



# **Structures and mechanisms to strengthen engagement with non-state actors in the protection and promotion of human rights**

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## **Structures and mechanisms to strengthen engagement with non-state actors in the protection and promotion of human rights**

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## Executive Summary

The previous reports in this work package have demonstrated that the European Union (EU) as a whole makes substantial efforts to engage with a range of Non-State-Actors (NSAs) encompassing i) businesses, including transnational corporations (TNCs) and indigenous SMEs; ii) civil society organisations (CSOs), economic and social partners; iii) international financial institutions (IFIs); and iv) individual human rights defenders (HRDs). That does not mean that engagement with these NSAs on the subject of human rights is perfect or that it cannot be improved, but the EU is clearly starting from a strong position and adaptations aimed at improving engagement should be possible within the existing frameworks. This report seeks to identify further steps that the EU can take to streamline and strengthen its engagement with NSAs in the protection and the promotion of human rights.

Three cross-cutting issues related to EU engagement with NSAs on human rights are examined in this report from a transversal perspective: public consultations, transparency and coherence. Public consultations, and more particularly stakeholder consultations, serve as a key point of engagement with NSAs across the EU in the policy-making process. The EU regime governing public consultations has been revised recently with the adoption of the Better Regulation Package, which presented new Guidelines for the European Commission on 19 May 2015. The practical value of these Guidelines remains to be seen, as the effective implementation of these Guidelines requires a whole shift in the way the Commission has been functioning so far. Our research considers that public consultation needs to be less formulaic, less statistical and less of a ‘tick-box’ exercise. This report proposes a number of recommendations on how the Commission should implement these Guidelines, notably by systematically consulting human rights organisations at an early stage of the policy-making process, by pro-actively reaching out to affected communities and human rights defenders in its consultations and by systematically assessing the human rights impacts of EU draft legislation. Moreover, the Regulatory Scrutiny Board should include at least one person with expertise in the field of human rights.

The second cross-cutting issue, transparency, is the lifeblood of engagement. If NSAs are not aware of EU activities, policy developments and the policy-making process more generally, they cannot contribute to them. This report demonstrates how continuous pressure from a variety of quarters, the European ombudsman, Members of the European Parliament (MEPs), civil society and the general public, has led to increased openness and transparency of the EU’s activities. However, there is still room for significant improvements, notably in relation to the systematic dissemination of documents to NSAs and a better communication of EU actions and policies to HRDs and CSOs working on the ground.

The lack of coherence in EU policy-making and implementation is the third cross-cutting issue examined in this report. The principle of coherence, often associated with consistency, is one of the main challenges for EU policy-making and the EU has had long-running difficulties in producing unified policies from a disparate set of competences. The EU can sometimes serve as a catalyst for engagement between different NSAs and it should ensure that human rights issues become a central theme in this engagement. The EU should think of its engagement with NSAs on the subject of human rights holistically as much as possible. Development financing has been examined in this report as an example of this type of cross-

cutting engagement with NSAs in which the EU should try to leverage the inter-relationship between CSOs, IFIs, business and HRDs arising from its work to promote better human rights outcomes.

Following these cross-cutting issues, the report focuses on the EU's engagement with each group of NSAs individually. It begins with an examination of how the EU could engage with IFIs to improve the protection of human rights and increase development policy coherence. The report discusses how the EU can utilise existing frameworks, such as the network of independent accountability mechanisms for IFIs and the EU Platform for Blending in External Cooperation to strengthen the engagement of the EU with IFIs on the protection and promotion of human rights. The report also contains a case study on the Greek financial assistance program implemented following the financial crisis with the assistance of the International Monetary Fund (IMF) to assess the EU's engagement with the IMF in relation to the promotion and the protection of human rights. The authors of the report recommend that both the EU and the euro area speak with one voice within the Troika in order to strengthen their position and ensure a more coherent representation. The division of tasks within the Troika (European Commission, the European Central Bank and the IMF) should be clarified for future negotiations to increase the transparency of the decision-making process and to allow for the determination of eventual responsibilities. The EU should also conduct credible human rights impact assessments as a prerequisite to providing loans. Finally, the recent proposal for a European Pillar of Social Rights is discussed in the report. This pillar could add a social dimension to economic integration and lead to a deeper and fairer Economic and Monetary Union overall. The authors consider that this framework could play a central role in the impact assessments of the measures negotiated between the Troika on the one hand and the Member States on the other hand.

On the subject of EU engagement with business, the authors call for a number of changes in EU policy. The EU needs to strengthen its engagement with SMEs, trade unions and consumer groups on the subject of business and human rights as these groups have deep-seated scepticism of this policy area. The EU should abandon the divisive language of Corporate Social Responsibility (CSR) with its connotations of voluntarism and perceptions that it only applies to larger corporations and embrace the broader and more neutral language of business and human rights. The report identifies a need for stronger political leadership and commitment to business and human rights within the Commission and greater coherence between the Commission and the Parliament on the subject of business and human rights. The subject of business and human rights as whole needs to be better integrated and co-ordinated across different policy areas like trade, development, procurement, financial regulation etc. Finally, the EU needs to play a more active role in providing advice and information to SMEs on business and human rights issues.

The EU's engagement with civil society can be described as a patchwork of dialogues. The challenge for the EU is to provide efficient and effective dialogue structures that are not replicated, and are consistent and coherent across the EU institutions. In order to diversify the CSOs that the EU engages with, the authors of this report recommend that the EU increases the formality of selection procedures to deal with preferential treatment of certain CSOs. Our research also identified a number of opportunities by which the EU can strengthen engagement through diversification to include more grassroots CSOs and boost the ownership of local actors. The EU should expand the use of information and communication technology to engage with smaller CSOs through online dialogue and advertise consultations more widely through the internet to target smaller CSOs. A number of suggestions have been discussed in this report to improve

the streamlining of engagement structures, ranging from an enhanced coordination between expert groups to the expansion of mechanisms that work well, such as the EIDHR Forum and the EU-NGO Forum, from the international level to regional or national levels. Coherence in dialogues with civil society is necessary for effective EU-CSO interactions on human rights and the Action Plan on Human Rights and Democracy 2015-2019 should be at the heart of strengthening engagement with CSOs. The research also highlighted the importance of funding for CSOs to increase their capacity to engage effectively with the EU in human rights protection in third countries. The research identified the many problems that CSOs face in obtaining funding, including the complexity of the process, the inexperience of funding evaluators and the competition between CSOs. We recommend that the EU do more to facilitate the ability of smaller CSOs to access funding, for example by engaging in capacity-building or providing for sub-granting. Overall, there are numerous challenges but many opportunities for change. In the last section, a case study looked at the special case of the social partners as an example of deep civil society engagement. The case study demonstrates that autonomous social dialogue is an effective and dynamic tool for cross-industry and grassroots involvement, yet there are concerns over the representativeness of social partners. The report recommends mutual learning between the social partners and other CSOs. The methods used in social dialogue have some potential to be adapted to other areas of civil society engagement.

In order to strengthen its engagement with HRDs, the communication channels used by the EU to contact HRDs should be improved and the EU should adopt a pro-active approach in contacting HRDs. The European Commission should ensure that all relevant contact details are published on the delegations' websites. The practice of using filter groups in EU missions in third countries should be further developed in order to provide HRDs with an established point of contact. A thorough analysis of the circumstances in which a HRD is operating should be undertaken in order to ensure safe and effective communication with HRDs. There is no 'one-size-fits-all' approach and the EU should analyse the circumstances and provide security and emergency plans to support the HRDs in the field. The recently established EU Human Rights Defender Mechanism, managed by a consortium of 12 independent international NGOs and funded by the EIDHR, constitutes a positive development strengthening the EU's engagement with HRDs and a relevant example of a collaborative effort, joining the forces of CSOs active in human rights to the ones of the EU in seeking to protect HRDs. In addition to the emergency support put in place by this mechanism and by its commitment to reaching HRDs in remote and dangerous areas, this EU Mechanism could also support HRDs in obtaining EU funding. The complexity and diversity of procedures and eligibility criteria surrounding EU funding generates the need for very clear communication by the EU to HRDs and by CSOs active in the field to increase the visibility of these tools and to support HRDs in the application process.

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## List of Abbreviations

ACP	African, Caribbean and Pacific Group of States
ATE	Pensioners' Union of the Agricultural Bank of Greece
BEUC	European Consumer Organisation
CEC	European Confederation of Executives and Managerial Staff
CEEP	European Centre of Employers and Enterprises providing Public Services
CEPS	Centre for European Policy Studies
CIIP	Competitive Industries and Innovation Program
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COHOM	European Council's Working Group on Human Rights
CSD	Civil Society Dialogue
CSF	Civil Society Facility
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
DEVCO	Directorate General of Development Cooperation
DG	Directorate General
DROI	European Parliament Sub-Committee on Human Rights
EaP CSF	Eastern Partnership Civil Society Forum
EBRD	European Bank for Reconstruction and Development
ECB	European Central Bank
ECOFIN	Economic and Financial Affairs Council
ECOSOC	European Economic and Social Committee
EEAS	European External Action Service
EED	European Endowment for Democracy

EESC	European Economic and Social Committee
EFSF	European Financial Stability Facility
EFSM	European Financial Stabilisation Mechanism
EIB	European Investment Bank
EIDHR	European Instrument for Democracy and Human Rights
EITI	Extractive Industries Transparency Initiative
ENI	European Neighbourhood Instrument
ENP	European Neighbourhood Policy
EP	European Parliament
ETUC	European Trade Union Confederation
EU	European Union
EUBEC	EU Platform for Blending in External Cooperation
EUD	European Union Delegation
FIDH	International Federation for Human Rights
FRA	European Union Agency for Fundamental Rights
FRAME	Fostering Human Rights among European Policies
FREMP	Fundamental Rights, Citizens Rights and Free Movement of Persons
FTA	Free Trade Agreement
HRA	Human Rights Agreement
HRBA	Human Rights Based Approach
HRD	Human Rights Defender
HRDN	Human Rights and Democracy Network
IAM	Independent Accountability Mechanism
IBRD	International Bank for Reconstruction and Development
IcSP	Instrument contributing to Stability and Peace

IDA	International Development Association
IFI	International Financial Institution
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IMF	International Monetary Fund
IO	International Organisation
MEFP	Memorandum of Economic and Financial Policies
MEP	Member of the European Parliament
MFFA	Master Financial Assistance Facility Agreement
MIP	Multi-annual Indicative Programme
MoU	Memorandum of Understanding
MS	Member State
MSM	EU Member States Mission
NGO	Non-Governmental Organisation
NSA	Non-State Actor
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
SME	Small and Medium-sized Enterprises
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UEAPME	European Association of Craft, Small and Medium-Sized Enterprises
UK	The United Kingdom
UN	United Nations
UNGA	United Nations General Assembly

UNGPs	United Nations Guiding Principles
UNHRC/HRC	United Nations Human Rights Council
UNICE	Union of Industrial and Employers' Confederations of Europe
US	United States
WB	World Bank
WHO	World Health Organization
WHRD	Women Human Rights Defender

## I. Introduction

### A. Research Context

In the context of the FP7 project ‘Fostering Human Rights among European Policies’ (FRAME),<sup>1</sup> Non-State Actors (NSAs) are understood to encompass i) businesses, including transnational corporations (TNCs) and indigenous SMEs; ii) civil society organisations (CSOs), economic and social partners; iii) international financial institutions (IFIs); and iv) individual human rights defenders (HRDs).

This report on ‘structures and mechanisms to strengthen engagement with non-state actors in the protection and promotion of human rights’ is the third deliverable of Work Package 7 (WP7), ‘Engagement with Private Actors, TNCs and Civil Society’, of FRAME. It follows a first report (D7.1) on the positive and negative human rights impacts of NSAs<sup>2</sup> and a second report (D7.2) on enhancing the contribution of EU institutions and Member States, Non-Governmental Organisations (NGOs), IFIs and HRDs, to more effective engagement with, and monitoring of, the activities of NSAs.<sup>3</sup>

In FRAME 7.1, the authors observed that the activities of NSAs have a huge capacity to influence human rights enjoyment both positively and negatively. As such, the EU’s engagement with NSAs can accentuate positive outcomes, help to prevent violations and help to ameliorate the worst effects of human rights abuses. At its best, this engagement with NSAs has the capacity to add a great deal of value to the EU’s activities in the field of human rights.

FRAME 7.2 examined the EU’s engagement with and monitoring of the activities of NSAs through a combination of desk research and in-depth targeted interviews with a wide range of actors. The report paid particular attention to the policy frameworks underpinning engagement with the NSAs and the various points of contact between the NSAs and the EU institutions.

This report, FRAME 7.3, seeks to identify further steps that the EU can take to streamline and strengthen its engagement with NSAs in the protection and the promotion of human rights. It focuses on the need to develop more institutionalised structures and mechanisms in order to engage in consultation with NSAs.

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<sup>1</sup> FRAME <[www.fp7-frame.eu](http://www.fp7-frame.eu)> last accessed 14 April 2016.

<sup>2</sup> Nicolas David, Mary Dowell-Jones, Mary Footer, Jeffrey Kenner, Maija Mustaniemi-Laakso, Aoife Nolan, Petr Pribyla, ‘Report on the positive and negative human rights impacts of non-state actors’ (FRAME D7.1 2014) (hereinafter FRAME D7.1).

<sup>3</sup> Wolfgang Benedek, Mary Footer, Jeffrey Kenner, Maija Mustaniemi-Laakso, Reinmar Nindler, Aoife Nolan, Stuart Wallace, ‘Report on enhancing the contribution of EU institutions and Member States, NGOs, IFIs and Human Rights Defenders, to more effective engagement with, and monitoring of, the activities of Non-State Actors’ (FRAME D7.2 2015) (hereinafter FRAME D7.2).

## B. Research Objectives

Previous reports in this work package mapped out the positive and negative human rights impacts of non-state actors and identified weaknesses in EU engagement. This report specifically aims to build on these analyses and suggest ways for the EU to strengthen and improve engagement with NSAs. This report actively looks at the practicalities of engagement and assesses the barriers to engagement that the EU faces with different NSAs. It aims to do this from a variety of different perspectives. The report aims to identify and analyse cross-cutting issues related to the subject of strengthening engagement like public consultations, transparency and coherence. The report will also utilise case studies of instances where engagement with the different NSAs is weak or could be improved, suggesting ways to improve engagement where appropriate. Finally, the report aims to pick up specific issues with each of the groups of NSAs identified in the previous reports in this work package and put forward proposals to address these issues.

## C. Methodology and Structure

This report relies on both desk research and qualitative, interview-based research to identify and evaluate the means through which the EU and the different types of NSAs engage with each other on human rights. Based on this research, specific proposals for more institutionalised engagement are put forward in this report. Their feasibility has been assessed through interviews and discussions with selected stakeholders and experts. On 3 July 2015, for example, a FRAME workshop was held in London to discuss how to move towards more effective engagement between the EU and Non-State Actors on human rights. At this workshop several representatives from NSAs presented their thoughts on the topic of engagement with the EU. These thoughts are reflected in this report and the programme for this workshop is included in an appendix to this report.

The second part of this report presents three cross-cutting issues related to engagement with NSAs on human rights, which were identified in the previous report FRAME 7.2. These three cross-cutting issues are public consultations, transparency and coherence. Each of these issues is central to effective engagement. Public consultations, and more particularly stakeholder consultations, are an important means of collecting inputs and views from those who may be concerned by a policy or initiative. In practice they can lead to more transparent and better-informed policy making and improve the democratic legitimacy of the EU through engaging affected stakeholders. Transparency is the lifeblood of engagement as if NSAs are not aware of EU activities, policy developments and the policy-making process more generally, they cannot contribute to them. Coherence, or rather the lack thereof, was also identified in

the previous FRAME report 7.2.<sup>4</sup> It represents a significant hurdle for EU policy-making,<sup>5</sup> where developing unified, consistent policy from disparate competences is an ongoing concern.<sup>6</sup>

The third part analyses the engagement with each group individually. The first chapter focuses on IFIs and is subdivided into a section providing for the general context of IFIs and human rights, as well as the EU's engagement with IFIs. The second section presents a case study of the human rights accountability of the IMF as part of the Troika in the recent Greek financial crisis, in order to present conclusions and recommendations to strengthen the engagement of the EU with the IMF in relation to the protection and promotion of human rights. The second chapter of part III examines the EU's engagement with businesses on human rights, with an emphasis on the multistakeholder forum on CSR. This chapter analyses the engagement with trade unions, with consumer groups and with SMEs. Chapter three considers engagement with CSOs on human rights, both in general and more specifically in relation to the diversification of their representation. This chapter also presents a case study on social partners. Finally, chapter four examines engagement with HRDs, particularly the issues of communication, funding, ensuring uniformity of access to the EU, and the organisation of fora to strengthen this engagement. The fourth part of the report provides a number of general conclusions and recommendations.

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<sup>4</sup> FRAME D7.2, 74.

<sup>5</sup> Leonhard den Hertog and Simon Stroß, 'Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term' (2013) 18 European Foreign Affairs Review 373.

<sup>6</sup> For a review of the different affirmations of coherence and coherency by EU institutions, see Tamara Lewis, Wolfgang Benedek and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies' (FRAME D8.1 2014) (hereinafter FRAME D8.1) 3 ff. See also the Commission's White Paper on Governance (2001). It promulgated five principles of good governance including coherence. For more details, see Alexandra Timmer, Balázs Majtényi, Katharina Häusler and Orsolya Salát, 'Critical analysis of the EU's conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law' (FRAME D3.2 2014) 39.

## II. Cross-Cutting Issues

### A. Public Consultations

#### 1. Public Consultations as a Mechanism to Strengthen Engagement with NSAs

Open public consultations and stakeholder consultations constitute key tools through which a policy-making body collects inputs and views from those who may be concerned by an initiative. Together with impact assessments, evaluations and expertise, consultations lead to more transparent and informed policy-making.<sup>7</sup> The participatory approach is meant to enhance the quality of policies and decisions and to consequently enable the decision-making body to better achieve its overarching objectives. Such engagement increases both the democratic legitimacy of its activities and the ownership of decisions by the affected stakeholders, which in turn makes the process more effective.<sup>8</sup> Indeed, the effectiveness of the decision-making process depends on a certain degree of inclusiveness and responsiveness towards stakeholders.<sup>9</sup>

EU institutions should build up knowledge on who has an interest in the policy area, which includes those who are directly impacted by the policy and also those involved in ensuring its correct application. Hence, persons or groups with expertise or technical knowledge in a specific field should be included among the stakeholders, as further defined below.

