issued before accession.

## B. The case of Croatia

The policy of conditionality, introduced in the fifth enlargement round, was also applied and gained even more significance in the enlargement policy towards the Western Balkan countries. In the accession process with Croatia, the EU pursued a broader agenda of conditionality reflecting also the legacy of ethnic conflicts in the region.

### 1. The framework for negotiations

The Luxembourg General Affairs Council in April 1997 adopted conclusions on the application of conditionality, with a view to developing a coherent EU strategy for its relations with the countries in the region of Former Yugoslavia.<sup>528</sup> The EU strategy was intended to serve as an incentive and not as an obstacle to fulfil certain general conditions that were applied to all countries in South-Eastern Europe. The

<sup>527</sup> Daniel Smilov, 'Bulgaria: The Discontents and Frustrations of a Newly Consolidated Democracy' in Morlino L and Sadurski W (eds), *Democratization and the European Union: Comparing Central and Eastern European Post-Communist Countries* (Routledge 2010) 115.

<sup>528</sup> Council of the European Union, 'Conclusions from the General Affairs Council Meeting' (Luxembourg, April 1997) Annex III.

conditionality defined by the Council included the requirements of co-operation with the International Criminal Tribunal for the former Yugoslavia (ICTY) and regional co-operation. Furthermore, specific conditions were set as obligations for certain countries only. The Commission guaranteed an operational cooperation between the EU and the Western Balkans through the Stabilisation and Association Process (SAP) for Countries of South-Eastern Europe to make further progress on their way to EU membership.<sup>529</sup>

The SAP was aimed to improve the situation in the region by assisting the creation of effective and accountable law enforcement institutions and improving the border control and migration management. These reforms were seen as a pre-condition to prepare for membership. A core element of the SAP were the Stabilization and Association Agreements (SAAs), which provided the formal contractual relationship between the EU and the potential candidate countries to support the adoption of the EU standards and necessary rules.<sup>530</sup> The Feira European Council in June 2000 reiterated its support for the reforms in the Western Balkans and confirmed the objective of ‘the fullest possible integration’ of the countries participating in the SAP by acknowledging them as ‘potential candidates for EU membership.’<sup>531</sup> To support the Western Balkan countries in the implementation of the relevant reforms in the SAP, the EU provided assistance through the Community Assistance for Reconstruction, Development and Stabilisation (CARDS) programme in the period 2000 to 2006.<sup>532</sup>

Taking account of the experiences of the fifth enlargement round, the Brussels European Council in 2004<sup>533</sup> requested that a general framework for negotiation had to be agreed in advance of the negotiations. Within the Enlargement Strategy 2004,<sup>534</sup> the Commission proposed the negotiating framework for Croatia and in this context introduced benchmarks as a new tool to monitor the progress in the accession process. The purpose of benchmarks was to improve the quality of negotiations, as they are providing quantifiable measures referred to the legislative alignment with the *acquis* or to a track record in the implementation. Upon proposal from the Commission, benchmarks were set to be met by the candidate country to open negotiations as well as to provisionally close the chapters. While opening benchmarks concerned key preparatory steps for the future alignment with the *acquis* requirements, closing benchmarks reflected the need for legislative measures, administrative or judicial reforms to implement the *acquis*. The benchmarks were regarded as incentives for the candidate countries to stimulate the necessary reforms at an early stage of the accession negotiations. The provisions of the negotiating framework also provided for the suspension of accession negotiation in case of ‘serious and

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<sup>529</sup> European Commission, ‘On the Stabilisation and Association Process for Countries of South-Eastern Europe’ (Communication) COM (1999) 235 final.

<sup>530</sup> Florian Trauner, ‘From Membership Conditionality to Policy Conditionality: EU External Governance in South Eastern Europe’ (2009) 16/5 *Journal of European Public Policy* 774, 779.

<sup>531</sup> European Council, ‘Conclusions of the Presidency’ (Santa Maria da Feira, June 2000) para. 67.

<sup>532</sup> Council Regulation (EC) 2666/2000 of 5 December 2000 on Assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia repealing Regulation (EC) No 1628/96 and amending Regulations (EEC) No 3906/89 and (EEC) No 1360/90 and Decisions 97/256/EC and 1999/311/EC [2000] OJ L306/1, Art. 2.

<sup>533</sup> European Council ‘Presidency Conclusions’ (Brussels, June 2004) para. 34.

<sup>534</sup> European Commission, ‘Strategy Paper of the European Commission on Progress in the Enlargement Process’ (Communication) COM (2004) 657 final, 7.

persistent breach of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.’<sup>535</sup>

The European Partnerships and Accession Partnerships remained a central element of the accession strategy. The Partnerships were setting out the priorities identified for each country in the Commission’s Progress Reports and provided the framework for the EU assistance.<sup>536</sup> As of 2007, the CARDS programme and the other programmes providing assistance to candidate countries were replaced by one single instrument, namely the IPA.<sup>537</sup> Assistance granted under the IPA was linked to the progress and needs identified through the Commission’s evaluations and was subject to a suspension clause for the case of failure to make sufficient progress in the accession process.<sup>538</sup>

## 2. The monitoring mechanism applied to Croatia

Croatia signed the SAA with the EU in 2001 and started the preparations for membership. The institutional framework of the SAA and the negotiating framework adopted by the Council provided for the continuous monitoring of Croatia’s progress in fulfilling the obligations. The Commission made use of the monitoring system that had been developed in the previous enlargement rounds and added new monitoring tools like the Screening Reports or Interim Reports to measure the level of realisation of the rule of law in Croatia. An overview of the different monitoring tools used by the Commission during the accession process of Croatia is presented in Figure 4. The monitoring tools were used throughout the different stages of the accession process to assess the progress towards fulfilling the obligations and implementing the political priorities of the SAA, the European Partnership and the Accession Partnerships between the EU and Croatia.

Figure 4: The monitoring mechanism applied to Croatia



### a) The Opinion on the Application for Membership

From 2002 on, the Commission was evaluating the SAP for South-Eastern Europe in annual reports.<sup>539</sup> Croatia presented its application for membership in 2003. Already in 2004, the Commission recommended

<sup>535</sup> European Commission, ‘Enlargement Strategy and Main Challenges 2006-2007’ (Communication) COM (2006) 649, 6.

<sup>536</sup> *ibid*, 7.

<sup>537</sup> Council Regulation (EC) 1085/2006 of 17 July 2006 Establishing an Instrument for Pre-Accession Assistance (IPA) [2006] OJ L210/82.

<sup>538</sup> European Union, ‘Instrument for Pre-Accession Assistance (IPA)’ (20 February 2012) <[http://europa.eu/legislation\\_summaries/agriculture/enlargement/e50020\\_en.htm](http://europa.eu/legislation_summaries/agriculture/enlargement/e50020_en.htm)> accessed 3 July 2014.

<sup>539</sup> European Commission, ‘The Stabilisation and Association Process for South East Europe: First Annual Report’ COM (2002) 163 final, 19 and European Commission, ‘The Stabilisation and Association Process for South East Europe: Second Annual Report’ COM (2003) 139 final, 30.

to open accession negotiations and submitted a favourable Opinion on Croatia's Application for Membership.<sup>540</sup> The methodology adopted by the Commission in drawing up this Opinion was based on the experience from earlier enlargement rounds and the structure of the Opinion followed the Copenhagen criteria and the conditionality established by the Luxembourg General Affairs Council in April 1997. The judiciary mainly was assessed as part of the political criteria. Other rule of law elements were covered by the *acquis* criteria in chapter 24, dealing with 'Co-operation in the field of justice and home affairs'.<sup>541</sup>

Croatia was recognised as a candidate country at the Brussels European Council in June 2004 with the prospective of launching the accession negotiations in March 2005. Also the SAA finally entered into force on 1 February 2005, after an enlargement protocol had been signed in December 2004.<sup>542</sup>

#### *b) The screening and the benchmarking process*

At the same time with the formal opening of the accession negotiations, the Luxembourg General Affairs Council in October 2005 adopted the negotiating framework for Croatia, setting out the principles governing the negotiations and providing a preliminary indicative list of negotiation chapters. The *acquis* was organised in a list of 33 negotiation chapters plus two chapters concerning institutions and other issues. The *acquis* in the field of 'justice, freedom and security' was negotiated in chapter 24 that covered issues like border control, visas, external migration, asylum, police cooperation, the fight against organised crime and judicial cooperation in criminal and civil matters. The negotiating framework provided for a new chapter 23, dealing with 'judiciary and fundamental rights', under which the political issues of the rule of law were addressed. As a result of the adoption of the new negotiating framework, the rule of law was no longer regarded solely as part of the political criteria but was also conceived as an integral part of the *acquis*, which should allow the Commission to keep the crucial areas of the rule of law, notably judiciary and fundamental rights, under close scrutiny.<sup>543</sup>

Immediately after the formal opening of accession negotiations in 2005, the Commission introduced the process of screening to obtain preliminary indications of the accession criteria for each negotiation chapter. The process of screening was completed in 2006. Separate Screening Reports were issued for each negotiation chapter. After a chapter had been screened, the Council decided on whether to open a chapter for negotiations or on the benchmarks to be met by the candidate country before opening it.<sup>544</sup>

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<sup>540</sup> European Commission, 'Opinion on Croatia's Application for Membership of the European Union' (Communication) COM (2004) 257 final, 119.

<sup>541</sup> *ibid*, 105-109.

<sup>542</sup> European Union, 'Press Release: The Stabilisation and Association Agreement with Croatia enters into force today' (1 February 2005) <[http://europa.eu/rapid/press-release\\_IP-05-122\\_en.htm](http://europa.eu/rapid/press-release_IP-05-122_en.htm)> accessed 9 August 2014.

<sup>543</sup> Christophe Hillion, 'Enlarging the European Union and Deepening its Fundamental Rights Protection' (2013) 11 European Policy Analysis <[http://www.sieps.se/sites/default/files/2013\\_11epa.pdf](http://www.sieps.se/sites/default/files/2013_11epa.pdf)> accessed 2 July 2014, 4.

<sup>544</sup> COM (2006) 649, 6.

After Croatia had made sufficient progress in fulfilling the opening benchmarks, the EU's common position for the opening of the negotiating chapter was adopted by the Council on 25 June 2010.<sup>545</sup>

Together with two other chapters, the chapter on judiciary and fundamental rights was among the last three negotiating chapters. In the EU common position the closing benchmarks that had to be met to provisionally close the chapter, were tabled. The Council set 10 closing benchmarks to be fulfilled by Croatia in the field of the judiciary and fundamental rights. Several closing benchmarks of chapter 23 were addressing the judicial system, very vaguely requesting Croatia to strengthen the independence, accountability, impartiality and professionalism of the judiciary and to improve the efficiency of the judiciary.<sup>546</sup> In this way, the benchmarks were not reflecting specific standards or targets, but were rather based on broad concepts that had to be further defined through specific indicators in the Commission's reports. However, from the available sources it does not appear that the development of the closing benchmarks was based on 'clear concepts, measurement methods, indicators, collection methods or time frames'.<sup>547</sup>

### *c) The Progress Reports on Croatia*

A mechanism for the implementation, management and monitoring of all areas of relations between the EU and Croatia was established through the institutional framework of the SAA.<sup>548</sup> The implementation of the obligations under the SAA was monitored in the annual Progress Reports together with the criteria for membership as defined by the Copenhagen European Council. The Commission presented annual Progress Reports on Croatia from 2005 to 2011. In drawing up the Progress Reports, the Commission followed the methodology applied in the previous enlargement rounds. Rule of law was covered under the political criteria for membership and in the chapters 23 and 24 of the acquis. In this way, the results of the assessment of the judicial system were presented in two sections of the report and cross-reference was made between these two sections. The opening and closing benchmarks that were introduced in the accession negotiations for the specific negotiation chapters would have provided an instrument to measure progress against. However, the Commission did not make reference to the closing benchmarks in the annual Progress Reports. This made the overall process of progress assessment quite untransparent.<sup>549</sup> In 2011, the Commission presented an Interim Report on the negotiation chapter 23 to describe the progress made in meeting the ten closing benchmarks.<sup>550</sup>

Based on the main priorities identified in the Progress Reports, the Commission proposed Accession Partnerships for Croatia. Two Accession Partnerships with Croatia were adopted by the Council in 2006

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<sup>545</sup> European Parliament, 'Progress in EU-Croatia accession negotiations at a glance' (5 November 2014) <[http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/d-hr/dv/1129\\_07\\_/1129\\_07\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-hr/dv/1129_07_/1129_07_en.pdf)> accessed 2 July 2014.

<sup>546</sup> European Commission, 'Interim Report on Reforms in Croatia in the Field of Judiciary and Fundamental Rights (Negotiation Chapter 23)' COM (2011) 110, 2-4.

<sup>547</sup> Wolfgang Benedek and others 'Mainstreaming Human and Minority Rights in the EU Enlargement with the Western Balkans' (Study, European Parliament 2012) 69.

<sup>548</sup> European Commission, 'Croatia 2005 Progress Report' SEC (2005) 1424, 4.

<sup>549</sup> Benedek and others (n 547) 68.

<sup>550</sup> COM (2011) 110, 2-4.

and 2008.<sup>551</sup> The financial assistance under the PHARE and CARDS programs was well focused on the Croatian accession priorities as defined in the partnerships and addressed the specific negotiation requirements in terms of opening and closing benchmarks.<sup>552</sup> As from 2007, Croatia has benefited from financial assistance under the IPA that was intended to support the preparations for accession. The Accession Partnerships provided a framework to determine the different areas to which funds were to be allocated and at the same time served as a checklist against which to measure progress in the annual reports.<sup>553</sup>

In preparing the Progress Reports, the Commission utilised numerous sources of information. Croatia was given the possibility to provide information on the progress made since the previous report and also the information provided by Croatia within the framework of the SAA was considered by the Commission. Various peer reviews and technical consultations have taken place to assess Croatia's administrative capacity. Furthermore, the deliberations and reports from the EU institutions, various international organisations and NGO's were considered.<sup>554</sup>

#### *d) Continued monitoring*

The accession negotiations were closed at the thirteenth meeting of the Accession Conference with Croatia on 30 June 2011 by closing the last four negotiating chapters.<sup>555</sup> The Council pointed out the considerable progress made with regard to fulfilling the commitments under chapter 23, however, the importance of the continuation to develop a track record of implementation and to further demonstrate concrete results was emphasised. Continuous effort was necessary for Croatia to meet the closing benchmarks of chapter 23, covering different areas related to the judiciary and fundamental rights. The progress in the respective fields was assessed by the Commission and presented in Monitoring Reports every six months up until the time of accession.

The assessment of the Commission was based on information gathered through own analysis, the input provided by Croatia and by Member States as well as information from international and civil society organisations. Furthermore, the Commission used specific Monitoring Tables to update its findings for the reports. These Monitoring Tables were working tools that were used to following up the details on all of Croatia's commitments from the negotiations.<sup>556</sup> Also in the last Monitoring Report presented in March 2013, the Commission identified several areas with regard to the judiciary and fundamental rights, for

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<sup>551</sup> Council Decision (EC) 2006/145 of 20 February 2006 on the Principles, Priorities and Conditions contained in the Accession Partnership with Croatia and repealing Decision 2004/648/EC [2006] OJ L55/30 and Council Decision (EC) 2008/119 of 12 February 2008 on the Principles, Priorities and Conditions contained in the Accession Partnership with Croatia and repealing Decision 2006/145/EC [2008] OJ L42/51.

<sup>552</sup> European Commission, 'Country Sections & Additional Information' (Staff Working Paper) SEC (2010) 1604, 22.

<sup>553</sup> Benoit-Rohmer and others (n 425) 86.

<sup>554</sup> SEC (2005) 1424, 4 and Croatia Progress Reports of the following years.

<sup>555</sup> Council of the European Union, 'Thirteenth Meeting of the Accession Conference with Croatia at Ministerial level' (Press Release, June 2011).