In the European Commission's 2015 Better Regulation Guidelines, one chapter is dedicated to guidelines on stakeholder consultations. These guidelines contain a non-exhaustive list of stakeholders, including citizen/individual, industry/business workers' organisations (multi-national/global, national, small and medium-sized enterprises (SMEs), business organisations, trade unions and chambers of commerce); EU platforms, networks, or associations (representing for-profit interests, representing not-for-profit interests, representing professions/crafts interests, national organisations representing

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<sup>7</sup> See for instance European Commission, 'Better Regulation', Stakeholder Consultation Guidelines <[http://ec.europa.eu/smart-regulation/guidelines/consultation\\_2014/stakeholder-consultation/index\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/consultation_2014/stakeholder-consultation/index_en.htm)> accessed 22 February 2016.

<sup>8</sup> Eva G. Heidbreder, 'Civil society participation in EU governance' (2012) 7(2) Living Reviews in European Governance 1, 9 and 12 <<http://www.europeangovernance-livingreviews.org/Articles/Ireg-2012-2/download/Ireg-2012-2Color.pdf>> accessed 22 February 2016. See also OECD, 'International Regulatory Co-operation and International Organisations, The Cases of the OECD and the IMO', OECD Publishing (2 November 2014) 14 <<http://www.oecd.org/gov/international-regulatory-co-operation-and-international-organisations-9789264225756-en.htm>> accessed 22 February 2016, where it is mentioned that the OECD was particularly effective in its rule-making activity when it benefited from stakeholder engagement.

<sup>9</sup> Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 Journal of Common Market Studies 603; Jonas Tallberg, Thomas Sommerer, Theresa Squatrito and Christer Jönsson, *The opening up of international organizations* (Cambridge University Press 2013).

professions/crafts and international/inter-governmental organisations), public authorities (EU institutions, national governments, national parliaments, regional/local/municipal authorities and national competent authorities/agencies), consultancies (think-tanks, professional consultancies and law firms), research/academia (universities, school and education establishments and research institutes) and others.<sup>10</sup> According to this non-exhaustive list, it is clear that all categories of NSAs, as understood in the context of FRAME – namely encompassing businesses, IFIs, CSOs and HRDs – may be included in the categories of stakeholders to be consulted.

The European Commission acknowledged that

[t]he initial design, evaluation and revision of policy interventions benefits from considering the input and views provided by stakeholders, including those who will be directly impacted by the policy but also those who are involved in ensuring its correct application. Stakeholder consultation can also improve the evidence-base underpinning a given policy initiative. Early consultation can avoid problems later and promote greater acceptance of the policy initiative/intervention. In addition, the Commission has a duty to identify and promote in its policy proposals the general public interest of the Union as opposed to special interests of particular Member States or groups or parts of society – hence the need to consult widely.<sup>11</sup>

Public consultations are about increasing the effectiveness and the legitimacy of the decision-making process. They foster a more democratic approach to negotiations and agenda setting. This purpose of public consultations aligns with the aim of ‘strengthening the engagement in the protection of human rights’ given the inherently discussion-based nature of human rights, in which an open dialogue may reveal (new) human rights concerns.

The research and interviews conducted for previous reports – especially FRAME 7.1 and FRAME 7.2 – have shown the impact of public consultations at various stages of the legislative process on the advancement of human-rights based policies within the EU by enhancing their legitimacy<sup>12</sup> and by shaping the policy-agenda relevant to human rights.<sup>13</sup> Thus it is important to assess public consultations as a cross-cutting issue related to strengthening engagement with NSAs in the protection and the promotion of human rights.

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<sup>10</sup> European Commission, ‘Commission Staff Working Document. Better Regulation Guidelines’, SWD(2015) 111 final (19 May 2015) 73-74 <[http://ec.europa.eu/smart-regulation/guidelines/docs/swd\\_br\\_guidelines\\_en.pdf](http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf)> accessed 22 February 2016.

<sup>11</sup> Ibid, 63-64.

<sup>12</sup> FRAME D7.1, 11.

<sup>13</sup> Ibid, 14.

## 2. The System of Public Consultations Prior to the 2015 Better Regulation Package

The importance of consultation as a principle of EU policy making has been acknowledged by the Lisbon Treaty, which integrated this concept into the primary law of the Union. Article 11 of the Treaty on the European Union (TEU) states that ‘the European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent’.<sup>14</sup> Furthermore, Protocol no. 2 on the application of the principles of subsidiarity and proportionality annexed to the Treaties stipulates that ‘before proposing legislative acts, the Commission shall consult widely’.

In the EU system, the term ‘stakeholder consultation’ equates to ‘consultations with interested parties’ or with ‘external parties’. Hence, they cover any consultation with stakeholders outside the European institutions and bodies, which is a particularly inclusive approach and does not make a firm distinction between CSOs and other interest groups.<sup>15</sup> However, it should be distinguished from input from citizens in the context of the ‘European Citizen Initiative’ and specific consultation frameworks in policy fields, such as Treaty provisions governing the consultation of social partners (Articles 153-155 TEU)<sup>16</sup> or the opinions of committees.

The system of public consultations by the European Commission was regulated until now by a 2002 Communication ‘Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission’.<sup>17</sup> These principles were not legally binding, but suggested how consultations should be conducted. As noted in a contribution describing the EU Commission Consultation Regime, such ‘societal participation falls short of any legally binding provisions which could be judicially enforced by third parties’.<sup>18</sup> There are only a few exceptions to this principle, such as the compulsory consultation of social partners. Scholte is critical of this approach

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<sup>14</sup> For further information, see Christine Quittkat and Barbara Finke, ‘The EU Commission Consultation Regime’, in Beate Kohler-Koch, Dirk De Bièvre and William Maloney (eds), *Opening EU-Governance to Civil Society: Gains and Challenges*, CONNEX Report Series Vol. 5 (University of Mannheim 2008) 183, 187-188.

<sup>15</sup> European Commission, ‘Civil Society’ <[http://ec.europa.eu/transparency/civil\\_society/general\\_overview\\_en.htm#5](http://ec.europa.eu/transparency/civil_society/general_overview_en.htm#5)> accessed 22 February 2016.

<sup>16</sup> For details of the European Social Dialogue and details of consultations with the Social Partners – DG Employment, Social Affairs and Inclusion, ‘Social Dialogue’ <<http://ec.europa.eu/social/main.jsp?catId=329&langId=en>> accessed 22 February 2016. For further information, see below, section III.C.5.

<sup>17</sup> European Commission, ‘Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission’ (Communication) COM(2002) 704 final (11 December 2002).

<sup>18</sup> Christine Quittkat and Barbara Finke, ‘The EU Commission Consultation Regime’, in Beate Kohler-Koch, Dirk De Bièvre and William Maloney (eds), *Opening EU-Governance to Civil Society: Gains and Challenges*, CONNEX Report Series Vol. 5 (University of Mannheim 2008) 183, 190 referring to Francesca Bignami, ‘Three Generations of Participation Rights in European Administrative Proceedings’, New York, NYU School of Law (Jean Monnet Working Paper 11/03) (2003).

condemning ‘the largely improvised character of many global governance consultations of CSOs’, which has ‘significant negative implications for democratic accountability’.<sup>19</sup>

The EU’s diverse public consultations are a key source of engagement between the EU and NSAs. Yet, in order to gain the full benefit of this process, they need to be more than a bureaucratic ‘tick-box’ exercise. As mentioned above, a key finding of the research carried out so far has been the disquiet among NSAs about the EU’s system of public consultation.<sup>20</sup> In a report published in 2015, we listed a number of problems – identified through a series of semi-structured interviews – which may be summarised as follows:

- the opacity of the methodology used when analysing public consultations;
- the inability of stakeholders to have qualitative inputs into the process;
- the misgivings about the quality and consistency of the design of public consultations, with some remarking that public consultations were very clear and well-constructed, while others were formulaic and ill-conceived;
- the lack of consistency in the design and structure of public consultations across the EU;
- the fact that public consultations are often only carried out at certain points e.g. the launch or development of new policy, which entails that there is little opportunity to offer feedback on existing policies etc.;
- the lack of sufficient advertisement and notification of public consultations to parties who may be interested in contributing to them and dissemination of public consultation details.

In general, the failure to institutionalise the process of public consultations and more particularly the lack of compelling rules organising the process meant that the Commission was mainly conducting public consultations in a discretionary manner.<sup>21</sup> In practice, the Commission could freely decide to conduct consultations when it found them appropriate, establish the timeframes and determine whether to issue feedback statements or not.<sup>22</sup> Moreover, it has been reported that the Commission favoured consultations with NGOs established at European level, such as CONCORD, the European NGO

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<sup>19</sup> Jan Aart Scholte, ‘Conclusion’, in Jan Aart Scholte (ed), *Building global democracy? Civil society and accountable global governance* (Cambridge University Press 2011) 306, 317.

<sup>20</sup> FRAME D7.2.

<sup>21</sup> Christian Marxsen, ‘Open Stakeholder Consultations at the European Level – Voice of the Citizens?’ (2015) 21(2) European Law Journal 257; Maxime Montagner, ‘Procédures et dispositifs du dialogue entre les organisations de la société civile et la Commission Européenne. La consultation dans le cadre des politiques européennes de coopération au développement: De la reconnaissance politique à la pratique sur le terrain’ (2006) <<http://www.institut-gouvernance.org/fr/analyse/fiche-analyse-55.html>> accessed 22 February 2016.

<sup>22</sup> Deirdre Curtin and Joana Mendes, *Citizens and EU Administration. Direct and Indirect Links*, Note requested by the European Parliament’s Committee on Legal Affairs, 2011, PE 432.754, 12.

Confederation for relief and development.<sup>23</sup> NGOs also complained that consultations often took place after the majority of institutional actors had already made their decision. Hence, such consultations were not so much a means for NGOs or the public to influence the Commission than a means of legitimising European policies *a posteriori*.<sup>24</sup>

Conversely, it should be noted that ‘some interest groups are much more effective in representing their views than others. Many business interest groups and companies, for example, were very well organised and resourced and could therefore participate continuously in the consultations.<sup>25</sup> As a result of this effective organisation, ‘business and industry interest groups generally dominate the consultation process’.<sup>26</sup> Among the reasons underlying this observation, it seems that the financial means of these organisations plays a crucial role. Indeed, participation in public consultations may prove to be costly and to require a certain level of expertise, which in turn entails the hiring of experts able to reply to the technical questions of the European Commission. Hence, mainly interest groups representing the business and industry sector are able to participate in these consultations, along with a few large non-profit organisations with the resources to engage continuously.<sup>27</sup> These observations constitute a challenge to the Commission’s duty ‘to identify and promote in its policy proposals the general public interest of the Union as opposed to special interests of particular Member States or groups or parts of society – hence the need to consult widely’.<sup>28</sup>

### 3. Better Regulation Package

On 19 May 2015, the Vice-President of the European Commission, Frans Timmermans, presented the Better Regulation package including the Communication ‘Better Regulation for Better Results – an EU Agenda’ and a set of Better Regulation Guidelines for European Commission (EC) officials, as well as a Toolbox and a Commission Decision to establish an independent Regulatory Scrutiny Board. These

<sup>23</sup> Maxime Montagner, ‘Procédures et dispositifs du dialogue entre les organisations de la société civile et la Commission Européenne. La consultation dans le cadre des politiques européennes de coopération au développement: De la reconnaissance politique à la pratique sur le terrain’ (2006) <<http://www.institut-gouvernance.org/fr/analyse/fiche-analyse-55.html>> accessed 22 February 2016.

<sup>24</sup> For further information on this system, see Joana Mendes, *Participation in EU Rule-making. A Rights-Based Approach* (Oxford University Press 2011).

<sup>25</sup> Christian Marxsen, ‘Open Stakeholder Consultations at the European Level – Voice of the Citizens?’ (2015) 21(2) European Law Journal 257, 277-278.

<sup>26</sup> Pieter Bouwen, ‘Business Interest Representation and Legitimate European Governance’, in Stijn Smismans (ed), *Civil Society and Legitimate European Governance* (Edward Elgar Publishing 2006) 277.

<sup>27</sup> Christian Marxsen, ‘Open Stakeholder Consultations at the European Level – Voice of the Citizens?’ (2015) 21(2) European Law Journal 257, 278-279.

<sup>28</sup> European Commission, ‘Commission Staff Working Document. Better Regulation Guidelines’, SWD(2015) 111 final (19 May 2015) 63-64 <[http://ec.europa.eu/smart-regulation/guidelines/docs/swd\\_br\\_guidelines\\_en.pdf](http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf)> accessed 22 February 2016.

documents confirm and further define the general rules governing the process of consultation by the Commission as set out in the 2002 Commission Communication.<sup>29</sup>

With the adoption of this package, the European Commission commits to ‘deliver better rules for better results’<sup>30</sup> and to design EU policies and laws ‘so that they achieve their objectives at minimum cost’.<sup>31</sup> This package notably renews the consultation procedures and presents a number of general principles and minimum standards for stakeholder consultation, including more frequent consultations and more effective participation of stakeholders at all stages of the policy-making process. In short, better regulation ‘ensures that policy is prepared, implemented and reviewed in an open, transparent manner, informed by the best available evidence and backed up by involving stakeholders’.<sup>32</sup>

The new Better Regulation Guidelines reinforce the European Commission’s commitment to carry out high quality, transparent and accessible consultations. The European Commission will have to develop a consultation strategy for major initiatives in identifying relevant stakeholders and the most relevant forms of consultation.

So far, open public online consultations were systematically part of the consultation strategy for initiatives subject to impact assessments,<sup>33</sup> initiatives subject to evaluation and fitness checks<sup>34</sup> and green papers.<sup>35</sup> Such consultations were open for a period of 12 weeks.

Following the Better Regulation package, ‘stakeholders will be able to express their views over the entire lifecycle of a policy’<sup>36</sup> provided that the initiative has received political validation at the appropriate political level.<sup>37</sup> The Better Regulation Guidelines contain the principle of mandatory consultation on initiatives with impact assessments, on evaluations, on fitness checks and on green papers. In order to translate this commitment into practice, the Commission ‘intends to establish a web portal where each initiative can be tracked’,<sup>38</sup> so that all stakeholders can provide feedback ‘right from the very start of work

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<sup>29</sup> COM(2002) 704 final, complemented by COM(2012) 746 and accompanying SWD(2012) 422 and by COM(2014) 368.

<sup>30</sup> European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions’, COM(2015) 215 final (19 May 2015) 3 <[http://ec.europa.eu/smart-regulation/better\\_regulation/documents/com\\_2015\\_215\\_en.pdf](http://ec.europa.eu/smart-regulation/better_regulation/documents/com_2015_215_en.pdf)> accessed 28 February 2016.

<sup>31</sup> European Commission, ‘Commission Staff Working Document. Better Regulation Guidelines’, SWD(2015) 111 final (19 May 2015) 15 <[http://ec.europa.eu/smart-regulation/guidelines/docs/swd\\_br\\_guidelines\\_en.pdf](http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf)> accessed 22 February 2016.

<sup>32</sup> European Commission, ‘Better Regulation’, Impact Assessment <[http://ec.europa.eu/smart-regulation/index\\_en.htm](http://ec.europa.eu/smart-regulation/index_en.htm)> accessed 22 February 2016.

<sup>33</sup> Ibid.

<sup>34</sup> European Commission, ‘Better Regulation’, Evaluation <[http://ec.europa.eu/smart-regulation/evaluation/index\\_en.htm](http://ec.europa.eu/smart-regulation/evaluation/index_en.htm)> accessed 22 February 2016.

<sup>35</sup> European Commission, ‘Green Papers’ <[http://ec.europa.eu/green-papers/index\\_en.htm](http://ec.europa.eu/green-papers/index_en.htm)> accessed 22 February 2016.

<sup>36</sup> Communication from the Commission, Better Regulation for Better Results, An EU Agenda, 5.

<sup>37</sup> Working methods of the Commission 2014-2019, C(2014)9004.

<sup>38</sup> Ibid, 4.

of a new initiative'.<sup>39</sup> This system of mandatory, open, internet-based public consultation for a minimum period of 12 weeks still needs to be implemented in practice.

In addition to this system of mandatory consultation, which involves a more structured engagement with stakeholders where the consultation principles and standards apply,<sup>40</sup> the Better Regulation Guidelines grant individuals the possibility to give feedback earlier in the policy-making process. There are multiple points where this can occur, on the accompanying impact assessments (8 weeks), roadmaps for evaluations and fitness checks roadmaps (4 weeks), roadmap and inception impact assessments (suggested timeline for feedback on a case by case basis), draft delegated acts<sup>41</sup> and implementing acts (4 weeks), legislative or policy proposals adopted by the Commission and, where applicable, the accompanying impact assessments (8 weeks).

These different modalities provide stakeholders with a number of interesting opportunities to raise their views early in the policy-making process. In its roadmaps, the Commission explains the problems to be tackled and the objectives to be achieved through EU action. Moreover, the Commission also informs stakeholders about the detailed consultation strategy and justifies why impact assessments are not carried out for specific initiatives. The possibility that stakeholders will be consulted on these elements is welcome, as well as consultations on inception impact assessments. The latter may be defined as a 'roadmap for initiatives subject to an [impact assessment] that sets out in greater detail the description of the problem, issues related to subsidiarity, the policy objectives and options as well as the likely impacts of each option'.<sup>42</sup> Public consultations are also to be organised for legislative or policy proposals adopted by the Commission, together with accompanying impact assessments if applicable. For the first time, draft texts of delegated acts and of 'important implementing acts' are subject to consultations open to the public at large. This inclusion of non-legislative acts in the consultative process constitutes a major innovation in the practice of the European Commission.

As to the consultation process itself, these Guidelines reiterate the four principles i.e. participation; openness and accountability; effectiveness and coherence and the five minimum standards i.e. clarity; targeting; publication; consultation period and feedback governing stakeholder consultations mentioned in the 2002 Communication.<sup>43</sup>

The four general principles governing the consultation process may be described as follows:

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<sup>39</sup> Working methods of the Commission 2014-2019, C(2014)9004, 9.

<sup>40</sup> European Commission, 'Commission Staff Working Document. Better Regulation Guidelines', SWD(2015) 111 final (19 May 2015) 66 <[http://ec.europa.eu/smart-regulation/guidelines/docs/swd\\_br\\_guidelines\\_en.pdf](http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf)> accessed 22 February 2016.

<sup>41</sup> A number of exceptions to this principle figure at section 4.1 of the guidelines.

<sup>42</sup> European Commission, 'Commission Staff Working Document. Better Regulation Guidelines', SWD(2015) 111 final (19 May 2015) 15 <[http://ec.europa.eu/smart-regulation/guidelines/docs/swd\\_br\\_guidelines\\_en.pdf](http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf)> accessed 22 February 2016.