<sup>556</sup> European Commission, 'Comprehensive Monitoring Report on Croatia' (Staff Working Document) SWD (2012) 338 final, 5.

which further efforts were necessary in order to fulfil the commitments.<sup>557</sup> However, unlike in the case of Bulgaria, the accession of Croatia was not made subject to the monitoring of the CVM, as benchmarks were to be reached before accession.<sup>558</sup>

### 3. The indicators applied to measure the rule of law in Croatia

Even though the Commission made use of new monitoring tools, like the Interim Report, to measure the rule of law in the accession process of Croatia, the indicators applied closely resembled those of previous enlargement rounds. With the introduction of benchmarks in the accession negotiations, the Commission made use of a new tool to assess the progress made towards achieving a specific standard that had to be fulfilled prior to accession. To define the standards against which the independence, impartiality and efficiency of the judiciary were measured, the Commission made reference to the definition of the content of these notions in the jurisprudence of the European Court of Human Rights, as this is an accepted reference for the EU acquis under Art. 2. In particular this definition included the following criteria:

Courts must be established by law; there shall be no discrimination in the appointment procedures of judges; the judiciary must not be influenced in its decision-making by either the executive or the legislature; judges must act impartially and be seen to do so; their conditions of tenure must be adequately ensured by law; the grounds for disciplinary action or removal from the post must be limited and laid down in the law.<sup>559</sup>

Furthermore, the Commission used the recommendation from international organisations as guidelines to identify a common European standard in the field of independence and accountability of the judiciary, efficiency of the judicial system and access to justice.<sup>560</sup> The progress made by Croatia in fulfilling the membership conditionality was assessed by the Commission against these standards in the annual Progress Reports. The assessments of the judiciary provided in chapter 23 of the reports was quite consistently structured along the areas ‘independence of the judiciary’, ‘impartiality’, ‘professionalism and competence’, ‘efficiency of the judiciary’ and ‘judicial reform strategy’, which allowed to track changes over time in these areas.<sup>561</sup>

#### a) The assessment of the independence and accountability of the judiciary

The cooperation in the field of justice and home affairs established under the SAA specifically focused on the reinforcement of institutions and the consolidation of the rule of law. The independence of the judiciary was one of the priority areas identified in the SAA.<sup>562</sup> Also in the Accession Partnerships of 2006

<sup>557</sup> European Commission, ‘Monitoring Report on Croatia's Accession Preparations’ (Communication) COM (2013) 171 final, 4-10.

<sup>558</sup> Carrera, Guild and Hernanz (n 405) 9.

<sup>559</sup> European Commission, ‘Screening Report Croatia: Chapter 23 – Judiciary and fundamental rights’ (2007), 2.

<sup>560</sup> In the ‘Screening Report of Croatia: Chapter 23’ (n 559) the European Commission refers to the CoE Committee of Ministers, ‘Recommendation on the Independence, Efficiency and Role of Judges’ R (94) 12 and to the CoE Conference of Prosecutors General of Europe, ‘European Guidelines on Ethics and Conduct for Public Prosecutors (the Budapest Guidelines)’ CPGE (2005) 05.

<sup>561</sup> European Commission, ‘Croatia 2006 Progress Report’ (Staff Working Document) SEC (2006) 1385, 49-51 and Croatia Progress Reports of the following years.

<sup>562</sup> Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part [2005] OJ L26/3 (SAA Croatia), Art. 75.

and 2008, 'judicial reform' and the establishment of 'an open, fair and transparent system of recruitment, evaluation, promotion and disciplinary measures in the judiciary' were identified as priorities to improve the independence, impartiality and accountability of the judiciary.<sup>563</sup>

In its assessment of the independence and accountability of the judiciary, the Commission has used very much the same indicators that had already been applied to Bulgaria. The institutional independence of the judiciary was measured through structural indicators evaluating the legal framework in place for judicial self-administration and the budgetary independence of the judiciary. In terms of accountability, the regulations on the appointment and dismissal of judges and the responsibility for disciplinary proceedings were examined. These parameters were measured through process indicators, assessing the structure and functioning of the State Judicial Council.<sup>564</sup> As of 2006, the Commission measured the number of disciplinary proceedings conducted by the State Judicial Council and the sanctions applied against judges, like reprimands, fines and dismissals or acquittals.<sup>565</sup> However, in 2009, the Commission criticised the lack of transparency in disciplinary proceedings and the absence of legal means for the Ministry of Justice to verify the declarations of assets by judges and prosecutors.<sup>566</sup>

The introduction of a Code of Ethics was assessed as a structural indicator to improve the accountability and impartiality of the judiciary.<sup>567</sup> The impartiality and independence of the individual judges was measured through the regulations in place for recruitment of judicial staff and the appointment to permanent positions, the regulations on the immunity of judges and the salaries of magistrates and judges. Shortcomings in the application of transparent criteria for the appointment of judges and prosecutors were criticised throughout numerous reports by the Commission.<sup>568</sup> Only in 2010, the Commission recognised the improvements made in this regard through the revision of the selection procedure for new judges, the application of transparent and objective selection criteria and the abolition of probation periods for judges. However, the Commission requested Croatia to establish a track record of the appointments based on the revised procedure and the new selection criteria in practice. Also the improvements in terms of judicial inspections were recognised in the Progress Report.<sup>569</sup>

The impartiality was a specific issue of the judicial system in Croatia, as there was a persisting ethnic bias against Serbs in local courts. In order to ensure a random allocation of cases, the implementation of an integrated case management system in all courts was requested and continuously assessed by the Commission.<sup>570</sup>

Benchmarks imposed for the opening and closing of specific negotiation chapters were a new instrument against which the progress of the implemented reforms could be measured. In the Monitoring Reports,

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<sup>563</sup> Decision 2006/145, Annex; Decision 2008/119, Annex.

<sup>564</sup> SEC (2005) 1424, 83.

<sup>565</sup> SEC (2006) 1385, 49, European Commission, 'Croatia 2007 Progress Report' (Staff Working Document) SEC (2007) 1431, 48 and European Commission, 'Croatia 2008 Progress Report' (Staff Working Document) SEC (2008) 2694, 51.

<sup>566</sup> European Commission, 'Croatia 2009 Progress Report' (Staff Working Document) SEC (2009) 1333, 51.

<sup>567</sup> SEC (2007) 1431, 48 and SEC (2008) 2694, 51.

<sup>568</sup> SEC (2007) 1431, 48; SEC (2008) 2694, 51 and SEC (2009) 1333, 51.

<sup>569</sup> European Commission, 'Croatia 2010 Progress Report' (Staff Working Document) SEC (2010) 1326, 47.

<sup>570</sup> SEC (2005) 1424, 16 and 83-84; SEC (2006) 1385, 49-50 and SEC (2010) 1326, 48.

the Commission assessed the continued effort to meet these closing benchmarks by applying similar indicators as in the annual Progress Reports. The legal framework guaranteeing judicial self-administration, the systems for recruitment and appointment of judges and the limits to the immunity of judges were evaluated. To monitor the progress in addressing the specific benchmarks, the Commission relied very much on process and outcome indicators, focusing on the implementation of measures and the establishment of solid track records.<sup>571</sup> The Commission requested Croatia to establish a track record of the application of uniform, transparent and objective criteria in recruiting and appointing judges and prosecutors as well as of the conduct of disciplinary procedures against errant judicial officials. Furthermore, the implementation of the system for asset declarations for judges and the application of the code of conduct were monitored in the reports.<sup>572</sup>

Figure 5 gives an overview of structural, process and outcome indicators applied in the Progress Reports and Monitoring Reports on Croatia to measure the independence and accountability of the judiciary.

**Figure 5: Indicators to measure the independence and accountability of the judiciary**

Independence and Accountability of the Judiciary		
Structural indicators	Process indicators	Outcome Indicators
<ul style="list-style-type: none"> <li>• Legal framework in place guaranteeing self-administration and organisation of the judiciary</li> <li>• Legal framework in place guaranteeing and restricting the immunity of magistrates</li> <li>• Provisions in place for the recruitment of judicial staff and for the appointment of judges</li> <li>• Provisions in place for assigning cases to individual judges</li> <li>• Codes of Ethics in place</li> <li>• Provisions in place for evaluating the impartiality of the judiciary</li> <li>• Provisions in place for judicial inspections</li> </ul>	<ul style="list-style-type: none"> <li>• Budget available for the judiciary</li> <li>• Salaries of magistrates and judges</li> <li>• Objective and transparent criteria established for the recruitment and appointment of judges and prosecutors</li> <li>• Implementation of an integrated case management system in courts</li> <li>• Enforcement of the Code of Ethics</li> <li>• Methodology adopted to evaluate judges for the purposes of promotion</li> <li>• Mandatory declarations of assets</li> <li>• Legal means to verify the declarations of assets by judges and prosecutors</li> <li>• Number of inspections carried out</li> </ul>	<ul style="list-style-type: none"> <li>• Reduction of risk of political interference in the judiciary</li> <li>• Number of appointments based on transparent and objective criteria</li> <li>• Number of disciplinary proceedings and sanctions against judicial staff</li> <li>• Number of irregularities reported through the inspections</li> </ul>

#### **b) The assessment of access to justice**

The improvement of the 'effectiveness' of the judiciary and the 'training of the legal professions' were areas of particular focus under the SAA.<sup>573</sup> The Accession Partnerships of 2006 and 2008 contained as priorities for the judicial system the reduction of backlog of cases, the rationalisation of court organisation and development of modern information technology systems, as well as the enhancement of professionalism through training and the proper execution of court rulings.<sup>574</sup> The progress in addressing these priorities was assessed by the Commission in the annual Progress Reports in chapter 23. Similar to the indicators applied in the accession process of Bulgaria, the efficiency of the judiciary was measured in

<sup>571</sup> COM (2011) 110, 2.

<sup>572</sup> COM (2011) 110, 3; SWD (2012) 338 final, 33 and COM (2013) 171 final, 4.

<sup>573</sup> SAA Croatia, Art. 75.

<sup>574</sup> Decision 2008/119, Annex and Decision 2006/145, Annex.

terms of the total budget provided for the judicial system, the infrastructure and equipment of courts, the number of judges and other judicial staff and the average duration of proceedings and backlog of unresolved cases. The Commission provided quantitative measures for these indicators in the Progress Reports and monitored the changes in the figures over time. Also the availability of Alternative Dispute Resolution methods and the reduction of the complexity of legal procedures were assessed as structural indicators to increase the efficiency of the judicial system.<sup>575</sup> The training programmes provided for judicial staff were assessed as a contribution to enhance professionalism and quality of the judiciary. Also the budget allocation for the Judicial Academy was considered as a quantitative indicator in the assessment of the Commission.<sup>576</sup> The Commission especially emphasised the importance of initial training and trainings covering matters of EU law in its reports.<sup>577</sup> The access to justice in terms of the legal framework in place to guarantee legal aid was not only assessed in chapter 23 of the Progress Reports, but also under the aspect of 'Civil and Political Rights' and in other chapters of the *acquis*.<sup>578</sup>

One of the closing benchmarks of chapter 23 specifically requested Croatia 'to improve the efficiency of the judiciary'. Under this benchmark, the reduction of the backlog of cases and of delay in court cases, the introduction of new methods of enforcement as well as the improvement of human resources and of the physical infrastructure and computerisation of courts were important parameters to measure against the progress of reform implementation.<sup>579</sup> The Commission continuously monitored the roll-out of the integrated case management system and the rules governing the mobility and transfer of judges. Also the performance of the Judicial Academy in terms of professional training programmes provided was assessed in the biannual Monitoring Reports. However, the successful completion of the priority areas identified under this closing benchmark could only be reported in the 2013 Monitoring Report.<sup>580</sup>

Figure 6 gives an overview of the structural, process and outcome indicators that were used in the Progress Reports and Monitoring Reports to measure access to justice and efficiency of the judiciary in Croatia.

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<sup>575</sup> SEC (2005) 1424, 84-86; SEC (2006) 1385, 50-51; SEC (2008) 2694, 52-53 and SEC (2010) 1326, 48.

<sup>576</sup> SEC (2005) 1424, 84; SEC (2006) 1385, 50 and SEC (2007) 1431, 49.

<sup>577</sup> SEC (2009) 1333, 51 and SEC (2010) 1326, 47.

<sup>578</sup> SEC (2006) 1385, 54 and SEC (2007) 1431, 11 and 60.

<sup>579</sup> COM (2011) 110, 3.

<sup>580</sup> SWD (2012) 338 final, 33-34 and COM (2013) 171 final, 4-5.

Figure 6: Indicators to measure access to justice

Access to Justice		
Structural indicators	Process indicators	Outcome Indicators
<ul style="list-style-type: none"> <li>• Legal framework in place facilitating quicker proceedings</li> <li>• Availability of Alternative Dispute Resolution methods</li> <li>• Legal provisions in place to provide human resources to courts and for the mobility of judges</li> <li>• Legal framework in place ensuring the qualification and training of judicial staff</li> <li>• Legal framework in place to guarantee legal aid</li> </ul>	<ul style="list-style-type: none"> <li>• Budget available for the judiciary</li> <li>• Speed of execution of rulings</li> <li>• Human resources available in courts</li> <li>• Material conditions in courts (physical infrastructure, computerisation of courts, integrated case management system in place etc.)</li> <li>• Availability and quality of professional trainings provided to the judicial staff</li> <li>• Availability of budget for the Judicial Academy</li> </ul>	<ul style="list-style-type: none"> <li>• Transparent and efficient handling of cases</li> <li>• Backlog of cases</li> <li>• Length of investigation phase in criminal procedures</li> <li>• Length of judicial proceedings</li> <li>• Number of trainings attended by judicial staff</li> </ul>

Overall, the independence, accountability and efficiency of the judiciary and access to justice were important issues tackled in the accession negotiations with Croatia. The prospect of EU membership was a powerful incentive for Croatia to bring about the requested reforms under the SAA and the Accession Partnerships.<sup>581</sup> The Commission continuously monitored the progress in fulfilling the required standards in its Progress Reports and Monitoring Reports. The transparency in measuring progress over time has been increased by following a more structured approach and by consistently applying the same indicators. However, the assessment of the progress towards fulfilling the closing benchmarks, that had been introduced as a new monitoring tool by the Commission, lacked consistent measurement methods. The underlying concepts and objectives were not well-defined and no clear reference to the benchmarks was made in the Progress Reports.<sup>582</sup> Only in the Monitoring Reports, the progress towards fulfilling the closing benchmarks was evaluated in a more consistent and transparent manner by applying a set of comprehensive indicators directly related to the benchmarks defined.

### C. The case of Montenegro

As one of the Western Balkan countries, Montenegro's perspective for EU membership is based on the decision of the Feira European Council in 2000 and on the *'Thessaloniki Agenda for the Western Balkans'* that had been endorsed by the Thessaloniki European Council in 2003.<sup>583</sup> Even before declaring its independence on 3 June 2006, Montenegro maintained relations with the EU as part of the state union Serbia and Montenegro. The European Partnership<sup>584</sup> and the SAA<sup>585</sup> with the new state Montenegro were

<sup>581</sup> Trauner (n 530) 782-83.

<sup>582</sup> Benedek and others (n 547) 69.

<sup>583</sup> European Council, 'Presidency Conclusions' (Thessaloniki, June 2003).

<sup>584</sup> Council Decision (EC) 2007/49 of 22 January 2007 on the Principles, Priorities and Conditions contained in the European Partnership with Montenegro [2007] OJ L20/16.

<sup>585</sup> Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Montenegro, of the other part, signed in Luxembourg, 15 October 2007 (SAA Montenegro).

signed in 2007, laying down the formal framework for relations and for Montenegro's way towards EU membership.

### 1. The new approach to negotiations

To take account of the experience acquired from previous accession negotiations, the Commission proposed a new Enlargement Strategy based on consolidation, conditionality and communication in its Enlargement Strategy Paper of 2006. This strategy formed the basis for 'a renewed consensus on enlargement' that called to address issues related to the rule of law at an early stage of the accession process.<sup>586</sup> The renewed consensus on enlargement was confirmed by the Brussels European Council in 2006, where also the EU's commitment towards the Western Balkan states was renewed. At the same time, the European Council reiterated 'that each country's progress towards the European Union depends on its individual efforts to comply with the Copenhagen criteria and the conditionality of the Stabilisation and Association Process.'<sup>587</sup> In the light of this, the Commission intensified the dialogue on the rule of law with the candidate and potential candidate countries and extended the use of peer missions. The use of benchmarking in the accession process served as an important catalyst for reforms and gave the clear obligation, to establish a convincing and credible track record.<sup>588</sup>

To acknowledge the importance attached to the area of the rule of law and fundamental rights in the accession process with the Western Balkan countries, the chapters 23 and 24 were put in the forefront of the accession negotiations. This new approach should allow maximum time for establishing the necessary legislation, institutions and a solid track record of implementation.<sup>589</sup> With the Council's endorsement of the Commission's proposed new approach, Montenegro was the first enlargement country, where both chapters were to be tackled early in the negotiations.<sup>590</sup> In the new approach to negotiations, the rule of law and democratic governance are firmly anchored at the heart of the accession process.<sup>591</sup> This new approach has increased the credibility of the enlargement policy through fair conditionality, established criteria and the principle of own merit.<sup>592</sup>

The new approach to negotiations was also reflected in the Commission's proposal for the new IPA II instrument for the multi-annual financial framework 2014 to 2020. Stronger linkages with the priorities identified in the Enlargement Strategy should guarantee an improved strategic focus of the pre-accession financial assistance provided to enlargement countries. Through country and multi-country strategy

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<sup>586</sup> COM (2006) 649.

<sup>587</sup> European Council 'Presidency Conclusions' (Brussels, December 2006), para. 8.

<sup>588</sup> European Commission, 'Enlargement Strategy and Main Challenges 2010 – 2011' (Communication) COM (2010) 600 final, 7.

<sup>589</sup> European Commission, 'Enlargement Strategy and Main Challenges 2011-2012' (Communication) COM (2011) 666 final, 5.