<sup>43</sup> COM(2002) 704 final, complemented by COM(2012) 746 and accompanying SWD(2012) 422 and by COM(2014) 368.

- Participation: consultations should be conducted as widely as possible in adopting an inclusive approach;
- Openness and accountability: the process has to be transparent;
- Effectiveness: the consultation has to be conducted at a moment when the views can still influence the policy-making process, respect the principle of proportionality and specific restraints;
- Coherence: the consultation process has to be consistent across the services, as well as the evaluation, the review and the quality control of the process.

In addition, five minimum standards regulate the process:

- Clarity: communication and consultation documents should be clear, concise and include necessary information;
- Targeting: all relevant parties should have an opportunity to express their opinions;
- Publication: an adequate awareness-raising publicity should be ensured and communication channels should be adequate to target audiences. Open public consultations should be available on the internet on a ‘single access point’;<sup>44</sup>
- Consultation period: sufficient time for planning and responses should be allocated;
- Feedback: contributions should be published after acknowledging their receipt. If published within 15 working days, such publication of contributions on the ‘single access point’ may replace such acknowledgment of receipt. These results should be published and adequate feedback should be given on how the results have been taken into account.

The responsibility for running stakeholder consultations is held by the Commission service responsible for the initiative, which also chooses consultation tools and methods, target groups and available resources while ‘taking into account the key mandatory requirements set out in these guidelines’.<sup>45</sup> The strategies and documents must be discussed and agreed by the inter-service group to be established for the policy initiative. The Guidelines allow the consultations to be conducted by external consultants, as long as the lead service remains accountable for establishing the scope and objective of the consultation, its process, outcome and compliance with the standards set out above.

As consultation is a dynamic, on-going process, it is important to carefully plan and design a consultation strategy. Pursuant to the Guidelines, such a strategy should identify the consultation activities, the methods and tools to announce the consultation, identify the stakeholders, provide them with the

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<sup>44</sup> European Commission, ‘Your voice in Europe’ <[http://ec.europa.eu/yourvoice/consultations/index\\_en.htm](http://ec.europa.eu/yourvoice/consultations/index_en.htm)> accessed 22 February 2016.

<sup>45</sup> European Commission, ‘Commission Staff Working Document. Better Regulation Guidelines’, SWD(2015) 111 final (19 May 2015) 68 <[http://ec.europa.eu/smart-regulation/guidelines/docs/swd\\_br\\_guidelines\\_en.pdf](http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf)> accessed 22 February 2016.

opportunity to express their views, endeavour to receive relevant input of highest possible quality, qualify the time and resources needed and be proportionate to the initiative it supports and the objectives of the consultation process.

Once such a strategy is established, the concerned service should announce and communicate about the consultation, run the latter, provide information on the contributions and analyse their content. Several ways to publicise the consultation are suggested in the Guidelines, such as press conferences, Commission blogs and social media or directly contacting interested parties or organisations. In this regard, the EU should strive to address not only Brussels-based platforms, but also to consult lower profile CSOs. The service may then run the consultation and send acknowledgments of receipts for written contributions received.

After the consultation has ended, these contributions should be published. Moreover, the input received should be thoroughly analysed and the service should provide information on the outcome of the work. An overall synopsis report should present the results of the consultation activities. For legislative proposals, an ‘explanatory memorandum should reflect how far the main contributions have been taken into account in the draft policy initiative and if not, [substantiate] why not’.<sup>46</sup>

In our view, it appears particularly important that the Commission publishes a summary of who was involved in the public consultation in order to shed light on the representativeness of the various stakeholders. Such a mechanism would enable observers to assess the stakeholders’ representativeness and to determine whether certain categories of actors in the private sector dominate the interactions and replies to the consultation.<sup>47</sup>

We recommend that the relevant Commission service conduct an internal quality assessment of the consultation process in order to improve future consultations. The effectiveness of the consultation strategy may be assessed by an end-of-process survey addressed to all consulted parties.

In addition to these Guidelines, which establish the mandatory requirements for each step in the policy cycle, a toolbox provides additional guidance and advice which is ‘not binding unless expressly stated to be so’.<sup>48</sup> This toolbox *inter alia* contains a specific tool on fundamental rights and human rights (number 24), which will be discussed further below.

In general, these new Guidelines constitute an interesting set of rules established by the Commission in order to reply to the criticism of the former Commission Communication of 2002. That being said, the practical value of these Guidelines remains to be seen. While the tools and commitments are in place, it

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<sup>46</sup> European Commission, ‘Commission Staff Working Document. Better Regulation Guidelines’, SWD(2015) 111 final (19 May 2015) 84 <[http://ec.europa.eu/smart-regulation/guidelines/docs/swd\\_br\\_guidelines\\_en.pdf](http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf)> accessed 22 February 2016.

<sup>47</sup> Concord, ‘The European Commission’s “Better Regulation Package” will it serve poverty eradication and human rights’, Spotlight Report 2015 Policy Paper 7 <<http://www.concordeurope.org/coherent-policies/pcd-in-the-eu/item/465-spotlight-2015-the-european-commission-s-better-regulation-package>> accessed 22 February 2016.

<sup>48</sup> Ibid, 4.

remains uncertain at this stage whether the different services of the Commission will be willing to implement these rules. The effective implementation of these Guidelines requires a shift in the way the Commission has been functioning so far.<sup>49</sup>

The Commission does not have a good track record in this regard and there are numerous examples where commitments or Guidelines in this field have not been applied by the Commission. In a previous report published in 2015,<sup>50</sup> a FRAME team observed that within the European Commission, the role of public consultations as a means for DG Trade to engage with CSOs only comes about when a new initiative is launched or a new negotiation takes place, such as the Transatlantic Trade and Investment Partnership (TTIP) negotiations. Yet, CSOs have frequently criticised the lack of transparency<sup>51</sup> and consultation accompanying negotiations with third countries on free trade agreements, despite the existence of a Factsheet issued by the European Commission on this area, which provided for several avenues of engagement.<sup>52</sup> In July 2015, new DG Trade ‘Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives’ were issued,<sup>53</sup> clarifying that stakeholder consultations had to be conducted ‘in line with relevant Commission guidelines’, i.e. the Better Regulation Guidelines. Moreover, while this package has been presented as a comprehensive, ambitious and innovative reform to streamline EU policy-making, it has also been criticised for rendering the latter ‘as patchy as ever’ and for entailing a panoply of open questions.<sup>54</sup>

#### 4. Inter-institutional Relations

As stated in the new Better Regulation Guidelines,

Better Regulation covers the whole policy cycle – policy design and preparation, adoption; implementation (transposition, complementary non-regulatory actions), application (including enforcement), evaluation and revision. For each phase of the policy cycle, there are a number of Better Regulation principles, objectives, tools and procedures to make sure that the EU has the best regulation possible. These relate to

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<sup>49</sup> The human rights aspects of this engagement are further discussed below, in section II.A.5.

<sup>50</sup> FRAME D7.2.

<sup>51</sup> Nicolás Brando, Nicolas Hachez, Brecht Lein, Axel Marx, ‘Assessing the impact of EU trade and development policies on human rights’ (FRAME D9.2 2015) (hereafter FRAME D9.2) 149.

<sup>52</sup> European Commission, ‘Factsheet – Transparency in EU trade negotiations’ <[http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc\\_151381.pdf](http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151381.pdf)> accessed 22 February 2016.

<sup>53</sup> European Commission, ‘Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives’ (July 2015) <[http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153591.pdf](http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf)> accessed 22 February 2016.

<sup>54</sup> Alberto Alemanno, ‘How Much Better is Better Regulation? Assessing the Impact of the Better Regulation Package on the European Union – A Research Agenda’ (2015) 6(3) European Journal of Risk Regulation 344.

planning, impact assessment, stakeholder consultation, implementation and evaluation.<sup>55</sup>

Given that the principles of better regulation concern the entire policy cycle, the European Commission's commitment in its Better Regulation package to more openness, participation and evidence-based policymaking, had to be extended to both the European Parliament and the Council. The Better Regulation package has altered inter-institutional relations and required the negotiation of an inter-institutional agreement on better law-making.<sup>56</sup> A provisional text was adopted in December 2015,<sup>57</sup> in which 'the three institutions consider that the use of stakeholder consultation, ex-post evaluation of existing legislation and impact assessments of new initiatives will help achieve the objective of better law-making'.<sup>58</sup> Moreover, this agreement states that:

Public and stakeholder consultation is integral to well-informed decision-making and to improving the quality of law making. Without prejudice to the specific arrangements applying to the Commission's proposals under Article 155(2) TFEU, the Commission will, prior to the adoption of its proposal, conduct public consultations in an open and transparent way, ensuring that their modalities and time-limits allow for the widest possible participation. The Commission will in particular encourage the direct participation of SMEs and other end-users in the consultations. This will include public internet-based consultations. The results of such consultations shall be communicated without delay to both legislators and made public.<sup>59</sup>

Once a Commission initiative is published, the other institutions have to ensure that the text remains compliant with the Charter during the legislative process.<sup>60</sup>

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<sup>55</sup> European Commission, 'Commission Staff Working Document. Better Regulation Guidelines', SWD(2015) 111 final (19 May 2015) 5 <[http://ec.europa.eu/smart-regulation/guidelines/docs/swd\\_br\\_guidelines\\_en.pdf](http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf)> accessed 22 February 2016.

<sup>56</sup> Alberto Alemanno, 'How Much Better is Better Regulation? Assessing the Impact of the Better Regulation Package on the European Union – A Research Agenda' (2015) 6(3) European Journal of Risk Regulation 344.

<sup>57</sup> The provisional text of the proposed interinstitutional agreement on better regulation is available at <[http://ec.europa.eu/smart-regulation/better\\_regulation/documents/20151215\\_iia\\_on\\_better\\_law\\_making\\_en.pdf](http://ec.europa.eu/smart-regulation/better_regulation/documents/20151215_iia_on_better_law_making_en.pdf)> accessed 22 February 2016. This agreement will enter into force after approval by the three institutions.

<sup>58</sup> Preamble of the provisional interinstitutional agreement on better regulation, paragraph 4.

<sup>59</sup> European Parliament, 'Draft report on the conclusion of an Interinstitutional Agreement on Better Law-Making between the European Parliament, the Council of the European Union and the European Commission', 2015/XXXX(ACI) (12 January 2016) <<http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-575.118&format=PDF&language=EN&secondRef=03>> accessed 22 February 2016.

<sup>60</sup> See for instance the Council of the EU, *Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies*, 18 May 2011 and *Conclusions on the Council's actions and initiatives for the implementation of the Charter of Fundamental rights of the European Union*, 23 May 2011.

## 5. Better Regulation, Fundamental Rights and Human Rights

The Guidelines described above do not contain any reference to fundamental rights or human rights as such. Yet, the Charter of Fundamental Rights of the EU is binding for all the Commission's acts and initiatives.<sup>61</sup> This is not limited to legislative initiatives and the Commission set up an assessment methodology based on a 'Fundamental Rights Check-list' to be applied by all Commission services.<sup>62</sup>

More specifically in relation to the consultation process, the toolbox mentioned above – which provides guidance to the Commission's services in their organisation of consultations – contains a specific tool number 24 focusing on fundamental rights. This tool sheds light on a number of points for the Commission to consider when assessing fundamental rights in impact assessments. According to this tool,

questions on fundamental rights should be addressed during the early preparatory stage of any envisaged initiative i.e. when the initial Roadmap is being prepared. Stakeholder consultations and studies should include collection of data on any potential fundamental rights aspect. If an early screening suggests that any policy options may raise substantial questions about fundamental rights requiring further guidance, you should consult colleagues from SJ and DG JUSTICE (and DG EMPL as regards the rights of persons with disabilities) who could also be invited to participate in the IA work of the interservice group. The EU Agency for Fundamental Rights (FRA) also provide a source of valuable information relating to fundamental rights, e.g. through providing relevant information or data or carrying out research, surveys and studies.<sup>63</sup>

Next to the Charter of Fundamental Rights and its explanations, the tool also refers to other sources of rights that may be affected by initiatives. If the initiative has an effect outside the EU, consideration should also be given to international human rights instruments in addition to the Charter of Fundamental Rights. More generally, these resources include the Commission Charter Strategy<sup>64</sup> describing the Commission's approach to implementing the Charter. Yet, it should be noted that this Strategy does not contain any provision regulating consultations on human rights aspects during the drafting phase of initiatives. As suggested by Amnesty International, '[i]n order to ensure that human rights issues raised in the impact assessment stage are duly addressed in the draft, the Commission should seek advice from external experts, including the FRA, Council of Europe and civil society experts before adopting its proposal'.<sup>65</sup>

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<sup>61</sup> Charter of Fundamental Rights of the European Union [2012] OJ C326/02, art 51.

<sup>62</sup> This checklist is available at <[http://ec.europa.eu/justice/fundamental-rights/files/operational-guidance\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/operational-guidance_en.pdf)> accessed 29 April 2016.

<sup>63</sup> European Commission, 'Better Regulation Toolbox' 177-178 <[http://ec.europa.eu/smart-regulation/guidelines/docs/br\\_toolbox\\_en.pdf](http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf)> accessed 22 February 2016 (footnotes omitted).

<sup>64</sup> European Commission, 'Communication from the Commission. Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union' COM(2010) 573 final (19 October 2010) <[http://ec.europa.eu/justice/news/intro/doc/com\\_2010\\_573\\_en.pdf](http://ec.europa.eu/justice/news/intro/doc/com_2010_573_en.pdf)> accessed 22 February 2016.

<sup>65</sup> Amnesty International European Institutions Office, 'Amnesty International – Outline for an EU internal human rights strategy Extract from AI's contribution on the future of EU justice and home affairs (January 2014) 3

Another interesting source of inspiration for the European Commission in its fundamental rights impact assessments is the operational guidance on taking account of fundamental rights in Commission impact assessments, which explores these issues in depth and provides relevant examples.<sup>66</sup> Moreover, the tool refers to the Fundamental Rights Agency's 'Charterpedia'<sup>67</sup> which does not represent an official Commission position, but provides an easy overview of several rights and case law. The case law of the European Court of Justice (CJEU) and of the European Court of Human Rights, as well as the European Convention on Human Rights and the opinions and general comments of the UN human rights monitoring committees may also be relevant to such assessments.

It is regrettable that these references to fundamental rights are not integrated in the Guidelines themselves but in the toolbox instead, which serves as guidance and is deprived of any legally binding value. Yet, the general inclusion of human rights considerations in the Better Regulation Package, even as a mere tool, may provide guidance to the Commission's Services.

This being said, the main challenge for the future remains to ensure the effective implementation of these tools.<sup>68</sup> This may be read together with the EU Action Plan on human rights and democracy 2015-2019 to 'continue to improve the incorporation of human rights in Commission impact assessments for proposals with external effect and likely significant impacts on human rights'.<sup>69</sup>

As suggested by CONCORD and the International Federation for Human Rights (FIDH), human rights organisations should be systematically consulted at an early stage of the policy-making process and the impact of different policies on human rights should be systematically assessed. Moreover, affected communities and human rights defenders should be included among the stakeholders targeted by European Commission consultations. For instance, ActionAid has criticised the EU for not consulting communities in developing countries, even when they were the most concerned by certain policies of the European Commission.<sup>70</sup> Finally, the Regulatory Scrutiny Board should have access to human rights expertise, for instance by including one member specifically selected for this task. This Board, set up on 1

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[<http://www.amnesty.eu/content/assets/Reports/AI\\_Outline\\_for\\_an\\_EU\\_internal\\_human\\_rights\\_strategy.pdf>](http://www.amnesty.eu/content/assets/Reports/AI_Outline_for_an_EU_internal_human_rights_strategy.pdf) accessed 22 February 2016.

<sup>66</sup> European Commission, 'Commission Staff Working Paper. Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments', SEC(2011) 567 final (6 May 2011) <[http://ec.europa.eu/smart-regulation/impact/key\\_docs/docs/sec\\_2011\\_0567\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/key_docs/docs/sec_2011_0567_en.pdf)> accessed 22 February 2016.

<sup>67</sup> European Union Fundamental Rights Agency, 'Charterpedia' <<http://infoportal.fra.europa.eu/InfoPortal/infobaseShowContent.do>> accessed 22 February 2016.

<sup>68</sup> Concord and FIDH, 'The European Commission's "Better Regulation Package" will it serve poverty eradication and human rights', Spotlight Report 2015 Policy Paper <<http://www.concordeurope.org/coherent-policies/pcd-in-the-eu/item/465-spotlight-2015-the-european-commission-s-better-regulation-package>> accessed 22 February 2016.

<sup>69</sup> Council of the European Union, Foreign Affairs Council, 'Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019' (20 July 2015) <<http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf>> accessed 22 February 2016.

<sup>70</sup> Actionaid, 'Actionaid Expose: European Commission fails to respect Lisbon Treaty <[http://www.actionaid.org/sites/files/actionaid/actionaid\\_expose\\_on\\_biofuels\\_may\\_2013\\_final.pdf](http://www.actionaid.org/sites/files/actionaid/actionaid_expose_on_biofuels_may_2013_final.pdf)> accessed 22 February 2016.

July 2015 to replace the Impact Assessment Board, provides control over and support to Commission impact assessments.<sup>71</sup> It is composed of three high-level Commission officials and three members selected outside the Commission on the basis of their expertise. We recommend that one of them should have specific expertise in the field of human rights.

## 6. A Promising Perspective: From Commitment to Practice

Public consultations serve as a key point for engagement with NSAs, including the public, across the EU in the EU policy-making process. The new Guidelines adopted in May 2015 indicate there will be more openness and responsiveness within the Commission towards public participation in policy-making. The fact that the public will be able to share views on the entire lifecycle of a given policy constitutes a particularly interesting feature of these new Guidelines. That being said, the practical value of these Guidelines remains to be seen. As mentioned above, the effective implementation of these Guidelines requires a whole shift in the way the Commission has been functioning so far.

It has been observed that it is often the same NSAs – generally better organised, having more financial means, but not necessarily always more expertise on specific subjects – that may generally reply to such consultations, while other NSAs are systematically left out of the process. In this regard, it seems particularly important to ensure adequate awareness-raising publicity is undertaken and that relevant communication channels target the appropriate audiences.

Moreover, the Commission should systematically communicate about the identities of those who were involved in the public consultation in order to allow an assessment of the representativeness of the stakeholders consulted. It has been noted in a previous FRAME report on impact assessments for legislative proposals, that the summaries of impact assessments often demonstrated that not many CSOs participated in such consultations and that the effort undertaken

by the consultant to reach out to vulnerable stakeholders who do not have the means or resources to participate spontaneously in the consultation is insufficient, and leads to truncated findings. Regarding the use of the information gathered through consultations [...] it comes only second to quantitative data and modelling, thereby causing stakeholders to be inadequately anchored in the experience of affected stakeholders.<sup>72</sup>

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<sup>71</sup> European Commission, ‘Decision of the President of the European Commission on the establishment of an independent Regulatory Scrutiny Board’, C(2015) 3263 final (19 May 2015).