<sup>590</sup> Council of the European Union, 'Conclusions on Montenegro of the General Affairs Council Meeting' (Luxembourg, June 2012).

<sup>591</sup> Council of the European Union 'Conclusions on Enlargement and Stabilisation and Association Process of the General Affairs Council Meeting' (Brussels, December 2012), 2 and European Commission, 'Enlargement Strategy and Main Challenges 2012-2013' (Communication) COM (2012) 600 final, 2-4.

<sup>592</sup> European Commission, 'Enlargement Strategy and Main Challenges 2014-15' (Communication) COM (2014) 700 final, 1.

papers clear targets and a performance element were introduced.<sup>593</sup> The IPA II Regulation<sup>594</sup> also foresees that progress towards achievement of these specific targets shall be monitored by using clear, transparent, country-specific and measurable indicators.

## 2. The monitoring mechanism applied to Montenegro

After the declaration of independence in 2006, Montenegro took part in the reporting arrangements applying to potential candidate countries. The monitoring mechanism applied by the Commission consisted of the tools that had been used in the previous enlargement rounds (as presented in Figure 7).

Figure 7: The monitoring mechanism applied to Montenegro



### a) The SAA and the Progress Reports on Montenegro

Even though contractual relations between the EU and Montenegro were only established in 2007, the Commission presented the first progress report under the SAP on Montenegro already in November 2006.<sup>595</sup> Progress Reports were issued on an annual basis from 2006 to 2009. In 2010 the Commission presented its Opinion on the Application for Membership and from 2011 on, the annual Progress Reports followed the structure of the Copenhagen criteria, assessing the ability to assume the acquis in 33 negotiating chapters. The conditionality established by the Luxembourg General Affairs Council in April 1997, namely the co-operation with the ICTY and regional co-operation, were included in the political criteria for membership. The 2011, 2012 and 2013 Progress Reports provided a detailed analysis of the judicial system under the political criteria for membership and in chapter 23 of the acquis criteria. To draw up the annual reports, the Commission gathered information from different sources. The data provided by the government of Montenegro, the EU Member States and the European Parliament as well as information from various international organisations and NGOs contributed to the reports.<sup>596</sup>

### b) The Opinion on the Application for Membership

Montenegro presented its application for membership of the EU in 2008 and the Commission issued an Opinion on Montenegro's application in 2010.<sup>597</sup> In preparing the Opinion, the Commission followed a methodology similar to that used in previous Opinions and included the elements of the renewed consensus on enlargement agreed in 2006. A detailed analysis of the criteria for membership was

<sup>593</sup> COM (2012) 600 final, 19.

<sup>594</sup> Regulation 231/2014.

<sup>595</sup> European Commission, 'Montenegro 2006 Progress Report' (Staff Working Document) SEC (2006) 1388, 4-5.

<sup>596</sup> cf European Commission, 'Montenegro 2011 Progress Report' (Staff Working Paper) SEC (2011) 1204 final; European Commission, 'Montenegro 2012 Progress Report' (Staff Working Document) SWD (2012) 331 final and European Commission, 'Montenegro 2013 Progress Report' (Staff Working Document) SWD (2013) 411 final.

<sup>597</sup> European Commission, 'Opinion on Montenegro's Application for Membership to the European Union' (Communication) COM (2010) 670.

presented in a separate Analytical Report accompanying the Opinion.<sup>598</sup> Based on the results of the Analytical Report, the Commission recommended granting the status of candidate country to Montenegro but at the same time identified seven key priorities to be addressed as a prerequisite to opening accession negotiations. Strengthening the rule of law through judicial reform was one of these key priorities.<sup>599</sup> In this way, the Opinion reiterated the need for reforms that had already been identified under the SAA and as a short-term priority in the European Partnership in 2007.<sup>600</sup> Furthermore, chapters 23 and 24 were identified as two of those chapters, where considerable and sustained efforts are necessary to align with the EU acquis.<sup>601</sup> The Commission supported Montenegro in addressing these issues by providing financial and technical support through IPA. The funds provided through the IPA have increased the capacity in the areas of the rule of law, justice and home affairs and have contributed to the opening of negotiations in June 2012.<sup>602</sup>

### *c) The screening and the opening of accession negotiations*

With a view to opening the accession negotiations, the Brussels European Council in 2011<sup>603</sup> requested the Commission to examine in particular Montenegro's progress in the area of the rule of law and fundamental rights and to prepare a proposal for a framework for negotiations, incorporating the new approach to negotiations. Following this request, the Commission presented a report on Montenegro's Progress in the Implementation of Reforms in May 2012. This report assessed the efforts made by Montenegro to address the seven key priorities as set out in the Opinion on the Application for Membership. In its assessment, the Commission confirmed that Montenegro had achieved 'the necessary degree of compliance with the membership criteria and in particular the Copenhagen political criteria, to start accession negotiations.'<sup>604</sup> Based on the Commission's report, the Luxembourg General Affairs Council in June 2012<sup>605</sup> adopted the general EU position and the negotiating framework to open accession negotiations with Montenegro. The negotiations were formally opened on 29 June 2012.<sup>606</sup>

Following the request of the Brussels European Council in 2011 and in line with the new approach, the Commission initiated the screening of chapter 23 and chapter 24 in spring 2012, as these chapters were to be tackled early in the accession process. This should allow Montenegro to develop the required solid track record of reform implementation and ensure sustainable and lasting progress in the realisation of the rule of law.<sup>607</sup> The Screening Report of chapter 23<sup>608</sup> and chapter 24<sup>609</sup> presented the results from the systematic examination of the acquis and also identified specific issues that needed to be addressed

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<sup>598</sup> European Commission, 'Analytical Report' (Staff Working Document) SEC (2010) 1334, 4-5.

<sup>599</sup> COM (2010) 670, 11.

<sup>600</sup> Decision (EC) 2007/49, Annex.

<sup>601</sup> COM (2010) 670, 9-10.

<sup>602</sup> COM (2012) 600 final 19.

<sup>603</sup> European Council, 'Conclusions' (Brussels, December 2011) para. 12.

<sup>604</sup> European Commission, 'Report on Montenegro's Progress in the Implementation of Reforms' COM (2012) 222 final, 12.

<sup>605</sup> Council of the European Union (n 590).

<sup>606</sup> European Council, 'Conclusions' (Brussels, June 2012).

<sup>607</sup> COM (2012) 600 final.

<sup>608</sup> European Commission, 'Screening Report Montenegro: Chapter 23 – Judiciary and Fundamental Rights' (2012).

<sup>609</sup> European Commission, 'Screening Report Montenegro: Chapter 24 – Justice, Freedom and Security' (2012).

before accession negotiations on these chapters could be opened. In its recommendations, the Commission requested the adoption of one or more Action Plan(s) that should guide the reform process on the rule of law. The recommendations in the field of judicial reform specifically addressed the shortcomings in terms of independence, impartiality, accountability as well as the competence and efficiency of the judiciary.<sup>610</sup> The analytical examination of all chapters of the *acquis* was completed in May 2014.<sup>611</sup>

Based on the recommendations given in the Screening Report on the Chapter 23 and bearing in mind the conclusions from the 2012 Montenegro Progress Report, the Government of Montenegro adopted an Action Plan for Chapter 23 Judiciary and Fundamental Rights<sup>612</sup> on 27 June 2013. This Action Plan outlines a comprehensive and detailed reform agenda for the area of rule of law and covers three sub-areas, namely the judiciary, the fight against corruption and fundamental rights. The Action Plan gives an overview of all commitments and deadlines imposed during the screening process and should enable the fulfilment of the accession conditionality through clearly defined objectives and by determining indicators of results and impacts. With the adoption of the Action Plan, Montenegro fulfilled the sole benchmark for the opening of accession negotiations in chapter 23.<sup>613</sup>

After the opening benchmarks had been fulfilled by Montenegro, chapters 23 and 24 were opened for accession negotiations in the third meeting of the Accession Conference with Montenegro at Ministerial level on 18 December 2013. In the EU common position on chapter 23 and chapter 24, the Accession Conference adopted a list of interim benchmarks that have to be met before the negotiation process can proceed to the next steps. The Accession Conference emphasised that particular attention shall be devoted to monitoring these issues throughout the negotiations.<sup>614</sup> 83 interim benchmarks were set for chapters 23 and 24 that mirror the ambitious Action Plans and cover issues reflecting the reality on the ground.<sup>615</sup> The interim benchmarks for chapter 23 especially address the *'independence'*, *'impartiality and accountability'* and *'professionalism, competence and efficiency'* of the judiciary as well as *'the handling of domestic war crimes cases'*.<sup>616</sup>

### 3. The indicators applied to measure the rule of law in Montenegro

The monitoring tools and indicators applied to measure the rule of law in Montenegro, quite closely resemble those applied in the case of Croatia. The Enlargement Strategy and the conduct of accession negotiations that had already been introduced in the previous enlargement rounds were further defined and became more comprehensive. Besides the opening and closing benchmarks that were already applied

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<sup>610</sup> European Commission (n 608) 21-22.

<sup>611</sup> European Commission, 'Montenegro 2014 Progress Report' (Staff Working Document) SWD (2014) 301 final, 1.

<sup>612</sup> Government of Montenegro, 'Action Plan for Chapter 23 Judiciary and Fundamental Rights' adopted in Podgorica on 27 June 2013.

<sup>613</sup> *ibid*, 4-9.

<sup>614</sup> Council of the European Union, 'Third Meeting of the Accession Conference with Montenegro at Ministerial level – key Rule of Law Chapters opened among Others' (Press Release, December 2013).

<sup>615</sup> European Union, 'Memo: EU-Montenegro: Inter-Governmental Conference' (18 December 2013) <[http://europa.eu/rapid/press-release\\_MEMO-13-1182\\_de.htm](http://europa.eu/rapid/press-release_MEMO-13-1182_de.htm)> accessed 2 November 2014.

<sup>616</sup> Council of the European Union, 'European Union Common Position: Chapter 23: Judiciary and fundamental rights' (Accession Document AD 17/1, December 2013)

as monitoring tools to Croatia and Bulgaria within the CVM, the Commission made use of interim benchmarks, allowing for a closer monitoring of the continuous progress towards fulfilling the obligations. The interim benchmarks set by the Commission are based on the obligations and measures determined in the Action Plans.<sup>617</sup>

In its assessments the Commission referred to the standards established by international organisations and conventions in the field of the judiciary and fundamental rights that had already been applied to Croatia.<sup>618</sup> The specific requirements identified with regard to independence, accountability and efficiency of the judiciary in chapter 23 were ‘a firm commitment to eliminating external influences over the judiciary’, ‘adequate financial resources and training’, ‘[l]egal guarantees for fair trial procedures’ and to ‘fight corruption effectively’.<sup>619</sup> These requirements are to be assessed by the Commission in the annual reports. The following analysis is conducted on the basis of the reports prepared by the Commission between 2010 and 2013.

#### *a) The assessment of the independence and accountability of the judiciary*

The monitoring tools applied by the Commission in the accession process of Montenegro made use of the indicators adopted in previous enlargement rounds to measure the independence, impartiality and accountability of the judiciary. In the Opinion on Montenegro’s application for membership, the Commission identified the de-politicisation of appointment procedures and the reinforcement of independence, autonomy and accountability of judges and prosecutors as key priorities to strengthen the rule of law.<sup>620</sup> The Analytic Report of 2010 and the Progress Reports of the following years assessed the improvements made in addressing these priorities. The indicators applied measured the de-politicisation of the Judicial and Prosecutorial Council, the system applied for the recruitment and appointment of judges and prosecutors, the budget available to the judiciary and the salaries of magistrates, prosecutors and judges. The existence of a Code of Ethics was welcomed by the Commission as a structural indicator for improving the accountability in the judiciary and also the number of proceedings initiated for its breach was continuously monitored. The system in place to ensure a random allocation of cases to individual judges was assessed by the Commission as a process indicator to guarantee the impartiality of judges.<sup>621</sup>

The interim benchmarks introduced with the opening of negotiations on chapter 23 by the Council in December 2013 also addressed the independence, impartiality and accountability of the judiciary. Based on these benchmarks, Croatia is requested to establish (among others) initial track records of ‘appointments of high-level judges and high level prosecutors based on transparent and merit-based procedures’, ‘recruiting judges and prosecutors on the basis of a single, nationwide, transparent and merit based system and [...]obligatory initial training in the Judicial Training Centre’, ‘implementing a fair and transparent system of promoting judges and prosecutors’ and ‘regular inspections of the work of judges

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<sup>617</sup> Government of Montenegro (n 612) 5-6.

<sup>618</sup> cf European Commission, ‘Screening Report Montenegro: Chapter 23’ (n 608) 2 and European Commission, ‘Screening Report Croatia: Chapter 23’ (n 559) 2.

<sup>619</sup> SEC (2010) 1334, 96 and European Commission, ‘Screening Report Montenegro: Chapter 23’ (n 608) 2.

<sup>620</sup> COM (2010) 670, 11.

<sup>621</sup> SEC (2010) 1334, 97; SEC (2011) 1204 final, 10-11 and 56; SWD (2012) 331 final, 44-45 and SWD (2013) 411 final, 36-37.

and prosecutors'.<sup>622</sup> These benchmarks were specifically addressed in the Progress Report of the year 2014 under chapter 23, however, no direct reference is made to the measures and deadlines determined in the Action Plan.<sup>623</sup>

Figure 8 gives an overview of the structural, process and outcome indicators that were used in the Progress Reports to measure access to justice and efficiency of the judiciary in Montenegro.

**Figure 8: Indicators to measure the independence and accountability of the judiciary**

Independence and Accountability of the Judiciary		
Structural indicators	Process indicators	Outcome Indicators
<ul style="list-style-type: none"> <li>• Legal framework in place guaranteeing self-administration and organisation of the judiciary</li> <li>• Legal framework in place guaranteeing and restricting the immunity of magistrates</li> <li>• Provisions in place to apply objective and transparent criteria for recruitment</li> <li>• Provisions in place to guarantee de-politicised and merit-based appointments and promotion of judges and prosecutors</li> <li>• Provisions in place for assigning cases to individual judges</li> <li>• Codes of Ethics in place</li> <li>• Provisions in place for regular inspections</li> </ul>	<ul style="list-style-type: none"> <li>• Budget available for the judiciary</li> <li>• Salaries of magistrates, prosecutors and judges</li> <li>• Objective and transparent criteria established for the recruitment of judicial staff and for the appointment of judges</li> <li>• Methodology adopted to evaluate judges for the purposes of promotion</li> <li>• Application of a system for random allocation of cases to individual judges</li> <li>• Establishment of a commission for monitoring the enforcement of the Code of Ethics</li> <li>• Mandatory declarations of assets</li> <li>• Publicity of court rulings</li> <li>• No of inspections carried out</li> </ul>	<ul style="list-style-type: none"> <li>• Reduction of risk of political interference in the judiciary</li> <li>• De-politicisation of the Judicial and Prosecutorial Councils</li> <li>• Number of disciplinary proceedings and sanctions against judicial staff</li> <li>• Establishment of a country-wide single recruitment system</li> <li>• Number of appointments based on transparent and objective criteria</li> <li>• Number of irregularities reported through the inspections and sanctions applied</li> </ul>

### *b) The assessment of access to justice*

To reinforce the efficiency of the judiciary was one of the key priorities identified by the Commission for the field of rule of law in its Opinion on the application of membership.<sup>624</sup> The Commission consistently monitored the efficiency of the judiciary and access to justice in the annual Progress Reports of Montenegro. The Analytical Report of 2010 and the following Progress Reports provided a comprehensive overview of the judicial system and identified several improvements and achievements as well as shortcomings. The three-tier jurisdiction was assessed with regard to the structure of the court system and of the public prosecution. Furthermore, the legal framework in place facilitating quicker proceedings, like the new Criminal Procedure Code with simplified pre-trial proceedings, was investigated. Also the budget allocations for the courts and the administrative capacity in terms of infrastructure and equipment were indicators to measure the efficiency of the judiciary. With regard to the professionalism of the judiciary, the Commission assessed the training for judges and prosecutors provided by the Judicial Training Centre and criticised the lack of permanent mandatory courses and of a set curricula. Also the improvements with regard to the guarantee of free legal aid were monitored and the Commission

<sup>622</sup> Council of the European Union, 'European Union Common Position: Chapter 23' (n 616) 19-20.

<sup>623</sup> SWD (2014) 301 final, 36-37.