<sup>72</sup> FRAME D9.2, 124-125.

Hence, it is not sufficient to offer the possibility of contributing to a process that would not be accessible to all types of stakeholders, including more vulnerable groups.<sup>73</sup> The EU should be pro-active in reaching out to these groups.

The follow-up given to the consultations also constitutes a crucial point. Reports summarising these consultations should transparently present the different views expressed in these consultations and explain how these concerns were taken into consideration.

## B. Transparency

Transparency is the lifeblood of engagement. If NSAs are not aware of EU activities, policy developments and the policy-making process more generally, they cannot contribute to them. Transparency has been identified in FRAME 7.2 as a significant cross-cutting issue across all the NSAs.<sup>74</sup> Information on engagement between the EU and IFIs for instance is sparse, changes to the DGs have stalled electronic channels of communication<sup>75</sup> and some of the information on EU websites is outdated. HRDs reported difficulty identifying contacts in third countries in some cases as the details of EU foreign delegations were not kept up to date. In other instances the information is available, but is difficult to find. Next to public consultations, transparency remains a significant cross-cutting issue with regard to the engagement with NSAs in the protection and promotion of human rights. While NSAs may play a substantial role in safeguarding transparency within the EU institutions, it should be noted that they can also generate problems of their own.<sup>76</sup>

As far as the EU institutions are concerned, a number of positive moves may be observed in this regard, such as the introduction of a transparency register,<sup>77</sup> the publication of draft documents for the TTIP negotiations (after intense CSO pressure) and the Regulation on access to documents.<sup>78</sup> More generally, a transparency portal was set up on the European Commission's website to give EU citizens direct access to information helping them to be better informed and better prepared to follow and participate in the

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<sup>73</sup> In this context, vulnerable groups refer to groups of people who do not have the means or resources to participate spontaneously in the consultation is insufficient. For further information on the notion of 'vulnerable groups' and on their human rights protection, see Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups – The European Human Rights Framework* (Hart Publishing 2015).

<sup>74</sup> FRAME D7.2, 163.

<sup>75</sup> This issue will be discussed in the next section on Coherence.

<sup>76</sup> FRAME D7.1, 89 and 114.

<sup>77</sup> European Union, 'Transparency and the EU'

<<http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en#en>> accessed 23 February 2016.

<sup>78</sup> European Parliament and Council Regulation (EC) 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.

EU decision-making process, to enjoy [their] rights and to play [their] role as a European citizen to the full.<sup>79</sup>

The cross-cutting issue of transparency has become particularly topical during the last few months, notably in relation to 'trilogues', which are informal meetings between the European Commission, the Council and the European Parliament that take place at several stages of the EU legislative procedure. As the European Ombudsman recently observed, these 'trilogues' are the place where deals are made and the vast majority of EU draft legislation is shaped through this process.<sup>80</sup> The very central role of these 'trilogues' in the EU legislative process raises the question of their openness and transparency towards EU citizens. In a letter of 30 September 2015 to the three institutions, 15 NGOs stated that these 'trilogues' have 'regardless of intent, become a means for EU institutions to bypass democratic good practices, prevent public participation and are contrary to the principles of transparency and accountability recognised under the EU treaties, including the citizen's right to access public documents'.<sup>81</sup> This topic has been at the core of subsequent developments discussed further below.<sup>82</sup>

In the provisional inter-institutional agreement on better law-making adopted in December 2015,<sup>83</sup> the European Commission, the Council and the European Parliament committed to

ensure the transparency of legislative procedures, on the basis of relevant legislation and case-law, including an appropriate handling of trilateral negotiations. They will improve communication to the public during the whole legislative cycle and in particular announce jointly the successful outcome of the legislative process in the ordinary legislative procedure once they have reached agreement, namely through joint press conferences or any other means considered appropriate.<sup>84</sup>

Moreover,

[i]n order to facilitate traceability of the various steps in the legislative process, the three institutions undertake to identify, by 31 December 2016, ways of further developing

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<sup>79</sup> European Commission, 'Transparency portal' <[http://ec.europa.eu/transparency/index\\_en.htm](http://ec.europa.eu/transparency/index_en.htm)> accessed 20 February 2016.

<sup>80</sup> European Ombudsman, 'Ombudsman launches public consultation on transparency of "trilogues"' (10 December 2015) <<http://www.ombudsman.europa.eu/en/press/release.faces/en/61593/html.bookmark>> accessed 24 February 2016.

<sup>81</sup> Letter sent by 16 NGOs to the European Council, the Council and the European Parliament on 30 September 2015 <<http://www.statewatch.org/news/2015/sep/ngo-letter-trilogues.pdf>> accessed 24 February 2016.

<sup>82</sup> See also Päivi Leino, 'On knowledge as power: transparency of EU law-making procedures' (10 January 2016) <<http://eulawanalysis.blogspot.com/2016/01/on-knowledge-as-power-transparency-of.html>> accessed 24 February 2016.

<sup>83</sup> The provisional text of the proposed interinstitutional agreement on better regulation is available at <[http://ec.europa.eu/smart-regulation/better\\_regulation/documents/20151215\\_iia\\_on\\_better\\_law\\_making\\_en.pdf](http://ec.europa.eu/smart-regulation/better_regulation/documents/20151215_iia_on_better_law_making_en.pdf)> accessed 22 February 2016. This agreement will enter into force after approval by the three institutions.

<sup>84</sup> Provision 28 of the provisional interinstitutional agreement on better regulation.

platforms and tools to this end, with a view to establishing a dedicated joint database on the state of play of legislative files.<sup>85</sup>

In December 2015, the European Ombudsman launched a public consultation on the transparency of 'trilogues', stating that Europeans should have 'a right to an EU law-making process that is as open as possible, while elected representatives also need the space to negotiate'.<sup>86</sup>

Pursuant to Regulation 1049/2001, legislative documents, i.e. documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should be directly accessible unless they concern one of the exceptions mentioned in the Regulation. Among these exceptions, Article 4(3) refers to situations where the institution has not yet taken a decision. The Council invoked this provision to refuse access to documents in several cases, but the CJEU developed a narrow interpretation of this exception in favour of transparency.<sup>87</sup>

More generally, the commitments expressed by the three institutions in the provisional inter-institutional agreement on better regulation represent promising moves toward increased transparency of these institutions, provided that these commitments are accompanied by adequate institutional attitudes in practice. The public consultation<sup>88</sup> launched by the European Commission on 1 March 2016 on a proposal for a mandatory Transparency Register covering the European Parliament, the Council of the EU and the European Commission reinforces this trend. Such a common Transparency Register may further increase transparency with regard to lobbyists seeking to influence the European institutions.

Despite the positive developments in favour of increased transparency described above, a number of issues relating to transparency remain problematic, as discussed in the following sections.

## 1. Right of Access to Documents

Article 15 of the Treaty on the Functioning of the European Union (TFEU) grants citizens and residents of EU countries the right of access to documents of the European Parliament, the Council and the Commission. Regulation (EC) No. 1049/2001 from these three institutions sets out the general principles in this field and its limits. In its 2015 report on the application of this Regulation in 2014, the European Commission defined the public's right to access documents as 'a cornerstone of the Commission's

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<sup>85</sup> Provision 28a of the provisional interinstitutional agreement on better regulation.

<sup>86</sup> European Ombudsman, 'Ombudsman launches public consultation on transparency of "trilogues"' (10 December 2015) <<http://www.ombudsman.europa.eu/en/press/release.faces/en/61593/html.bookmark>> accessed 24 February 2016.

<sup>87</sup> See for instance European Court of Justice, C-280/11 P, *Council v Access Info Europe*.

<sup>88</sup> European Commission, 'Public Consultation on a proposal for a mandatory Transparency Register' <[http://ec.europa.eu/transparency/civil\\_society/public\\_consultation\\_en.htm](http://ec.europa.eu/transparency/civil_society/public_consultation_en.htm)> accessed 14 March 2016.

approach to transparency, supporting the Commission's proactive publication of a wealth of information on its website'.<sup>89</sup>

Yet, complaints relating to a lack of transparency within EU institutions still top the list of complaints received by the European Ombudsman, amounting to between 20 and 30% of the total number of complaints.<sup>90</sup> Most of these cases concern the institutions' reluctance to grant access to documents or information.

An interesting illustration of the importance of transparency is provided by the recent negotiations entered into by the European Commission on behalf of the EU on a wide-ranging trade and investment partnership agreement with the United States – the TTIP. The public interest in these negotiations has been unprecedented, both in terms of seeking information on the progress of these negotiations and in the search for a means to shape the outcome of the negotiations. Although the Commission has made efforts to enhance the transparency of the negotiations and to promote public participation within the TTIP negotiating process, a number of dissenting voices have expressed their dissatisfaction.

In July 2014, the European Ombudsman presented a first set of suggestions to the Commission to enhance transparency in this process. In November 2014, the Commission outlined a range of transparency measures aiming to open the TTIP negotiations as much as possible to the public. Following a public consultation, the Ombudsman presented ten further suggestions to the Commission in January 2015 to ensure that the TTIP negotiating process enjoys greater legitimacy and public trust.<sup>91</sup> In response to the Ombudsman, the Commission announced in March 2015 that it was building a more pro-active approach to publishing TTIP documents and that it was seeking to persuade the United States of the need for greater transparency in these trade talks. It notably published the list of TTIP documents that it shared with the Council and the Parliament since the start of the negotiations.<sup>92</sup>

In addition, on 2 December 2015, the European Parliament Trade Committee chair announced that all Members of the European Parliament would have access to all categories of confidential documents on TTIP talks with the United States pursuant to a European Parliament/European Commission agreement approved by the College of Commissioners. These documents also include the 'consolidated texts'

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<sup>89</sup> European Commission, 'Report on the application in 2014 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents', 6 August 2015, COM(2015) 391 final.

<sup>90</sup> European Ombudsman, Annual Report 2014

<[http://www.ombudsman.europa.eu/showResource?resourceId=1432800522448\\_AnnualReport2014\\_EN\\_web\\_final.pdf&type=pdf&download=true&lang=en](http://www.ombudsman.europa.eu/showResource?resourceId=1432800522448_AnnualReport2014_EN_web_final.pdf&type=pdf&download=true&lang=en)> 7 accessed 23 February 2016.

<sup>91</sup> European Ombudsman, Decision of the European Ombudsman closing her own-initiative inquiry OI/10/2014/RA concerning the European Commission

<<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark>> accessed 23 February 2016.

<sup>92</sup> European Commission, 'The Transatlantic Trade and Investment Partnership (TTIP). Towards an EU-US trade deal', List of Documents (26 February 2016) <[http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc\\_153263.pdf](http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153263.pdf)> accessed 26 February 2016.

reflecting the US position.<sup>93</sup> The MEPs will be able to read these sensitive documents in a secure reading room in the European Parliament, take handwritten notes and in principle use this information to hold EU negotiators to account. Yet, several MEPs have reported that they were requested to sign a confidentiality agreement in order to see documents in the guarded room.<sup>94</sup> This requirement constitutes a major step-back, removing citizens' representatives from the debates and discussions on TTIP.

Hence, the continuous pressure of the European ombudsman, the MEPs, the civil society and the public in general has generated a number of positive developments towards increased openness and transparency of the negotiating process, but much progress still needs to be made to open this debate to the public at large.

In addition, the role of the CJEU should not be underestimated as a venue to promote transparency and the right of access to documents in the EU. It would exceed the scope of this report to conduct an exhaustive analysis of the CJEU case-law on transparency.<sup>95</sup> In short, the Court refuses to accept general confidentiality in the field of legislation, which is why access must be maximised and exceptions construed tightly.<sup>96</sup> Yet, a number of exceptions to the right of access are provided by Article 4 of the Regulation 1049/2001, such as privacy and public security considerations, which may reduce the scope of transparency and the rights of access.

## 2. Balance of Interests and Lobbying

Increasing the transparency of the EU decision-making process may also favour a more balanced representation of interests and avoid situations of undue pressure by lobbying organisations. In this regard, the transparency register allows people to identify which interests are pursued, by whom and with

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<sup>93</sup> European Parliament, 'All MEPS to have access to all confidential TTIP documents' (12 December 2015) <http://www.europarl.europa.eu/news/en/news-room/20151202IPR05759/All-MEPs-to-have-access-to-all-confidential-TTIP-documents> accessed 28 February 2016.

<sup>94</sup> See for instance the opinion published by the MEP Molly Scott Cato in The Guardian entitled 'I've seen the secrets of TTIP, and it is built for corporations not citizens' <<http://www.theguardian.com/commentisfree/2015/feb/04/secrets-ttip-corporations-not-citizens-transatlantic-trade-deal>> accessed 24 February 2016; more recently, an article by Philipp Inman in The Guardian on 18 February 2016 entitled 'MPs can view TTIP files – but take only pencil and paper with them' quoting MEP Caroline Lucas that 'a cloak of secrecy still surrounds TTIP. If the same rules apply here in the UK as they do in Brussels, which is what the minister is implying, then MPs will be bound by a confidentiality agreement if they want to see the text. This opaque process, which shuts citizens out of this crucial debate, is profoundly undemocratic'.

<sup>95</sup> Irma Spahiu, 'Courts: An Effective Venue to Promote Government Transparency? The Case of the Court of Justice of the European Union' (2015) 31(80) Utrecht Journal of International and European Law 5. Among the recent case-law, see for instance General Court, T-677/13, *Axa Versicherung AG v European Commission*, 7 July 2015; General Court, T-402/12, *Carl Schlyter v European Commission*, 16 April 2015.

<sup>96</sup> Court of Justice, C-506/08 P, *Sweden v MyTravel and Commission*, 21 July 2011, paragraph 75 and the case-law cited.

which means.<sup>97</sup> Lobbyists seeking to influence EU policymakers have to disclose certain information on their budget and methods on this register. On 24 February 2016, there were 9,209 registrants in the register, out of which a majority (4,699) were in-house lobbyists and trade/business/professional associations.<sup>98</sup>

The registration is currently made on a voluntary basis, but the European Parliament seeks to make it obligatory and the Juncker Commission announced that it would come up with its own proposal for a mandatory register of lobbyists covering the Commission, the European Parliament and the Council in 2015. As of February 2016, this proposal has not yet been presented by the European Commission.

As noted in the European Ombudsman's 2014 Annual Report, 'Brussels is fast becoming the second most important lobbying hub in the world, after Washington. So, not surprisingly, the Ombudsman's work in 2014 increasingly focused on transparency in lobbying activities'.<sup>99</sup>

In February 2016, the European Ombudsman demanded more transparency of the European Commission on so-called expert groups, notably by publishing the minutes of meetings as well as positions advanced by individual members. Confidentiality should only be allowed in exceptional situations 'following a majority vote within the group and with the consent of the commission'.<sup>100</sup>

The two decisions adopted by the European Commission on 25 November 2014 to record and publish data on meetings between high level EU public officials and interest representatives is a promising move in the right direction. Indeed, since 1 December 2015, senior European Commission staff – which includes Commissioners, members of their Cabinets and Directors-General – shall disclose details of meetings with lobbyists including their names, time, location and subject of the meeting on their websites.<sup>101</sup>

We recommend that the European Parliament and the Council follow this example and also publish information on such meetings with lobbyists. Moreover, the system should be extended to the disclosure of comprehensive information on the lobbying activity, as suggested by the NGO Transparency International, in order to create a 'legislative footprint' for EU legislation. All three EU institutions should record and disclose the input received from lobbyists and interest representatives at the different stages

<sup>97</sup> European Union, 'Transparency and the EU'

<<http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en#en>> accessed 23 February 2016.

<sup>98</sup> European Union, 'Transparency and the EU', Statistics <<http://ec.europa.eu/transparencyregister/public/homePage.do?locale=en#en>> accessed 23 February 2016.

<sup>99</sup> European Ombudsman, 'Annual Report 2014' 8 <[http://www.ombudsman.europa.eu/showResource?resourceId=1432800522448\\_AnnualReport2014\\_EN\\_web\\_final.pdf&type=pdf&download=true&lang=en](http://www.ombudsman.europa.eu/showResource?resourceId=1432800522448_AnnualReport2014_EN_web_final.pdf&type=pdf&download=true&lang=en)> accessed 23 February 2016.

<sup>100</sup> European Ombudsman, 'Ombudsman: Citizens need to know more about expert groups' advice to Commission' <<http://www.ombudsman.europa.eu/press/release.faces/en/63520/html.bookmark>> accessed 24 February 2016.

<sup>101</sup> European Commission, Decision of 25 November 2014 on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals, C(2014) 9051 final <[http://ec.europa.eu/news/2014/docs/c\\_2014\\_9051\\_en.pdf](http://ec.europa.eu/news/2014/docs/c_2014_9051_en.pdf)> accessed 24 February 2016; Decision of 25 November 2014 on the publication of information on meetings held between Director-Generals of the Commission and organisations or self-employed individuals C(2014) 9048 final <[http://ec.europa.eu/news/2014/docs/c\\_2014\\_9048\\_en.pdf](http://ec.europa.eu/news/2014/docs/c_2014_9048_en.pdf)> accessed 24 February 2016.

of the EU law-making process.<sup>102</sup> The NGO further suggests that the information on the influence of lobbyists be published on one centralised online database.

### 3. Dissemination

The dissemination of documents to NSAs should be developed in a more systematic and proactive manner, not exclusively relying upon specific requests by these NSAs. Indeed, there are situations that may justify a more active system of dissemination by EU institutions to interested NSAs.

For instance, the European Ombudsman recommended that the transparency of meetings be increased or improved in relation to the European Commission's meetings with tobacco lobbyists. The Ombudsman opened an inquiry on this subject after the NGO Corporate Europe Observatory had complained about the fact that the Commission was failing to meet UN World Health Organization (WHO) transparency rules on tobacco. In her recommendations of 5 October 2015, the Ombudsperson, Emily O'Reilly, called for a pro-active publication of meetings and relevant minutes for all interactions with tobacco organisations. She considered that the Commission was not fully implementing WHO rules and guidelines on transparency and tobacco lobbying, to which the EU was a party.