<sup>624</sup> COM (2010) 670, 11.

welcomed the implementing acts adopted on the Law of Free Legal Aid in 2012 and the opening of free legal aid offices.<sup>625</sup>

The interim benchmarks introduced for chapter 23 by the Council in December 2013 addressed the professionalism, competence and efficiency of the judiciary and required in particular to develop an initial track record of backlog reduction, to implement the Judicial Information System that allows monitoring the workload and performance of judges and courts as well as the adoption of a law on judicial training, securing the necessary financial and human resources for the Judicial Training Centre.<sup>626</sup> In this way, the interim benchmarks adopted by the Council reflect the priorities established in the SAA and European Partnership and are based on the objectives set in the Action Plan. These objectives were already monitored by the Commission in the reports from 2010 to 2013 and specifically addressed by the 2014 Progress Report. In the field of professionalism, competence and efficiency of the judiciary, all interim benchmarks set in 2013 were followed up in the Progress Report of the year 2014, however, no direct reference was made to the measures and deadlines determined in the Action Plan.<sup>627</sup>

Figure 9 gives an overview of the structural, process and outcome indicators that were used in the Progress Reports to measure access to justice and efficiency of the judiciary in Montenegro.

Figure 9: Indicators to measure access to justice

Access to Justice		
Structural indicators	Process indicators	Outcome Indicators
<ul style="list-style-type: none"> <li>• Legal framework in place guaranteeing a three-tier jurisdiction</li> <li>• Legal framework in place facilitating quicker proceedings</li> <li>• Availability of Alternative Dispute Resolution methods</li> <li>• Legal framework in place with regard to the right to legal remedy</li> <li>• Legal framework in place ensuring the qualification and training of judicial staff</li> <li>• Legal framework in place to guarantee free legal aid</li> </ul>	<ul style="list-style-type: none"> <li>• Budget available for the judiciary</li> <li>• Speed of execution of rulings</li> <li>• Implementation of the law on the right to trial within a reasonable time</li> <li>• Human resources available in courts</li> <li>• Material conditions in courts (infrastructure, equipment and IT system)</li> <li>• Mandatory courses and systematic training for judges and prosecutors</li> <li>• Availability of budget for the Judicial Training Centre</li> </ul>	<ul style="list-style-type: none"> <li>• Length of judicial proceedings</li> <li>• Length of pre-trial detention</li> <li>• Backlog of cases</li> <li>• Rejections of complaints on procedural grounds</li> <li>• Transparent and efficient handling of cases</li> <li>• Number of trainings attended by judicial staff</li> <li>• Number of free legal aid offices</li> </ul>

In the current EU enlargement policy towards Western Balkan countries, the accession conditionality has been expanded and specific criteria to be fulfilled by the candidate countries have been identified. Montenegro is one of the countries, for which the new approach to negotiations should allow establishing *'the necessary legislation, institutions and solid track record of implementation before the negotiations are closed'*.<sup>628</sup> The Commission is promoting and monitoring the reforms to be implemented in the field

<sup>625</sup> SEC (2010) 1334,16-17, 19 and 98; SEC (2011) 1204 final, 11-12 and 57; SWD (2012) 331 final, 45-46 and SWD (2013) 411 final 37-38.

<sup>626</sup> Council of the European Union, 'European Union Common Position: Chapter 23' (n 616) 21-22.

<sup>627</sup> SWD (2014) 301 final, 38-39.

<sup>628</sup> Hillion (n 543) 6.

of judiciary and fundamental rights in its annual reports. In the Analytical Report from 2010, the Commission stressed the paramount importance of an independent and efficient judiciary to safeguard the rule of law in the EU and its Member States.<sup>629</sup>

In its assessments, the Commission has very consistently addressed the key priorities identified in the Screening Report, the SAA and the European Partnership in terms of independence, accountability, efficiency and professionalism of the judiciary. With the opening of accession negotiations for chapter 23 in December 2013, very specific interim benchmarks have been established, requesting Montenegro to develop convincing track records in several areas of judiciary. In what way these specific benchmarks will be addressed in the assessments conducted for the annual progress through indicators remains to be seen in the future.

#### **D. Implications for the use of indicators in the EU enlargement policy**

The Commission has set up a comprehensive monitoring mechanism for the EU enlargement policy in order to measure the progress of candidate and potential candidate countries in realising the rule of law and fulfilling the membership criteria. Areas, where only little progress was made, were repeatedly addressed as priorities in the subsequent Accession Partnerships with the countries, and the progress in implementing these priorities was monitored in the annual reports. Based on the lessons learned from previous enlargement rounds, the EU continuously improved its Enlargement Strategy. As one can see along the three case studies, the consistency between the different monitoring tools used by the Commission has improved over time and more transparency was achieved. Based on the findings of the case studies, the following general implications for the use of indicators for measuring the rule of law in the EU enlargement policy can be derived.

##### **(1) Combining structural, process and outcome indicators**

The case studies have shown that in the fifth and sixth enlargement round, the monitoring of the Commission primarily focused on structural and process indicators. While the progress in terms of legislation and policies adopted for the promotion of the rule of law was assessed in great detail through the various monitoring instruments, there was an apparent deficiency in measuring the results achieved by the requested reforms through outcome indicators. Following a human rights centred approach, the Commission has recognised that also the realisation of rule of law perceived by the population is an important element to be assessed in the rule of law measurement. As a first step in this direction, the current Enlargement Strategy specifically focuses on the development of solid track records of reform implementation in the enlargement countries.

##### **(2) Combining quantitative and qualitative indicators**

The measurement of the rule of law in the accession processes initially was performed mainly through qualitative assessments and the results were presented in a descriptive manner in the annual reports. As pointed out by an official from DG Enlargement in the interview,<sup>630</sup> the rule of law is a field, where appropriate quantitative indicators are hard to define. Therefore, the assessments will always be mostly

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<sup>629</sup> SEC (2010) 1334, 96.

<sup>630</sup> ETC Graz (n 480).

based on qualitative indicators. However, the case studies have shown that the Commission makes more and more use of quantitative measures provided by international organisations to conduct the assessments. To enhance the consistency and comparability of the reports, the Commission should indicate the data sources more explicitly and continuously follow up on the measures provided in previous years.

### (3) Combining universal and country-specific indicators

As the decisions on accession shall be based on the same criteria for all the enlargement countries, the Commission tries to unify the indicators used for measuring the rule of law in the candidate countries as much as possible. The use of a reasonable core set of universal indicators is meant to ensure objectivity and consistency in the measurements and to allow for comparisons among countries.<sup>631</sup> However, the enlargement countries strongly vary in terms of the initial level of realisation of the rule of law, as some of the current candidate and potential candidate countries in the Western Balkans are weakly established states suffering grave political problems in terms of national identity, ethnic conflicts and corruption.<sup>632</sup> These particular challenges have to be taken into account, when assessing progress in the field of the rule of law in these countries. To address these particular challenges and to provide meaningful measures, the indicators applied to measure the rule of law require a thorough contextualisation for the specific situation in the country and should be adapted to the local specificities in cooperation with the respective state authorities and actors from civil society.<sup>633</sup>

### (4) Combining multiple data sources

As the case studies showed, the Commission draws upon multiple data sources to prepare the annual reports. These sources include data provided directly by the enlargement countries themselves, data collected by the Commission's delegations and through expert reviews as well as the data stemming from international organisations and NGOs. As it was pointed out in an interview,<sup>634</sup> the Commission is in continuous contact with international institutions that provide data for the measurement of the rule of law. To increase transparency and to allow for greater comparability between enlargement countries, the different data sources used and the measures applied to conduct the assessments should be more clearly indicated in the reports.

### (5) Tracking changes over time and setting benchmarks

As one can see along the three case studies, the Commission has become more consistent in tracking changes over time throughout the latest enlargement rounds. According to the current Enlargement Strategy, an analytical examination of the *acquis* is conducted by the Commission in the beginning of the accession negotiations with each country. This assessment provides the basis for the definition of appropriate opening and closing benchmarks for all negotiation chapters. As emphasized in an interview,<sup>635</sup> the Commission mainly relies on the *acquis*, the practices from the Member States and the standards set by international organisations to decide on appropriate benchmarks in the field of the rule

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<sup>631</sup> *ibid.*

<sup>632</sup> *cf* Bieber (n 423).

<sup>633</sup> Benedek and others (n 547) 62.

<sup>634</sup> ETC Graz (n 480).