The European Commission has a particular responsibility in its role as initiator of EU legislation to ensure that policy-making in public health is as transparent as possible. This is all the more true when it comes to tobacco control, for which there is a dedicated UN framework. The UN framework applies to all EU institutions, who should implement these safeguards against undue tobacco lobbying. It is an opportunity for the Juncker Commission to be a global leader in this area of public health promotion.<sup>103</sup>

The NGO Transparency International recommended that such disclosures should also extend to the European Parliament and to the Council and that the parties should implement the legislative footprint scheme described above.

In its opinion of 29 January 2016 in response to the Ombudsman's recommendation, the European Commission stated that it was meeting its obligations under the WHO's Framework Convention on Tobacco Control.<sup>104</sup> The European Ombudsman strongly regretted the European Commission's decision

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<sup>102</sup> Transparency International, 'EU legislative footprint. What's the real influence of lobbying?' (2015) <<http://www.transparencyinternational.eu/wp-content/uploads/2015/03/The-EU-Legislative-Footprint.pdf>> accessed 24 February 2016.

<sup>103</sup> European Ombudsman, 'Ombudsman: European Commission not transparent enough about tobacco lobbying' (5 October 2015) <<http://www.ombudsman.europa.eu/press/release.faces/en/61027/html.bookmark>> accessed 24 February 2016.

<sup>104</sup> European Commission, 'Opinion of the Commission on the European Ombudsman's recommendation - Complaint by Mr Oliver HOEDEMAN, Corporate Europe Observatory (CEO), ref. 852/2014/LP

not to make its dealings with the tobacco industry more transparent in line with UN guidelines.<sup>105</sup> With the exception of DG Health, the Commission's approach was qualified by the Ombudsman as 'inadequate, unreliable, and unsatisfactory'.

On the one side, the possibility of bringing issues to the European Ombudsman's attention strengthens the engagement of NSAs. On the other side, through the recommendations, the European Ombudsman seeks to improve and increase the transparency, which ultimately results in a better dissemination of documents *inter alia* to NSAs. Hence, this constitutes an interesting example of cross-cutting engagement involving NSAs.<sup>106</sup>

#### 4. Improving Communication Channels between the EU and the NSAs

The previous report published in this work package has demonstrated the need to improve communication channels between the EU and NSAs.<sup>107</sup> Such a development would indeed have positive consequences for both the EU and the NSAs themselves. On the one hand, the EU needs to improve the communication channels between it and NSAs on the ground in order to receive accurate and up-to-date information on the human rights situations, both in its Member States and in third countries. Internally, the Commission works regularly with networks of independent experts from Member States to get reliable information on fundamental rights within these Member States.<sup>108</sup> Such networks are established by way of tenders and offer an institutionalised form of engagement with NSAs. On the other hand, NSAs need effective communication channels with EU institutions in order to receive updated information. For instance, HRDs reported that in certain third countries the EU's delegation details were not kept up to date. The fact that not all websites on human rights and HRD issues of the EU and its delegations abroad are up-to-date damages the visibility of EU action in this field, as well as the accessibility of this information for HRDs. Hence, the regular update of such information constitutes a crucial element to strengthen the engagement of such NSAs.

More generally, it may be noted that the EU is not communicating its actions and policies to HRDs and CSOs working on the ground well enough. Among the different possible communication channels, e-mails are undeniably the least costly and most rapid mechanism, but a study published in 2014 concluded that both for EU-level CSOs based in Brussels and for representatives of member organisations, it was crucial to be able to communicate face-to-face with EU officers and other member representatives in order to

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<[http://www.ombudsman.europa.eu/showResource?resourceId=1454592902162\\_DRREPLY\\_201400852\\_20160201-142840.pdf&type=pdf&download=true&lang=en](http://www.ombudsman.europa.eu/showResource?resourceId=1454592902162_DRREPLY_201400852_20160201-142840.pdf&type=pdf&download=true&lang=en)> accessed 24 February 2016.

<sup>105</sup> European Ombudsman, 'Ombudsman regrets Commission stance on UN tobacco lobbying rules' <<http://www.ombudsman.europa.eu/press/release.faces/en/63655/html.bookmark>> accessed 24 February 2016.

<sup>106</sup> For further discussion on such cross-cutting engagement, see below, section II.C.2.

<sup>107</sup> FRAME D7.2.

<sup>108</sup> An example of such a network may be found in the field of non-discrimination and gender equality law. For further information, see the website of this network available at <<http://www.equalitylaw.eu/>> accessed 24 April 2016.

develop personal relations.<sup>109</sup> As far as electronic communications are concerned, it is imperative to exchange contact details among different European Commission services, notably in case of restructuring of services or when different services are involved, such as the policies relating to CSR.

As CSOs can provide very useful, up-to-date information and work as ‘eyes and ears’ on the ground for the EU, breakdowns in communication may lead the EU to miss opportunities to harness the expertise and experience of CSOs. The same applies with HRDs.

Hence, the EU should improve communication channels with such NSAs and work harder to identify points of contact in different policy fields so that it does not lose out on valuable input from outside. It also needs to improve its processes of following up and offering feedback on engagement with CSOs and HRDs. The different forms and channels of communication will be further discussed in relation to each category of NSAs below.<sup>110</sup>

## 5. What Lessons can be learned from the Extractive Industries Transparency Initiative?

The Extractive Industries Transparency Initiative (EITI) is a voluntary initiative aiming to improve transparency and accountability in countries with oil, gas and mineral resources. Each country endorsing the initiative renders the EITI process mandatory for all extractive industry operators active in that particular country. Launched in 2002, the EITI has been described as

a coalition of governments, companies, civil-society groups, investors and international organisations, and is conceived of as a standard for monitoring compliance with contract disclosure and revenue-transparency criteria to ensure that companies publish what they pay and governments disclose what they receive from the extraction and export of natural resources. Member countries voluntarily adopt the standard, and seek ‘validation’ status through compliance.<sup>111</sup>

In 2013, the EU amended its EU Accounting Directive<sup>112</sup> and the Transparency Directive<sup>113</sup> to require that EU-listed companies active in the extractive industry or the logging of primary forest shall provide for

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<sup>109</sup> Meike Rodekamp, *Their Members’ Voice. Civil Society Organisations in the European Union* (Springer 2014) 214-228.

<sup>110</sup> See part III of this report.

<sup>111</sup> EITI website <<https://eiti.org/countries>> accessed 25 February 2016.

<sup>112</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.

<sup>113</sup> Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive

enhanced transparency in relation to payments made to governments, large undertakings and public-interest entities. This system of mandatory disclosure aims to complement the EITI efforts by legally endorsing the EITI requirements in order to strengthen the latter and to extend their scope to all resource-rich countries.<sup>114</sup>

CSOs have played a major role in the development of the EITI, notably in acting as watchdogs over the activities of the government.<sup>115</sup> Pursuant to the EITI principles,

the government is required to commit to work with civil society and companies, and establish a multi-stakeholder group to oversee the implementation of the EITI. [...] The government, companies and civil society must be fully, actively and effectively engaged in the EITI process.<sup>116</sup>

A 2011 Protocol on the participation of civil society further adds that ‘civil society organisations are central players in public debates about EITI and transparency related issues’ and play an active role in the design, monitoring and evaluation of the EITI.<sup>117</sup>

The disclosure requirement imposed by the EU seeks to improve the transparency of payments made to governments, so that CSOs in these countries receive the information needed to hold those governments to account for this income. In this system, the information will be publicly available to all stakeholders either via the stock market information repository or via the business registry in the country of incorporation.

It is undeniable that this system strengthens the engagement of CSOs in the promotion and the protection of human rights. Nonetheless, it is submitted that the EU could go much further in this direction, following the example of the World Bank Group,<sup>118</sup> which has supported the EITI since its inception as an integral part of its corporate strategy for the extractive sectors and strategy for governance and anti-corruption. An important aspect of this assistance relies on providing support to CSOs through a development grant facility (DGF). Its activities were mainly designed to increase CSO’s awareness of the EITI, improve their understanding, strengthen their capacity to communicate with the broader population about EITI,

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2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC.

<sup>114</sup> European Commission, ‘New disclosure requirements for the extractive industry and loggers of primary forests in the Accounting (and Transparency) Directives (Country by Country Reporting) – frequently asked questions’ (12 June 2013) <[http://europa.eu/rapid/press-release\\_MEMO-13-541\\_fr.htm](http://europa.eu/rapid/press-release_MEMO-13-541_fr.htm)> accessed 25 February 2016.

<sup>115</sup> See for instance Eghosa Osa Etkhator, ‘The Roles of Civil Society Organizations in the Extractive Industries Transparency Initiative in Nigeria’ (2014) 16(2) International Journal of Not-for-Profit Law 47.

<sup>116</sup> 23<sup>rd</sup> EITI Board Meeting, ‘EITI Standard’ (Sydney 22 May 2013) <<https://eiti.org/files/DRAFT%20final%20EITI%20Standard.pdf>> accessed 26 February 2016.

<sup>117</sup> Ibid, 29-30.

<sup>118</sup> The World Bank Group is composed by the International Bank for Reconstruction and Development (IBRD) International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for the Settlement of Investment Disputes (ICSID).

improve the coordination among CSOs in order to increase their role as stakeholders in the EITI implementation process and in general strengthen the coordination among CSOs at regional and global level.<sup>119</sup>

Through these policies, the World Bank has played an important role in shaping the development of the extractive industries around the world. This being said, a survey conducted in 2009 on the civil society participation in the EITI revealed the need for a stronger role of the World Bank in monitoring EITI requirements, notably in order to assess CSO participation and hold governments accountable.<sup>120</sup>

In relation to the mandatory reporting requirement based on the Accounting and Transparency Directives, it should be noted that this requirement is limited to extractives and logging, but not extended to the minerals sector. As noted in FRAME 7.2, the EU's engagement in this field remains fragmented and the EU continues to pursue a

sectoral approach that remains inconsistent from one sector to the next in terms of the nature, scope and depth of engagement. Whereas for the extractive industry and logging, EU-listed companies are faced with mandatory reporting requirements combined, in the timber supply chain, with due diligence requirements, when it comes to conflict minerals a process of business self-regulation has been proposed. For the textiles and apparel sector, the EU relies on its existing development cooperation programme. The EU has supported more intensive action in Bangladesh as a reaction to a major incident concerning suppliers in the [ready-made garment] industry but, thus far, the EU has failed to adopt a proactive and cohesive approach towards [responsible supply chain management].<sup>121</sup>

In order to effectively strengthen the promotion and protection of human rights, a political coherence is also needed between commitments and practices on the ground. At a conference held in London in November 2015 entitled 'Beyond Good Business: Advocating for Women's Human Rights in the context of Natural Resource Extraction and the UN Guiding Principles on Business and Human Rights (Beyond Good Business)', speakers denounced the ambivalent role of the EU providing financial and technical support to Women Human Rights Defenders (WHRDs) on the one hand and simultaneously endorsing the politics of criminalisation and repression through trade agreements with resource-rich countries on the other hand.<sup>122</sup> These WHRDs are subject to endless threats, surveillance, harassment, repression of their

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<sup>119</sup> Extractive Industries Transparency Initiative (EITI) program. Oil Gas and Mining Policy and Operations Unit (COCPO) World Bank Group, 'Engagement with Civil Society: An EITI implementation case study' (June 2009) <[http://siteresources.worldbank.org/INTOGMC/Resources/csos\\_eiti.pdf?cid=EXTIACSONwsltr](http://siteresources.worldbank.org/INTOGMC/Resources/csos_eiti.pdf?cid=EXTIACSONwsltr)> accessed 26 February 2016.

<sup>120</sup> Heike Mainhardt-Gibbs, 'Survey of Civil Society Participation in the Extractive Industries Transparency Initiative and the Role of the World Bank' (February 2010) <<http://www.bankinformationcenter.org/en/Document.102027.pdf>> accessed 26 February 2016.

<sup>121</sup> FRAME D7.2, 71.

<sup>122</sup> Report of 5 November 2015 on the international conference 'Beyond Good Business: Advocating for Women's Human Rights in the context of Natural Resource Extraction and the UN Guiding Principles on Business and Human Rights (Beyond Good Business)' <<http://lammp.org/wp-content/uploads/2015/11/Beyond-Good-Business-report-05.11.2015.pdf>> accessed 26 February 2016.

civil and political rights and criminalisation of peaceful activism and protest. This example illustrates the trade-off that may exist between the EU's economic interests and its commitment to human rights. Moreover, it also reveals an issue of coherence, which will be further scrutinised in the next section of this report.

## C. Coherence

The lack of coherence is another cross-cutting issue that has been identified in the previous FRAME report 7.2.<sup>123</sup> The principle of coherence, often associated with consistency, is one of the main challenges for EU policy-making,<sup>124</sup> which derives from the difficulty of producing unified policy from a disparate set of competences.<sup>125</sup> In a previously published FRAME report 8.1, it has been noted that, in EU policy,

coherence in human rights policy entails: policymaking that seeks to achieve common, identifiable goals that are devised and implemented in an environment of collaboration, coordination and cooperative planning among and within the EU Institutions, among the EU Institutions and Member States, as well as among EU Member States. This policymaking considers the internal (within EU borders) and external (with third countries or other partners) aspects of human rights policies, together with the vertical (policies handed to Member States by the EU) and horizontal relationships (policies among EU Institutions or among Member States). Additionally, human rights policymaking ensures the respect for the universality and indivisibility of human rights in each policy dimension.<sup>126</sup>

It would exceed the scope of this report to exhaustively discuss all the aspects of coherence that may be relevant to the FRAME project. Other reports have examined this issue, such as FRAME D8.1,<sup>127</sup> FRAME D8.2<sup>128</sup> and FRAME 15.1.<sup>129</sup> Yet, in the context of this work package focusing on the relations between the EU and NSAs in the promotion and the protection of human rights, two aspects relating to coherence

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<sup>123</sup> FRAME D7.2, 74.

<sup>124</sup> Leonhard den Hertog and Simon Stroß, 'Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term' (2013) 18 European Foreign Affairs Review 373.

<sup>125</sup> For a review of the different affirmations of coherence and coherency by EU institutions, see FRAME D8.1 2014, 3 ff. See also the Commission's White Paper on Governance (2001). It promulgated five principles of good governance including coherence. For more details, see Alexandra Timmer, Balázs Majtényi, Katharina Häusler and Orsolya Salát, 'Critical analysis of the EU's conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law' (FRAME D3.2 2014) 39.

<sup>126</sup> FRAME D8.1, 18.

<sup>127</sup> FRAME D8.1, 18.

<sup>128</sup> Tamara Lewis, Adina Raducanu, Ricki Schoen, Karen Murphy, TJ McIntyre, and Graham Finlay, 'EU and Member State competences in human rights' (FRAME D8.2 2015) (hereinafter FRAME D8.2).

<sup>129</sup> Nicolas Hachez, 'Report discussing and integrating the outcome of the research realised in the FRAME Project' (FRAME D15.1 2015).

need to be addressed: first, the horizontal coherence between the services of EU institutions, with a focus on the European Commission and the area of CSR, and second, the coherence in cross-cutting engagement, with a case study on development funding.

## 1. Horizontal Coherence between the Services of EU Institutions

Policy coherence and coordination between the services of EU institutions are of the utmost importance.<sup>130</sup> The field of CSR provides for an interesting illustration of this cross-cutting issue. A coherent direction of the CSR agenda is needed to strengthen and facilitate engagement with NSAs. Yet, CSR is itself a cross-cutting theme, which engages multiple policy areas and which entails a risk of incoherence. In the field of CSR, business and human rights, the rearrangement of DG Enterprise within the European Commission and the spread of CSR to different DGs has generated risks of incoherence.

This risk of incoherence has been aggravated by the reorganisation of the Commission under President Jean-Claude Juncker's leadership, which has led to a number of Commission staff changing roles and policy briefs switching between different DGs. With new staff adjusting to their roles and fragmentation in the CSR agenda, the risk of inaction and incoherence on pressing CSR issues has been amplified. Such a situation may have negative repercussions in terms of engagement with businesses, which may become confused by this situation and not know which part of the EU to contact about specific issues.<sup>131</sup>

As acknowledged in a 'Commission staff working document on implementing the UN Guiding Principles on Business and Human Rights – State of Play' of 14 July 2015, policy coherence on business and human rights has to be ensured within the EU at different levels, including within EU institutions themselves.<sup>132</sup> Within the Commission, such coherence may be ensured at the general level by the collegial decision-making process, the procedures and clusters under the responsibility of the Vice-President and specific Commissioners. Furthermore, in order to ensure operational coordination, an inter-service group on CSR and on human rights has been established. This inter-service group encompasses the following policy areas: environment; justice, liberty and security; internal market; health and consumer affairs; external affairs. It seeks to ensure consistency in CSR matters and to allow an efficient exchange of information among the different services involved.

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<sup>130</sup> See for instance European Commission, 'The Corporate Social Responsibility Strategy of the European Commission: Results of the Public Consultation Carried out between 30 April and 15 August 2014' (DG Enterprise and Industry, 21 November 2014) 9

<<http://ec.europa.eu/DocsRoom/documents/8021/attachments/1/translations/en/renditions/native>> accessed 29 April 2016.

<sup>131</sup> FRAME D7.2 2015, 164.

<sup>132</sup> European Commission, 'Commission staff working document on implementing the UN Guiding Principles on Business and Human Rights – State of Play' (14 July 2015) <[https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/swd\\_2015\\_144\\_f1\\_staff\\_working\\_paper\\_en\\_v2\\_p1\\_818385.pdf](https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/swd_2015_144_f1_staff_working_paper_en_v2_p1_818385.pdf)> accessed 27 February 2016.

Moreover, in order to coordinate the services, joint meetings may be useful to inform the different services of their initiatives and issues they are faced with. Such practice of joint meetings has notably been developed by the Council Working Party on Human Rights (COHOM), responsible for external promotion of human rights, and the Council Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP), responsible for aspects of the internal protection of fundamental rights.<sup>133</sup>

This issue of horizontal coherence will be further discussed below in part III.C.2 of this study, focusing on the engagement of the EU with CSOs.

## 2. Cross-Cutting Engagement: The Case of Engagement with the World Bank

One key issue, which has not been dealt with in previous reports in this work package, is cross-cutting engagement with NSAs. In some cases the EU can serve as a catalyst for engagement between different NSAs and it should ensure that human rights issues become a central theme in this engagement. The EU should think of its engagement with NSAs on the subject of human rights holistically as much as possible. Development financing is a good example of this type of engagement. Collectively the EU and its member states are the largest source of Official Development Assistance in the world.<sup>134</sup> These funds are directed through various channels, the European Investment Bank manages a significant portion, but the EU also channels funds to other IFIs. We examined the EU's relationship with the World Bank in detail in the previous report,<sup>135</sup> noting that the EU makes significant contributions to World Bank trust funds and is recognised as the 'partner of choice' of the World Bank.<sup>136</sup>

Through these trust funds the EU engages with a range of non-state actors. If we take the example of a single program we can see how these links emerge. The Competitive Industries and Innovation Program (CIIP) is a multi-donor partnership comprised of two World Bank-executed trust funds, a multi-donor trust fund, supported by the EU and other European countries and a single donor trust fund financed through the EU's primary development fund for ACP countries, the European Development Fund.<sup>137</sup> The World Bank takes responsibility for the program development, implementation, monitoring and evaluation of the CIIP. So in this instance the EU and some of its member states contribute funds and the World Bank

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<sup>133</sup> See e.g. Council of the European Union, 'Consistency between internal and external aspects of human rights protection and promotion in the EU', 31 March 2014, 8318/14.