<sup>635</sup> *ibid.*

of law. The Commission is following-up on the progress of the enlargement countries in addressing the benchmarks in its annual reports. The issues monitored correspond to the priorities identified in European and Accession Partnerships and reflect the improvements achieved through the financial assistance provided by the EU. However, for the sake of guaranteeing consistency in the overall monitoring process, the various monitoring tools should be linked in a more transparent manner and the progress made against reaching the specific benchmarks should be clearly indicated in all reports. Benedek and others suggest:

to spell out in the Progress Reports more explicitly which priorities have been identified in the European and Accession Partnerships and make a concrete statement as to the degree in which these priorities are met or work is taking place in order to reach them, and as to the measures to be taken to reach the goal.<sup>636</sup>

As stressed by Bieber, it often remains unclear, 'what changes are essential for further progress towards EU membership'.<sup>637</sup> Clear guidance and concrete recommendations, on the one hand, would help the enlargement countries in their efforts to reaching the set targets and, on the other hand, would also make it easier for the Commission to assess the progress or decline in the reports.<sup>638</sup>

## VIII. Conclusions and outlook

Over the last decade, the EU enlargement policy has been constantly linked to the prerequisite of the realisation of the rule of law in the enlargement countries. As non-compliance with this requirement could undermine the functioning of the internal market and mutual trust among Member States, the EU has imposed strict accession conditionality on the candidate countries. This conditionality in conjunction with the continuous monitoring efforts of the Commission has proven to be a successful tool to bring about the demanded reforms for the realisation of the rule of law. The three case studies have shown that rule of law issues always had a prominent position in the EU enlargement processes and this position was further strengthened in the current EU Enlargement Strategy.

The tools and indicators applied for measuring the rule of law in the EU enlargement processes have been continuously improved over time. In conducting the country assessments for the annual Progress Reports, the Commission has been relying on qualitative and quantitative indicators from diverse sources of data. Through the close cooperation with national authorities, NGOs, country experts and international organisations, multiple data sources could be accessed. The performance of the enlargement countries was measured against the standards set through the *acquis communautaire* and by international organisations, like the CoE or the UN. By setting common standards in the accession negotiations, the comparability and transparency of the conditions to be fulfilled by the enlargement countries could be increased. For several areas of rule of law, the Commission has set specific benchmarks, reflecting the required standards to be achieved prior to accession. These benchmarks are adapted to the specific

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<sup>636</sup> Benedek and others (n 547) 63.

<sup>637</sup> Bieber (n 423) 1795

<sup>638</sup> Benedek and others (n 547) 92-93.

situation of the respective country and shall allow for tracking changes over time through the annual reports. However, not all elements of the rule of law are covered by the *acquis*, and for some areas no common standards could be identified at international level. In these areas, it is harder to ensure comparability, and the realisation of the rule of law can only be measured through qualitative assessments. Also the benchmarks established for these areas of rule of law often lack a clear definition of the underlying concepts and of the objectives to be achieved, which hampers a consistent and comprehensive monitoring process.

By analysing the quality of the Progress Reports over time and over countries, it becomes clear that there is a serious effort by the EU to enhance consistency and transparency in the enlargement process. Through the incorporation of the lessons learned from previous enlargement rounds, a comprehensive negotiation policy has been established that shall ensure equal treatment of all enlargement countries. Throughout the latest enlargement rounds, the Commission has shifted its focus from a structure-driven approach to a more result-oriented approach. The promotion and realisation of the rule of law is now measured by simultaneously applying structural, process and outcome indicators. In this way, the progress in terms of legislation adopted can be matched to the policies applied and the respective results achieved. Under the current Enlargement Strategy, enlargement countries are asked to develop a solid track record of reform implementation, demonstrating the results achieved with regard to the realisation of rule of law in practice. In the long term, this should not only assure that enlargement countries fulfil the membership conditionality in terms of legislation adopted and policies implemented, but should also improve the situation for the population of these countries.

The membership conditionality is considered to be the fundament of the successful EU enlargement policy in Central and Eastern Europe. The case of Bulgaria, however, has shown that it is crucial to meet specific standards already during the pre-accession phase. At the time of accession, Bulgaria had not met all the conditions for membership. With the establishment of the CVM, the Commission intended to support Bulgaria in achieving the same standards as other Member States. However, also five years after accession no sufficient progress could be observed, what leads to the conclusion that the post-accession incentives were too weak to bring about the requested changes after accession. As pointed out by Hillion,<sup>639</sup> post-accession monitoring may be useful to spell out the required reforms, but the credibility and potential of such a mechanism is hampered by the lack of serious consequences in case of non-compliance. This underlines the importance of the accession conditionality that shall lead to the realisation of the required standards already in the pre-accession and negotiation phase. To tackle the problems experienced in previous accession processes, the EU policy of conditionality has been expanding from one enlargement round to the other. The case studies of Croatia and Montenegro have shown the wider scope of the accession conditionality on the one hand and the growing number of monitoring tools applied by the Commission to measure the rule of law on the other hand. In its enlargement strategy, the Commission emphasises the ‘transformative effect’ of the EU’s enlargement policy by ‘ensuring a stronger focus on addressing fundamental reforms early in the enlargement process’.<sup>640</sup> Also for the future enlargement towards the countries of Eastern and South-Eastern Europe, the EU has imposed strict accession

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<sup>639</sup> Hillion (n 543) 12-13.

<sup>640</sup> COM (2014) 700 final, 1.

conditionality. The credibility of the conditionality applied to the candidate and potential candidate countries can only be ensured, if the indicators applied for measuring the countries' alignment with the membership criteria are concrete and specific enough and if benchmarks are set in a systematic way and based on clearly defined concepts and objectives.

The EU was often criticised for applying double standards, with regard to the conditionality applied in the field of the rule of law and fundamental rights. On the one side, the EU requires strict adherence to those values by the enlargement countries as a prerequisite for joining the EU. On the other side, the EU is aware that there are current Member States that do not fully comply with those values.<sup>641</sup> Even though there is a long-standing experience in measuring the rule of law in enlargement countries, the information available about the rule of law in the Member States is often intermittent, hardly comparable and based on weak data sources and data collection methods. When exploring better ways, on how to monitor and safeguard the rule of law in the EU, the vast institutional experience in assessing candidate countries could be used as a basis.<sup>642</sup> This goes in line with the recommendation that the EU shall apply the same indicators and benchmarks for its internal as well as for the external policy to increase the credibility of the EU's policy and to legitimate the export of its values towards enlargement and third countries.<sup>643</sup>

A consistent set of indicators and data collection methodology for the EU's internal and external policy would make the progress in promoting the rule of law and justice more transparent, comparable and manageable and would assist the enlargement countries as well as Member States in realising and upholding the rule of law. This would also respond to the request from the European Parliament for establishing 'an effective mechanism for a regular assessment of the Member States' compliance with the fundamental values of the EU'.<sup>644</sup> Such 'a new Copenhagen mechanism'<sup>645</sup> could ensure the respect and protection of the EU's foundational values and can be applied as a tool of the EU's internal and external policy to promote the rule of law.

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<sup>641</sup> Spreeuw (n 404) 12 et seqq.

<sup>642</sup> FRA, 'Promoting the Rule of Law in the European Union' (FRA Symposium Report 4<sup>th</sup> Annual FRA Symposium, Vienna, June 2013) <<http://fra.europa.eu/sites/default/files/fra-2013-4th-annual-symposium-report.pdf>> accessed 20 January 2014.

<sup>643</sup> Anja Mihr, 'Human Rights Benchmarks for EU's External Policy' (Briefing Paper, European Parliament 2011) 5.

<sup>644</sup> Resolution P7\_TA-PROV (2014) 0231, para. 6.

<sup>645</sup> Carrera, Guild and Hernanz (n 405).

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### Annex III – List of conducted interviews

Nr.	Date	Location/Mode	Identification of Interviewee(s)	Interviewer
1	May 2014	Telephone	EP - FEMM	Maddalena Vivona
2	June 2014	Copenhagen	EC - SPC	Erik André Andersen and Hans Otto Sano
3	June 2014	Telephone	EC – Indicators Subgroup of the SPC	Erik André Andersen and Hans Otto Sano
4	June 2014	Brussels	EC - DG DEVCO	Klaus Starl
5	June 2014	Brussels	EC - DG Home	Klaus Starl
6	June 2014	Brussels	EP - INTA	Maddalena Vivona
7	June 2014	Brussels	EP - LIBE	Maddalena Vivona
8	June 2014	Brussels	EP - DG JUST	Erik André Andersen
9	June 2014	Brussels	Council - FREMP	Hans Otto Sano
10	June 2014	Telephone	EC - DG Enlargement	Markus Möstl
11	June 2014	Brussels	Council - COHOM	Klaus Starl
12	June 2014	Brussels	EP - DROI	Maddalena Vivona
13	June 2014	Brussels	EC - DG Strategy, Research and International Affairs	Hans Otto Sano
14	June 2014	Telephone	EEAS	Markus Möstl
15	June 2014	Brussels	EEAS	Erik André Andersen and Hans Otto Sano
16	June 2014	Telephone	EP - DROI	Markus Möstl
17	June 2014	Telephone	EC - DG Enlargement	Markus Möstl
18	July 2014	Vienna	FRA	Klaus Starl