<sup>134</sup> Development policy is a shared competence between EU and MSs - Treaty on the Functioning of the European Union Protocol (No. 5) on the Statute of the European Investment Bank [2012] OJ C 326/47, art. 4(4); European Union, 'The EU remains the world's largest aid donor in 2014' (New York, 8 April 2015) <[http://europa.eu/articles/en/article\\_16293\\_en.htm](http://europa.eu/articles/en/article_16293_en.htm)> accessed 2 February 2016.

<sup>135</sup> FRAME D7.2, 74.

<sup>136</sup> Ibid, 75.

<sup>137</sup> Competitive Industries and Innovation Program, 'About the project' <<https://www.theciip.org/node/3>> accessed 2 February 2016.

handles the logistical and managerial aspects of the funds. The purpose of the program is to address market and governance failures that hinder firms from competing in global markets.<sup>138</sup> In Georgia, for example, the project has led to the creation of over 100 new firms and has invested 27 million dollars in SMEs.<sup>139</sup> Programs like the CIIP create lines of engagement between NSAs and the EU. The EU engages with the IFI contributing funds and establishing project parameters. The IFI engages with the business sector, delivering funding to businesses and working with them to realise project goals.

Development finance is also channelled into the civil society sphere. The EU encourages the participation of civil society in development cooperation.<sup>140</sup> The World Bank engages with CSOs to monitor its projects and in some instances even provides direct funding to CSOs to carry out certain tasks for it.<sup>141</sup> Thus there is a high degree of interconnectedness between the EU, IFIs, business and CSOs all linked together by development finance operations. The EU should try to leverage these relationships and links to promote better human rights outcomes. However, in practice when the EU engages in development finance activities like giving money to World Bank trust funds, it sacrifices a degree of policy control over the project's implementation. Thus, for example, while the Commission may show a strong commitment to United Nations Guiding Principles (UNGPs) on Business and Human Rights,<sup>142</sup> it cannot ensure that the funding that goes to the SMEs through the CIIP supports businesses that abide by the UNGPs. In a similar vein the EU cannot ensure that the third parties like the World Bank undertake the same levels of supervision of human rights and environmental matters as say the EIB does in their projects. In the following sections we examine this problem in greater detail, looking specifically at engagement between the EU and the World Bank. We have chosen this example because at present the World Bank is in the process of examining its project safeguards on human rights, which is very pertinent to this issue.

### a) *World Bank Safeguards and Human Rights*

The World Bank currently has a series of policies, collectively referred to as safeguards, which help to identify, avoid, and minimise harms to people and the environment.<sup>143</sup> In 2010, the World Bank's independent evaluation group produced a study entitled Safeguards and Sustainability Policies in a Changing World.<sup>144</sup> In the study some members of the World Bank Committee on Development

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<sup>138</sup> Ibid.

<sup>139</sup> Competitive Industries and Innovation Program, 'Country Operations' <<https://www.theciip.org/node/8>> accessed 2 February 2016.

<sup>140</sup> European Commission, 'International cooperation and development' (European Union, 1 November 2014) 7 <[http://europa.eu/pol/pdf/flipbook/en/development\\_cooperation\\_en.pdf](http://europa.eu/pol/pdf/flipbook/en/development_cooperation_en.pdf)> accessed 2 February 2016.

<sup>141</sup> World Bank, *World Bank– Civil Society Engagement Review of Fiscal Years 2010-12* (World Bank, 2013) 43.

<sup>142</sup> European Commission, 'Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play' SWD(2015) 144 final.

<sup>143</sup> World Bank, 'Safeguard Policies' <<http://go.worldbank.org/WTA1ODE7T0>> accessed 2 February 2016.

<sup>144</sup> World Bank, *Safeguards and Sustainability Policies in a Changing World An Independent Evaluation of World Bank Group Experience* (World Bank, 2010).

Effectiveness noted that the World Bank group institutions must avoid adverse human rights impacts and ensure that a project does not infringe on government's obligations under international and national human rights law. In order to achieve this aim, the study suggested examining the Bank's existing policies to identify and fill gaps in them.<sup>145</sup> Following on from this recommendation, in 2012 the World Bank began a series of consultations aimed at updating its safeguards policies with a range of stakeholders across the world. There were three rounds of consultations, the first running from October 2012 to March 2014, the second from July 2014 to mid-2015 and the third and final round running August 2015 to March 2016.<sup>146</sup>

The deficiency of the existing safeguards in providing human rights protection is openly acknowledged by the World Bank and its officials. At the most recent round of consultations on updating the safeguards held in Brussels, Charles di Leva, Lead Counsel in the Environmental and International Law Unit of the World Bank Legal Department, acknowledged that the existing safeguards were deficient particularly on social issues noting that Policy 4.01, which is central to the current safeguards policy, in particular gave the impression that social issues did not have the same level of prominence as environmental issues.<sup>147</sup> This policy 4.01 does not contain any references to human rights.<sup>148</sup> The Bank itself acknowledged in documentation outlining its position on human rights that “[t]he World Bank needs to undertake analytic work to examine how human rights fit within the constitutional framework and what positive contribution they could make to the development process”<sup>149</sup>

### b) *World Bank Engagement on Human Rights*

As part of this work the World Bank has consulted widely with civil society and experts in an attempt to address the human rights protection deficiencies of its safeguards. In particular, the World Bank engaged an expert focus group on human rights to address this issue further in April 2013. The group recommended that the World Bank should explicitly refer to human rights law and standards to increase the clarity of its policies. It should, as a minimum, state in its policies its commitment to ensure that the activities it promotes will not contribute to human rights violations and it should have a role in supporting countries

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<sup>145</sup> Ibid, 47.

<sup>146</sup> World Bank, 'Review and Update of the World Bank Safeguard Policies' (World Bank, 2 February 2016) <<https://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies>> accessed 2 February 2016.

<sup>147</sup> Charles di Leva, 'Introductory Remarks' (World Bank Consultations: Discussion on Human Rights, Brussels, 27 January 2016).

<sup>148</sup> World Bank, 'OP 4.01 - Environmental Assessment' <<http://go.worldbank.org/K7F3DCUDD0>> accessed 2 February 2016.

<sup>149</sup> World Bank, 'Human Rights' (World Bank, 1 June 2012) <<http://go.worldbank.org/72L95K8TN0>> accessed 2 February 2016.

to uphold their legal human rights obligations, ensuring that its safeguards policies are in line with human rights law and standards.<sup>150</sup>

The World Bank has since issued its most recent draft of the Environmental and Social Framework. The draft contains ten proposed environmental and social standards, which it has issued for consultation. This draft contains a number of provisions that refer to the principle of non-discrimination,<sup>151</sup> a specific standard on labour and working conditions,<sup>152</sup> and some specific provisions aimed at protecting indigenous peoples' rights.<sup>153</sup> However, overall the human rights protections in the draft are deficient in many ways and the Bank has failed to adopt many of the expert group's proposals. The failure to follow the expert group's advice prompted a number of UN special procedures mandate holders to write to the president of the World Bank, Jim Yong Kim, in December 2014 to raise 'a number of concerns' they had with the draft framework as it was then, which focused predominantly on human rights.<sup>154</sup>

That framework has since been revised, but many of the problems identified remain in the second draft. While the focus of the discussion here is on the EU's engagement with the World Bank and other NSAs on the subject of human rights, it is worth briefly discussing some of the issues with human rights in the second draft to provide some context to the discussion.

The second draft for consultation only explicitly mentions human rights twice in the 140 page document – once referring to the development process respecting the human rights of indigenous peoples,<sup>155</sup> and once by analogy where it states 'the World Bank shares the aspirations of the Universal Declaration of Human Rights and helps its clients fulfill those aspirations'.<sup>156</sup> The characterisation of human rights as mere aspirations here reflects a very narrow and archaic view. A significant proportion of human rights

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<sup>150</sup> World Bank, 'Summary Report - Expert Focus Group on the Emerging Area Human Rights' (World Bank Safeguards Consultations, New York, 15 April 2013) <[https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/meetings/safeguards\\_focus\\_group\\_humanrights\\_newyork\\_summary\\_final.pdf](https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/meetings/safeguards_focus_group_humanrights_newyork_summary_final.pdf)> accessed 2 February 2016.

<sup>151</sup> World Bank, 'Environmental and Social Framework Setting Environmental and Social Standards for Investment Project Financing' (2nd Draft for Consultation, 1 July 2015) 40 <[https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/clean\\_second\\_draft\\_es\\_framework\\_final\\_draft\\_for\\_consultation\\_july\\_1\\_2015.pdf](https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/clean_second_draft_es_framework_final_draft_for_consultation_july_1_2015.pdf)> accessed 2 February 2016.

<sup>152</sup> Ibid, 50.

<sup>153</sup> Ibid, 102.

<sup>154</sup> United Nations Office of the High Commissioner for Human Rights, 'Letter to Jim Yong Kim' OL OTH 13/2014 (OHCHR, 12 December 2014) <<http://www.ohchr.org/Documents/Issues/EPoverty/WorldBank.pdf>> accessed 6 February 2015.

<sup>155</sup> World Bank, 'Environmental and Social Framework: Setting Environmental and Social Standards for Investment Project Financing (Second Draft for Consultation)' (World Bank, 1 July 2015) 102 <[http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/phases/clean\\_second\\_draft\\_es\\_framework\\_final\\_draft\\_for\\_consultation\\_july\\_1\\_2015.pdf](http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/phases/clean_second_draft_es_framework_final_draft_for_consultation_july_1_2015.pdf)> accessed 13 April 2016.

<sup>156</sup> Ibid, 5.

are now legal obligations enshrined in international treaties, which can be enforced in courts of law, they are not mere unspecified hopes of achieving something. Referring to human rights in this manner implicitly undermines their legally binding status. The World Bank has a track record of taking a very anachronistic view of human rights and undermining their legal character. As Philip Alston points out, the Bank has historically viewed human rights as a ‘political issue’, which the Bank’s Articles of Association prevent them from interfering in.<sup>157</sup> He argues that the Bank adopts double standards in this regard and doesn’t have many qualms dealing with a range of issues with a strong political element, such as corruption, money laundering, terrorist financing, governance and the rule of law’.<sup>158</sup>

The safeguards do incorporate some elements that are related to human rights law such as equality, non-discrimination, transparency and accountability, but the commitment to human rights overall is quite weak and the safeguards do not refer to specific international human rights treaties or obligations in the text. The World Bank defends its failure to refer to international treaties in the safeguards by saying that while it has an accountability system to determine compliance with its own policies and procedures,

it is not a competent authority to decide whether a sovereign state is in compliance with its treaty obligations. That judgment lies within treaty bodies that have their own system of governance or rely upon other tribunals. Given the near universal membership of the World Bank and the varied degree of ratification, revision, and interpretation, the World Bank cannot track and impose international obligations on its Borrowers.<sup>159</sup>

However, there is an inconsistency here because on the one hand the World Bank claims that it will take into account ‘all issues relevant to the project’ including ‘obligations of the country directly applicable to the project under relevant international treaties and agreements’,<sup>160</sup> but on the other that it is not competent to decide whether the State is complying with its international obligations. If the World Bank cannot make a determination in this regard, it seems unlikely that projects will be suspended or cancelled on the grounds that the borrower is violating human rights law. Furthermore, while there are clearly differences in ratification, implementation and interpretation, that does not mean that the World Bank can just wash its hands of the issue. It can and should ensure protection of customary human rights norms and that the State upholds the international obligations it has ratified during project work. While all of this may change in the final draft, it seems unlikely that the World Bank will have a complete change of heart on this issue and the new safeguards will most likely continue to have a weak commitment to human rights protection.

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<sup>157</sup> United Nations General Assembly (UNGA), ‘Report of the Special Rapporteur on extreme poverty and human rights’ UN Doc. A/70/274 (4 August 2015), 8.

<sup>158</sup> Ibid, 12.

<sup>159</sup> World Bank, ‘Review and Update of the World Bank’s Safeguard Policies Environmental and Social Framework (Proposed Second Draft) - Consultation Paper’ (World Bank, 1 July 2015) 8 <[https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/consultation\\_paper\\_for\\_es\\_framework\\_second\\_draft\\_for\\_consultation\\_july\\_1\\_2015.pdf](https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/consultation_paper_for_es_framework_second_draft_for_consultation_july_1_2015.pdf)> accessed 13 April 2016.

<sup>160</sup> Ibid, 12.

### c) The EU and the World Bank's Human Rights Protections

It seems clear from the previous section and the content of the draft safeguards that the World Bank will not impose international human rights law (IHRL) obligations on borrowers and will not monitor their compliance with IHRL. This poses particular difficulties for the EU as a lender to the Bank. Article 51 of the EU Charter of Fundamental Rights states:

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.<sup>161</sup>

The Charter rights are addressed to the EU and its constituent parts, which include for example Directorate General of Development Cooperation (DG Devco). As a result DG Devco must respect the rights in the Charter and promote the application of them in the exercise of its powers. Thus when Devco or another EU body transfers money to a World Bank trust fund for a specific project, and the World Bank applies a level of human rights protection which is far beneath the standards of the Charter to this project, Devco is arguably not respecting the rights in the Charter, observing its principles and promoting its application by engaging in this activity and is therefore arguably violating Article 51.

In a similar vein, general public international law stipulates that an international organisation, like the EU, could be responsible under international law where it aids or assists another international organisation, such as the World Bank, in the commission of an internationally wrongful act, which could include a violation of IHRL or customary law. Article 14 of the International Law Commission's Articles on the Responsibility of International Organizations states that:

An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if:

- (a) the organization does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that organization.<sup>162</sup>

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<sup>161</sup> Charter of Fundamental Rights of the European Union [2012] OJ C326/02, art 51.

<sup>162</sup> ILC, 'Draft Articles on the Responsibility of International Organizations' (26 April - 3 June and 4 July to 12 August 2011) UN Doc A/66/10, art 14.

A similar problem arises for member states of the EU. As we just noted international organisations cannot use other international organisations to carry out acts which they would not normally be legally allowed to carry out themselves and the same goes for States. Many EU member states are large contributors to the World Bank's projects, particularly Germany, France, UK and Italy.<sup>163</sup> These countries are also simultaneously members of the Council of Europe and signatories to the European Convention on Human Rights.<sup>164</sup> In *M & Co v Federal Republic of Germany*, the ECtHR held:

The Convention does not prohibit a Member State from transferring powers to international organisations. Nonetheless [...] a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character. The object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted so as to make its safeguards practical and effective. Therefore the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection.<sup>165</sup>

There is a clear argument to be made here that many EU member states and Council of Europe members are transferring power and control over their development activities to the World Bank. It is also clear that the safeguards proposed by the World Bank in its Environmental and Social Framework fall well short of providing protection of human rights that is equivalent to that of the European Convention on Human Rights. Thus the World Bank, by failing to include greater human rights protections in its Environmental and Social Framework, opens its donors to legal liability where the World Bank's projects result in human rights violations.

There is also a business and human rights dimension to this issue. We already mentioned that World Bank funds can be used to finance businesses, particularly in the developing world. The UN guiding principles on business and human rights create specific obligations for member states with respect to business, human rights and their engagement with international organisations. Principle 10 stipulates that when acting as members of multilateral institutions that deal with business related issues, which expressly include international trade and financial institutions, States should:

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<sup>163</sup> See, for example, contributions to the International Bank for Reconstruction and Development - World Bank, 'International Bank for Reconstruction and Development Subscriptions and Voting Power of Member Countries' (27 January 2016) <<http://siteresources.worldbank.org/BODINT/Resources/278027-1215524804501/IBRDCountryVotingTable.pdf>> accessed 2 February 2016.

<sup>164</sup> Council of Europe, 'Simplified Chart of signatures and ratifications' (Council of Europe, 2 February 2016) <<http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chartSignature/3>> accessed 2 February 2016.

<sup>165</sup> *M and Co. v Federal Republic of Germany* App no 13258/87 (EComHR, 9 February 1990).

- (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;
- (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;
- (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.<sup>166</sup>

Yet at no point in the existing Environmental and Social Framework proposed by the World Bank do they make reference to the UN guiding principles. If the EU commits funds to third parties which are then administered in ways which do not pay sufficient regard to human rights the EU could be funding human rights violations. Similarly if funds are used to create businesses and those businesses do not adhere to the UNGPs, the same problem can arise. There is a need for an integrated approach here, the commitment to human rights obligations should not cease once the funds are transferred to a third party, the commitment to human rights should instead inform the entire relationship between the EU/MS and the NSA responsible for executing the project.

#### *d) EU Engagement with the World Bank on Safeguards*

The EU has had a number of opportunities to engage with the World Bank on the issue of the safeguards. The Bank undertook three separate consultations in Brussels over a number of years on 5 March 2013, 10 November 2014 and between 25 and 27 January 2016. While these were predominantly multi-stakeholder consultations, the World Bank had targeted meetings for EU officials. To the EU's credit it has pro-actively raised some of the human rights issues in the World Bank's safeguards during its consultations. On 5 March 2013, the World Bank officials met with the European Commission Sustainable Impact Assessment Committee, although there are no summaries outlining what was discussed at this meeting available on the World Bank's website. On 10 November 2014, they met with a number of government and EU officials, including four delegates from DG Devco, two delegates from DG Trade and delegates from DG CLIMA, EIB and the EEAS.<sup>167</sup> At this meeting the delegates emphasised that the 'core principles of human rights should

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<sup>166</sup> UNHRC, 'Report by Special Representative John Ruggie on Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) UN Doc A/HRC/17/31, Principle 10.

<sup>167</sup> World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies Phase 2' (Brussels, 10 November 2014) <[https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/meetings/safeguard\\_belgiumparticipant\\_list\\_government\\_un\\_nov\\_10.14docx.pdf](https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/meetings/safeguard_belgiumparticipant_list_government_un_nov_10.14docx.pdf)> accessed 3 February 2016.

be embedded throughout the entire project cycle' and that '[a]s most countries signed international human rights treaties, the World Bank should use its leverage in projects to promote the implementation of these commitments'. The delegates at this meeting also stressed that the World Bank should include human rights assessments in its methodology for risk assessment.<sup>168</sup>

On 26 January 2016, World Bank officials met with MEPs to consult on updating the safeguards. The meeting itself was chaired by a Finnish MEP Heidi Hautala. It was relatively poorly attended with only approximately 10 MEPs out of the 750 MEPs actually in attendance. A significant number of these MEPs were from the UK with Neena Gill, Jude Kirton Darling and Linda McAvan all making representations at the meeting. The MEPs present did, however, raise a number of significant concerns with the World Bank officials, perhaps foremost among them the role of human rights in the Bank's new safeguards policy framework. The MEPs present questioned why the arena of development assistance should be exempted from compliance with IHRL when the majority of donors and receiving countries had ratified IHRL treaties. Another MEP argued that the Ruggie principles should form an explicit part of the proposed Environmental and Social Framework. Others present raised the issue of the availability of grievance mechanisms to victims of abuses. In an interjection from the chair, Heidi Hautala specifically challenged the World Bank's placement of references to human rights in the aspirational, vision section of the draft Environmental and Social Framework, rather than in the binding sections of the framework.<sup>169</sup>

Overall, there has been positive engagement between the EU and the World Bank on the issue of human rights. There is a need to emphasise the legal dimensions of this problem and take an integrated approach to these engagements because they have the potential to impact upon EU engagement with IFIs, CSOs and businesses across the board. The EU and its member states have a great deal of leverage here to strengthen human rights protection in their engagement with IFIs, business and CSOs as the largest donors of overseas development assistance in the world. Ultimately, if the World Bank does not adopt sufficiently robust human rights safeguards in its Environmental and Social Framework, as EU officials have repeatedly urged it to do, the EU should not be afraid to limit its engagement with the World Bank as this engagement could be ethically and legally dubious. It has other means of channelling its overseas development assistance, such as the European Investment Bank, which offers protections that are consistent specifically with the Charter and much more robust protections than the World Bank.

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<sup>168</sup> World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 2: Feedback Summary' (Brussels, 10 November 2014) <[https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/meetings/safeguard\\_review\\_phase\\_2\\_consultations\\_2014\\_-\\_feedback\\_summary\\_brussels\\_government\\_and\\_multilaterals\\_meeting\\_november\\_10.pdf](https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/meetings/safeguard_review_phase_2_consultations_2014_-_feedback_summary_brussels_government_and_multilaterals_meeting_november_10.pdf)> accessed 3 February 2016.

<sup>169</sup> World Bank, 'MEP Meeting on World Bank Safeguards' (Brussels, 26 January 2016).

### III. Particular issues with regard to each group of NSAs identified

Following part II of this report presenting three cross-cutting issues, which are applicable to EU engagement with all types of NSAs, this part III focuses on the engagement by the EU with each group of NSAs individually: IFIs (section A), businesses (Section B), CSOs (section C) and HRDs (section D).

#### A. Strengthening Engagement with IFIs on Human Rights

##### 1. General Context

###### a) *IFIs and Human Rights*

The consequences of the financial and economic crisis of 2007-2008 are still perceptible in European States nowadays. The impact of the austerity measures adopted by these States on the human rights of their citizens has been the subject of growing academic interest<sup>170</sup> and civil society scrutiny. As noted in the previous report published in this work package, '[t]he changes in sovereign debt levels and difficulties in restructuring debts have had an enduring negative impact on human rights enjoyment throughout the world and have dominated the EU's interaction with IFIs'.<sup>171</sup> The authors of report FRAME 7.2 also observed that, with the exception of the EIB, IFIs have generally been reluctant to integrate human rights standards in their due diligence assessments.

In a report on extreme poverty and human rights submitted on 4 August 2015 to the United Nations General Assembly, the United Nations Special Rapporteur in this field, Philip Alston, noted that '[f]or most purposes, the World Bank is a human rights-free zone. In its operational policies, in particular, it treats human rights more like an infectious disease than universal values and obligations'.<sup>172</sup> He further argued that the World Bank 'now stands almost alone, along with the International Monetary Fund, in insisting that human rights are matters of politics which it must, as a matter of legal principle, avoid, rather than being an integral part of the international legal order'.<sup>173</sup>

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<sup>170</sup> See for instance Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2015).

<sup>171</sup> FRAME D7.2, 6. These authors referred notably to Jernej Letnar Cernic, 'Sovereign Financing and Corporate Responsibility for Economic and Social Rights', in Juan Pablo Bohoslavsky and Jernej Letnar Cernic (eds), *Making Sovereign Financing and Human Rights Work* (Hart Publishing 2014) 139; Eva Maria Lassen, Monika Mayrhofer, Peter Vedel Kessing, Hans-Otto Sano, Daniel García San José, Rikke Frank Jørgensen, 'Report on factors which enable or hinder the protection of human rights' (FRAME D2.1 2014) Chapter V.

<sup>172</sup> Report of the UN Special Rapporteur on extreme poverty and human rights, A/70/274, 4 August 2015, para. 68.

<sup>173</sup> Ibid, para. 58.

Nevertheless, the revisions of the World Bank's safeguards policy, through which it ensures that environmental, social and sustainability standards are incorporated in the assessment, could offer an interesting opportunity to also integrate human rights considerations in its assessments. This very topical issue has been examined in the previous section II.C.2 of this report.<sup>174</sup>

The EIB has distinguished itself from the other main IFIs, namely the IMF and the World Bank Group, by incorporating human rights standards into its operational guidelines in its 2013 updated social and environmental handbook.<sup>175</sup> Within the EIB, the human rights concerns raised by a project are considered as part of the EIB's social due diligence framework and its standards. Furthermore, the EIB introduced a new three pillar assessment in order to ensure that its projects aligned with the EU's broader policy objectives.<sup>176</sup> In principle, such a system should ensure that the EIB's activities are coherent with the EU's human rights policies. *A posteriori*, the establishment of a results measurement framework<sup>177</sup> should enable the examination of whether the principles presented in the environmental and social handbook are achieving beneficial outcomes in individual projects.

The EIB reports annually to the Commission on the development impacts of its projects.<sup>178</sup> In turn, the Commission reports on an annual basis to both the European Parliament and the Council on EIB financing of investment projects outside the EU.<sup>179</sup> The latter report must present 'an assessment of the contribution of those financing operations to the fulfilment of Union external policy and strategic objectives',<sup>180</sup> which include human rights. Report FRAME 7.2 highlighted that DG DEVCO broadly trusted the impact assessments of the EIB as it did not have sufficient human rights expertise to assess the human rights issues arising from development projects.<sup>181</sup> Hence, there is a need to foster a more effective engagement on human rights in EIB projects. A key means of achieving this objective is the EU Platform for Blending in External Cooperation (EUBEC), which will be discussed further below.

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<sup>174</sup> See also Jessica Evans, 'Abuse-Free Development: How the World Bank Should Safeguard against Human Rights Violations' (2013) 107 American Society of International Law Proceedings 298, 299.

<sup>175</sup> European Investment Bank, 'Environmental and Social Handbook' (Projects Directorate, 2 December 2013) <[http://www.eib.org/attachments/strategies/environmental\\_and\\_social\\_practices\\_handbook\\_en.pdf](http://www.eib.org/attachments/strategies/environmental_and_social_practices_handbook_en.pdf)> accessed 4 March 2016.

<sup>176</sup> For an overview see European Investment Bank, 'The EIB's Three Pillars: Outcomes assessment framework of operations within the EU' (Projects Directorate, 7 November 2013) <[http://www.eib.org/attachments/general/events/2013\\_11\\_07\\_roundtable\\_added\\_value\\_briefing\\_note\\_en.pdf](http://www.eib.org/attachments/general/events/2013_11_07_roundtable_added_value_briefing_note_en.pdf)> accessed 4 March 2016.

<sup>177</sup> European Investment Bank, 'The EIB Results Measurement (ReM) Framework' <<http://www.eib.org/projects/cycle/monitoring/rem.htm>> accessed 4 March 2016.

<sup>178</sup> Council and European Parliament Decision 1080/2011/EU of 25 October 2011 granting an EU guarantee to the European Investment Bank against losses under loans and loan guarantees for projects outside the Union and repealing Decision No 633/2009/EC [2011] OJ L 280/1, Articles 7(3) and 11(2), respectively.

<sup>179</sup> Ibid, Articles 11(1) and 2.

<sup>180</sup> Ibid, Article 11(1).

<sup>181</sup> FRAME D7.2, 84.

As far as the IMF and the World Bank are concerned, their relationship towards human rights considerations has been discussed at length by scholars.<sup>182</sup> Some authors have suggested that these IFIs should generally have a ‘duty of vigilance’ to ensure that their actions do not have negative effects on the human rights situation in the borrowing state.<sup>183</sup> Others have gone further arguing that the IFIs’ substantial influence over borrowing countries makes it ‘increasingly untenable that the IFIs should function without human rights responsibilities within their spheres of influence, and without accountability for the impact of their economic decisions on the exercise of human rights’.<sup>184</sup> Human rights are not mentioned in the Articles of Agreement of the IMF, the International Bank for Reconstruction and Development (IBRD) or the International Development Association (IDA). Moreover, these international organisations are not parties to any human rights treaty.<sup>185</sup> At the World Bank, a set of operational standards and policy directives govern the activities of the institution.<sup>186</sup> Yet, there is no such rule specifically regulating the human rights obligations of the World Bank.

### b) EU's Engagement with IFIs

The EU is represented in the IMF and the World Bank by its Member States. In addition, the European Commission participates as an observer in the IMF’s International Monetary and Financial Committee and in the World Bank’s Development Committee. Within the European Commission, it is the Commissioner for Economic and Monetary Affairs who is in charge of coordination with IFIs.

As far as the IMF is concerned, the EU Member States coordinate their positions at the Economic and Financial Committee meetings and through the group of EU representatives to the IMF (so-called EURIMF). Yet, the coordination may remain insufficient in some cases and ‘external representation of the euro area is still particularly fragmented in the International Monetary Fund’.<sup>187</sup> The representation of the

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<sup>182</sup> See *inter alia* Bahram Ghazi, *The IMF, the World Bank Group and the Question of Human Rights* (Transnational 2005); Willem van Genugten, Paul Hunt and Susan Mathews (eds), *World Bank, IMF and Human Rights* (Wolf Legal Publishers 2003); Marc Darrow, *Between Light and Shadow: the World Bank, the International Monetary Fund and International Human Rights Law* (Hart Publishing 2003); Sigrun I. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish 2001).

<sup>183</sup> Pierre Klein, ‘Les institutions financières internationales et les droits de la personne’ (1999) *Revue Belge de Droit International* 8.

<sup>184</sup> Margot E. Salomon, ‘International Economic Governance and Human rights Accountability’, in Margot E. Salomon, Arne Tostensen and Wouter Vandenhole (eds), *Casting the Net Wider: Human rights, Development and New Duty-Bearers* (Intersentia 2007) 153.

<sup>185</sup> Ibid.

<sup>186</sup> See Laurence Boisson de Chazournes, ‘Policy Guidance and Compliance: The World Bank Operational Standards’, in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International legal System* (Oxford University Press 2000) 281.

<sup>187</sup> European Commission, ‘Communication from the Commission to the European Parliament, the Council and the European Central Bank. A roadmap for moving towards a more consistent external representation of the euro area in international fora’, Com(2015) 602 final (21 October 2015) <<https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-602-EN-F1-1.PDF>> accessed 5 March 2016.

euro area has to be strengthened in order to allow a more coherent representation. On 21 October 2015, the Commission has presented a three-pronged approach to address this issue: '(i) strengthened coordination among the Member States of the euro area; (ii) improved representation of the euro area within the IMF; and (iii) once the necessary adjustments to the IMF governance are made, a unified representation and a single seat for the euro area'. These recommendations should be implemented in practice to achieve stronger cooperation and increased coherence.

In relation to the World Bank, the Commission coordinates relations with the World Bank so as to ensure consistency towards developing countries. Moreover, the Commission follows the implementation of the international debt strategy in light of the contribution by the EU to the debt initiative for highly indebted poor countries (HIPC).<sup>188</sup> The EU is a large contributor to the World Bank with a contribution amounting to nearly 0,5 billion euro per year. Moreover,

[t]he EU and [the World Bank Group] work together to promote global public goods. This requires actions that go beyond what market systems or individual countries can do on their own. Areas of focus include environmental protection; control of communicable diseases such as HIV/AIDS; and preventing or mitigating crises in the international financial system.<sup>189</sup>

Among the different means of enhancing EU engagement with IFIs, the EUBEC, launched in December 2012 by the European Commission, deserves close attention.<sup>190</sup> Blending is a method through which EU grants are combined with additional resources to achieve EU external policy objectives.<sup>191</sup> EUBEC provides recommendations and guidance on the use of blending in EU external cooperation in order to 'unlock additional public and private resources and thereby increase the impact of EU external cooperation and development policy'.<sup>192</sup> The blending enables the partners *inter alia* to 'further develop the partnership with European Financial Institutions and deepen cooperation with other international institutions', such

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<sup>188</sup> European Commission, 'Relations with the World Bank', <[http://ec.europa.eu/economy\\_finance/international/forums/world\\_bank/index\\_en.htm](http://ec.europa.eu/economy_finance/international/forums/world_bank/index_en.htm)> accessed 5 March 2016.

<sup>189</sup> World Bank, 'The EU and World Bank Group', <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/PARTNERS/WBEU/0,,contentMDK:22924761~menuPK:7952425~pagePK:64137114~piPK:64136911~theSitePK:380823,00.html>> accessed 5 March 2016.

<sup>190</sup> Commission, 'EU launches new Platform for blending funds in external cooperation' (Brussels, 21 December 2012) <[http://ec.europa.eu/economy\\_finance/articles/financial\\_operations/pdf/2012-12-21-blending-funds\\_en.pdf](http://ec.europa.eu/economy_finance/articles/financial_operations/pdf/2012-12-21-blending-funds_en.pdf)> accessed 5 March 2016.

<sup>191</sup> A more detailed definition of the notion is available on the website of the European Commission, as follows: 'Blending is an instrument for achieving EU external policy objectives, complementary to other aid modalities. Blending means a combination of EU grants with loans or equity from public and private financiers. The idea behind blending is that EU grants can be used in a strategic way to attract additional financing for important investments in EU partner countries'. European Commission, 'EU blending - European Union aid to catalyse investments' (14 July 2015) <[https://ec.europa.eu/europeaid/eu-blending-european-union-aid-catalyse-investments\\_fr](https://ec.europa.eu/europeaid/eu-blending-european-union-aid-catalyse-investments_fr)> accessed 24 April 2016.

<sup>192</sup> Commission, 'EU launches new Platform for blending funds in external cooperation' (Brussels, 21 December 2012) <[http://ec.europa.eu/economy\\_finance/articles/financial\\_operations/pdf/2012-12-21-blending-funds\\_en.pdf](http://ec.europa.eu/economy_finance/articles/financial_operations/pdf/2012-12-21-blending-funds_en.pdf)> accessed 5 March 2016.

as the World Bank and the IMF.<sup>193</sup> Hence, it constitutes a remarkable tool for coordination and more coherence between these relevant actors, including the EIB, the IMF and the World Bank.

We recommend that the EU should utilise the EUBEC to engage with other IFIs in order to better promote and protect human rights and further improve development policy coherence. Moreover, the EUBEC could serve to evaluate the positive impact of development finances on human rights protection and to prevent human rights violations of such policies. Finally, the EUBEC could serve as a platform to exchange information and best practices on implementing human rights standards in practice. Given that the EIB itself has made major steps to incorporate human rights standards in its work practice, it should share its experience with the other IFIs, specifically the IMF and the World Bank, which have so far been reluctant to adopt similar practices.

The previous report in this work package, FRAME 7.2, noted that the EU has many points of contact with IFIs, which mainly focus upon technical aspects of financing and economic data. Yet, the EU's interaction with the IFIs on human rights issues remains quite limited.<sup>194</sup> Furthermore, the interaction that occurred between IFIs and the EU is generally informal in nature. Hence, it is difficult to assess the extent to which human rights issues are discussed in this exchange. The enhancement of 'blending mechanisms' under the new EUBEC may help the parties to incorporate human rights standards in their collaborative efforts.

Another interesting mechanism which could help to strengthen the EU's engagement with IFIs on the protection and promotion of human rights is the independent accountability mechanisms (IAMs) for IFIs network. The World Bank was the first IFI to establish the Inspection Panel, in 1993, as an independent accountability mechanism in order to respond to the concerns of people affected by the World Bank's funded projects.<sup>195</sup> Similar IAMs have been established in other IFIs subsequently and these mechanisms have formed an 'IAM Network'<sup>196</sup> with the aim of fostering cooperation and sharing ideas, experiences and challenges, as well as identifying possible areas of collaboration among IAMs and identifying best practices relating to accountability and development.

At the European level, the European Bank for Reconstruction and Development (EBRD) and its Project Complaint Mechanism, the EU and the EIB's Complaints Mechanism and the European Ombudsman belong to the IAM Network. The EU should strengthen engagement with the IAM Network, provide for relevant input to the Network and look at ways to expand it. For instance, the EIB is the only IFI with a

<sup>193</sup> Joint Statement by Commissioner for Development Andris Piebalgs, Commissioner for Enlargement and European Neighbourhood Policy, Štefan Füle and Commissioner for Economic and Monetary Affairs and the Euro, Vice-President Olli Rehn, reproduced in Commission, 'EU launches new Platform for blending funds in external cooperation' (Brussels, 21 December 2012) <[http://ec.europa.eu/economy\\_finance/articles/financial\\_operations/pdf/2012-12-21-blending-funds\\_en.pdf](http://ec.europa.eu/economy_finance/articles/financial_operations/pdf/2012-12-21-blending-funds_en.pdf)> accessed 5 March 2016.

<sup>194</sup> FRAME D7.2, 89.

<sup>195</sup> IBRD, IDA, Resolution No. IBRD 93-10, Resolution No. IDA 93-6, 'The World Bank Inspection Panel', reproduced in Ibrahim F.I. Shihata, *The World Bank Inspection Panel: in practice* (2<sup>nd</sup> edn, Oxford University Press 2000) 271 ff. This Resolution was reviewed twice in 1996 and 1999. See *Review of the Resolution Establishing the Inspection Panel* (1996) and *Conclusions of the Board's Second Review of the Inspection Panel* (1999) <[www.worldbank.org](http://www.worldbank.org)> accessed 5 March 2016.

<sup>196</sup> <<http://lnadbg5.adb.org/ocrp002p.nsf>> accessed 5 March 2016.

second-stage recourse mechanism – the European Ombudsman – which is an independent institution. As such, this constitutes a very interesting instrument that may influence other IFIs around the world to improve their accountability mechanisms. Moreover, the European Ombudsman has the power to investigate maladministration by an EU institution (including the EIB), which includes failures to comply with human rights, with applicable law or with principles of good administration. The inclusion of human rights in the scope of competences of the European Ombudsman constitutes a particularly interesting feature since the Ombudsman has competence over the EIB's activities. Such human rights complaints mechanisms may inspire other IFIs around the world to set up similar accountability mechanisms. Finally, this IAM Network may offer an opportunity to the EU to better monitor human rights among IFIs across the world.

In a contribution to Rio+20 in 2012, the IAM Network suggested several recommendations on how these IAMs had to evolve in order to support the post-Rio+20 agenda. In a remarkable statement, the IAM Network acknowledged the importance of promoting the realisation of human rights.

Not just activists and legal scholars but also IFI boards, management, and staff themselves now reject the idea that IFIs can or should make decisions solely based on economic factors. The whole international human rights regime, including the 2007 UN Declaration on the Rights of Indigenous Peoples, sees economic factors as inextricably linked to the realization of the full complement of human rights. In addition, the poverty reduction mandates of many IFIs are arguably rooted in a human rights framework. If IFI mandates are revised to reflect human rights principles more explicitly, rather than just implicitly as now, the roles and responsibilities of the IAMs will change significantly, though questions remain as to whether IFIs will incorporate clearly recognizable human rights language in their policies.<sup>197</sup>

It is undeniable that, in their current state, IAMs may not be considered as human rights mechanisms since they generally have no mandate to consider the IFIs responsible for human rights violations. This being said, within the World Bank, there is one operational policy – on indigenous peoples – which explicitly refers to human rights. This policy ‘contributes to the Bank’s mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples’.<sup>198</sup> In the case of a complainant invoking a violation of this policy, the World Bank Inspection Panel could reach the conclusion that the policy had not been complied with and issue a recommendation to the Board of Executive Directors to order the Management to exert leverage on the Member State or the subcontractor to stop the violation; otherwise the World Bank would interrupt further loan or grant disbursements.<sup>199</sup> Except for this reference, there is no other

<sup>197</sup> Kristen Lewis, ‘Citizen-driven Accountability for Sustainable Development: Giving Affected People a Greater Voice—20 Years On. A contribution to Rio+20 by the Independent Accountability Mechanisms Network’ (June 2012) <<https://www.opic.gov/sites/default/files/files/citizen-driven-accountability.pdf>> accessed 5 March 2016.

<sup>198</sup> World Bank, *Operational Policy 4.10: Indigenous Peoples*, July 2005, para. 1.

<sup>199</sup> Gerhard Thallinger, ‘Piercing jurisdictional immunity: The possible role of domestic courts in enhancing World Bank accountability’ (2008) 1 Vienna Online Journal of International Constitutional Law 4, 27.

indication on the scope of human rights obligations for the World Bank in the directives and operational standards. As a consequence, human rights violations may only be invoked if they coincide with non-compliance with the operational policies.<sup>200</sup> Some operational policies guarantee rights to individuals affected by the projects of the World Bank, such as operational policy 4.12 on involuntary resettlement. This policy states that project-affected individuals shall be assisted in their reestablishment, in their efforts to improve their living standards to pre-displacement levels and with adequate compensation for their loss of resources prior to the project implementation.<sup>201</sup>

The World Bank Inspection Panel has taken the time to integrate human rights considerations into its analytical framework, but this may be changing. The evolution started with the case relating to the Chad-Cameroon Petroleum and Pipeline Project, in which the Inspection Panel addressed the question of whether the World Bank had to consider the human rights situation in a borrowing country in designing its projects. Claimants argued that the project was violating unspecified operational directives on human rights. The Management replied that the World Bank's Articles of Agreement

require the Bank to focus on economic considerations and not on political or other non-economic influences as the basis for its decisions. In evaluating the economic aspects of any project, human rights issues may be relevant to the Bank's work if they may have a significant direct economic effect on the project. Having carefully considered all aspects of this issue, Management's conclusion is that the Project can achieve its developmental objectives. The Project in many aspects has been instrumental in creating a space for dialogue for certain groups of Chadian citizens to exercise their rights.<sup>202</sup>

The Panel disagreed with this 'narrow view' by the Management and clarified:

[i]t is not within the Panel's mandate to assess the status of governance and human rights in Chad in general or in isolation, and the Panel acknowledges that there are several institutions (including UN bodies) specifically in charge of this subject. However, the Panel felt obliged to examine whether the issues of proper governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank's policies.<sup>203</sup>

It is remarkable that the Panel expressly declared that it was not broadening its mandate, nor that the World Bank had specific human rights obligations under customary law or general principles of law.

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<sup>200</sup> Koen de Feyter, 'Self-regulation', in Willem van Genugten, Paul Hunt and Susan Mathews (eds), *World Bank, IMF and Human Rights* (Wolf Legal Publishers 2003) 79.

<sup>201</sup> World Bank, *Operational Policy 4.12, Involuntary Resettlement*, December 2001, revised in February 2011.

<sup>202</sup> Chad-Cameroon Petroleum and Pipeline Project (Loan No. 4558-CD); Petroleum Sector Management Capacity Building Project (Credit No. 3373-CD); and Management of the Petroleum Economy (Credit No. 3316-CD), Management Response to the Request for Inspection dated 10 May 2001, para. 27.

<sup>203</sup> World Bank Inspection Panel, Investigation Report, Chad-Cameroon Petroleum and Pipeline Project (Loan No. 4558-CD); Petroleum Sector Management Capacity Building Project (Credit No. 3373-CD); and Management of the Petroleum Economy (Credit No. 3316-CD), para. 215. Emphasis in the original report.

Hence, the World Bank Inspection Panel was simultaneously acknowledging the imperative to operate within the scope of its mandate and trying to expand its mandate in practice.<sup>204</sup>

Interestingly, the presentation of the investigation report by the Panel's Chairman to the Board was published by the Bank. In this presentation, Chairman Ayensu further developed the theme of human rights and declared that the Panel considered that human rights were 'implicitly embedded in various policies of the Bank' and consequently included within the Panel's jurisdiction.<sup>205</sup>

Since then, in some – scarce – cases, the World Bank Inspection Panel has explicitly referred to human rights in its reports. In the *Honduras: Land Administration Project* (2007) claim, the Inspection Panel explicitly considered the merits of a claim grounded on international human rights law. A community of indigenous people brought a claim against this project, arguing that the project violated the World Bank's Indigenous Peoples policy and operational policies, but also that it violated the Honduras Government's commitments under ILO Convention No. 169 on Indigenous and Tribal Peoples. The Panel concluded that this international convention was applicable through the Bank's operational policy on project appraisal (Operational Manual Statement 2.20), according to which the Bank should ensure that the Project Plan was consistent with the borrower's international agreements related to its environment and the health and well-being of its citizens.<sup>206</sup> This very broad conception obviously included all of the borrower's human rights obligations.<sup>207</sup>

There are only a handful of other claims in which human rights issues were taken into consideration by the World Bank Inspection Panel. Although it is unclear how far the World Bank Inspection Panel may be willing to admit human rights claims, these cases may persuade other affected people to integrate human rights concerns in their claims.<sup>208</sup>

## 2. Case Study on the Human Rights Accountability of the IMF as Part of the Troika in the Recent Greek Financial Crisis

<sup>204</sup> Evarist Baimu and Aristeidis Panou, 'Responsibility of International Organizations and the World Bank Inspection Panel: Parallel Tracks Unlikely to Converge?', in Hassane Cissé, Daniel Bradlow and Benedict Kingsbury (eds), *International Financial Institutions and Global Legal Governance* (vol 3, The World Bank Legal Review 2012) 162.

<sup>205</sup> IBRD/IDA Press Release, 'Chairman's statement on Chad investigation', 2001 *Chad Petroleum Development & Pipeline Project*.

<sup>206</sup> OMS 2.20. on Project Appraisal and OP 4.01 on Environment Assessment.

<sup>207</sup> Steven Herz and Anne Perrault, 'Bringing Human Rights Claims to the World Bank Inspection Panel' (Centre for International and Environmental Law/Bank Information Center & San Francisco, International Accountability Project, October 2009) <[http://www.bankinformationcenter.org/wp-content/uploads/2013/01/InspectionPanel\\_HumanRights.pdf](http://www.bankinformationcenter.org/wp-content/uploads/2013/01/InspectionPanel_HumanRights.pdf)> accessed 25 April 2016.

<sup>208</sup> Steven Herz and Anne Perrault, 'Bringing Human Rights Claims to the World Bank Inspection Panel' (Centre for International and Environmental Law/Bank Information Center & San Francisco, International Accountability Project, October 2009) <[http://www.bankinformationcenter.org/wp-content/uploads/2013/01/InspectionPanel\\_HumanRights.pdf](http://www.bankinformationcenter.org/wp-content/uploads/2013/01/InspectionPanel_HumanRights.pdf)> accessed 25 April 2016.

The IMF is engaged in providing policy advice, financing, and technical assistance in several EU Member States.<sup>209</sup> As far as EU Member States are concerned, the IMF has cooperated since 2010 through the so-called Troika with the European Commission and the ECB in order to ensure coherence and efficiency in the discussions with these governments on the policies that are needed to achieve sustainable economic growth.<sup>210</sup> Since 2008, its work in the EU has intensified as a result of the financial crisis in 2008 and the euro area crisis in 2010.<sup>211</sup> These two crises have increased the IMF's interaction with the EU in the last decade.<sup>212</sup>

The Troika finds its origins in a decision of 25 March 2010 by the Eurogroup Heads of State and Government to establish a joint program providing financial assistance to Greece. It has also been operational in other countries, such as Portugal, Ireland and Cyprus. Its role has been defined in Regulation (EU) No. 472/2013 of the European Parliament and the Council of 21 May 2013.<sup>213</sup>

Within the Troika, the Commission acts as an agent of the Eurogroup. As further specified by the European Parliament in a 2014 report on the role and operations of the Troika with regard to the euro area programme countries, the European Commission negotiates the conditions for financial assistance for the Euro area Member States 'in liaison with the ECB' and 'wherever possible together with the IMF'.<sup>214</sup> The Council holds the political responsibility for approving the macroeconomic adjustment programmes. Furthermore, 'despite the Commission acting on behalf of the Member States, the ultimate political responsibility for the design and approval of the macroeconomic adjustment programmes lies with EU finance ministers and their governments'.<sup>215</sup>

Hence, 'following preparatory work by the Troika, formal decisions are made, separately and in accordance with their respective legal statutes and roles, by the Eurogroup and the IMF, who thus respectively acquire political responsibility for Troika actions'.<sup>216</sup> This observation has led the European Parliament to criticise 'the way EU institutions are being portrayed as the scapegoat for adverse effects in Member States' macroeconomic adjustment, when it is the Member States' finance ministers who bear

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<sup>209</sup> For a recent overview, see European Parliament, Briefing on Macro-Financial Assistance to EU Member (February 2016) <[http://www.europarl.europa.eu/RegData/etudes/note/join/2014/497721/IPOL-ECON\\_NT\(2014\)497721\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2014/497721/IPOL-ECON_NT(2014)497721_EN.pdf)> accessed 8 March 2016.

<sup>210</sup> See for instance the financial assistance programme entered into by the Irish Government with the ECB, the European Commission and the IMF. For further information, see FRAME D8.2, 54 ff.

<sup>211</sup> IMF, 'The IMF and Europe' (10 April 2015) <<http://www.imf.org/external/np/exr/facts/europe.htm>> accessed 7 March 2016.

<sup>212</sup> Wolfgang Bergthaler, 'The Relationship between International Monetary Fund Law and European Union Law: Influence, Impact, Effect and Interaction' in Ramses Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Springer 2013) 159, 161.

<sup>213</sup> Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (OJ L140/1, 27 May 2013).

<sup>214</sup> European Parliament Report 2009-14 on the inquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277 (INI)), A7-0149/2014 (28 February 2014) para. 59.

<sup>215</sup> Ibid, para. 59.

<sup>216</sup> Ibid, para. 58.

the political responsibility for the Troika and its operations'.<sup>217</sup> Consequently, it has called on 'the Eurogroup, the Council and the European Council to assume full responsibility for the operations of the Troika'.<sup>218</sup> As to the IMF, its decisions are ultimately taken by the IMF's 24-member Executive Board.<sup>219</sup>

It has been reported by numerous observers<sup>220</sup> and human rights institutions<sup>221</sup> that the conditionality imposed by the Troika upon countries requesting loans to overcome the financial crisis – particularly in relation to Greece – has led to devastating cuts *inter alia* in health, pensions, education and public services, which may in turn result in violations of human rights of people in these countries.

We examine the recent requests for financial assistance by the Greek Government as a case study in order to assess the conduct of the three bodies comprising the Troika in light of their human rights obligations.<sup>222</sup> More particularly, the engagement of the EU with the IMF will be discussed in relation to the promotion and the protection of human rights.

This case study starts with a brief description of the historical background of the case, presenting the different requests for assistance and the involvement of the IMF in the different packages. The second stage of this study investigates the respective human rights obligations of the three international bodies in the Troika. The third point examines the extent to which the human rights impacts of the conditionality imposed by the Troika have been properly taken into consideration during the negotiations and/or whether they may be constitutive of human rights violations on the part of these bodies. As will be demonstrated, the opacity of the Troika's internal functioning and the lack of information on the role played by each institution in the Troika obscure the determination of clear responsibilities for the different institutions. The availability of accountability mechanisms to challenge these violations needs to be addressed in a fourth point. Finally, this case study concludes with a number of recommendations on how these actors could strengthen their engagement in relation to the protection and the promotion of human

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<sup>217</sup> Ibid, para. 60.

<sup>218</sup> Ibid, para. 61.

<sup>219</sup> IMF, 'The IMF and Europe' (10 April 2015) <<http://www.imf.org/external/np/exr/facts/europe.htm>> accessed 7 March 2016.

<sup>220</sup> See for instance Olivier De Schutter and Margot E. Salomon, 'Economic Policy Conditionality, Socio-Economic Rights and International Legal Responsibility: The Case of Greece 2010-2015', Legal Brief prepared for the Special Committee of the Hellenic Parliament on the Audit of the Greek Debt (Debt Truth Committee), 15 June 2015 <<http://www.lse.ac.uk/humanRights/documents/2015/SalomonDeSchutterGreekDebtTruth.pdf>> accessed 22 February 2016.

<sup>221</sup> See for instance United Nations Committee on Economic, Social and Cultural Rights, Concluding observations on the second periodic report of Greece, 27 October 2015, E/C.12/GRC/C/O/2, para. 7.

<sup>222</sup> This is not the only example of recent intervention by the Troika in an EU Member State. As mentioned above, the Irish Government similarly entered into a financial assistance programme with the ECB, the European Commission and the IMF. This case has been scrutinized within the Report FRAME D8.2, Part four, which focuses on 'the case of the EU-backed financial bailout package agreed between Ireland and the ECB/EU/IMF, and discusses (i) the human rights implications of the package and the associated policies adopted by the Irish state, and (ii) the inconsistencies observed within the EU system vis-a-vis human rights obligations and financial stability objectives'. For further information, see FRAME D8.2, 53ff.

rights. In the framework of this case study, the responsibility of individual Member States will not be discussed.<sup>223</sup>

### a) *Historical Background*

As a consequence of the financial crisis, the downgrading of Greece by credit rating agencies and the rise of risk premiums on long-term Greek Government bonds, the Greek Government submitted a request for financial assistance on 23 April 2010 to the 16 countries composing the Eurozone – the Eurogroup – and the IMF. The fact that Greece addressed its request to the IMF in addition to the members of the Eurogroup deserves closer attention. There was no legal obligation for Greece to act that way. A priori, one may assume that the support of the IMF was requested because of the magnitude of the crisis. Moreover, all EU Member States remain eligible to request such assistance from the IMF under the IMF's Articles of Agreement. However, it should be noted that this issue has been the subject of heated political debate, given that the different actors at play were not of one mind with regard to the IMF's involvement. It has been reported that 'the Europeans wanted to keep the Greek problem in-house. Paris, in particular, opposed bringing in the fund'.<sup>224</sup> The then President of the ECB Jean-Claude Trichet 'wasn't hostile in principle to an IMF intervention', but 'was resolutely, totally and very publicly hostile to the idea that the IMF should go there alone, which was a thesis that seemed to prevail at some point'.<sup>225</sup> On the opposite side, German Chancellor Angela Merkel reportedly saw the ECB and the European Commission as 'soft and vulnerable to political influence'. As observed by George Papaconstantinou, Greece's Finance Minister from 2009 to 2011, the German Chancellor 'came to the conclusion that the Commission was not credible and that the only thing that could convince the markets would be the IMF'.<sup>226</sup> Hence, the IMF's involvement was set down as a key condition by German Chancellor Merkel to her willingness to provide financial assistance to Greece. The IMF's reputation for rigour may also have motivated this decision, together with internal pressure set by several German political parties, which strongly pleaded in the German Bundestag for this IMF involvement.<sup>227</sup>

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<sup>223</sup> See Olivier De Schutter and Margot E. Salomon, 'Economic Policy Conditionality, Socio-Economic Rights and International Legal Responsibility: The Case of Greece 2010-2015', Legal Brief prepared for the Special Committee of the Hellenic Parliament on the Audit of the Greek Debt (Debt Truth Committee), 15 June 2015 <<http://www.lse.ac.uk/humanRights/documents/2015/SalomonDeSchutterGreekDebtTruth.pdf>> accessed 22 February 2016.

<sup>224</sup> Lesley Wroughton, Howard Schneider and Dina Kyriakidou, 'How the IMF's misadventure in Greece is changing the fund', Reuters (28 August 2015) <<http://www.reuters.com/investigates/special-report/imf-greece/>> accessed 9 March 2016.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid.

<sup>227</sup> Bundesregierung, 'Regierungserklärung von Bundeskanzlerin Merkel zu den Hilfen für Griechenland' (5 May 2010) <<https://www.bundesregierung.de/ContentArchiv/DE/Archiv17/Regierungserklaerung/2010/2010-05-05-merkel-erklaerung-griechenland.html>> accessed 8 March 2016; Spiegel, 'Griechenland-Hilfen: Bundestag segnet Merkels Milliarden-Nothilfe ab' (7 May 2010) <<http://www.spiegel.de/politik/deutschland/griechenland-hilfen-bundestag-segnet-merkels-milliarden-nothilfe-ab-a-693507.html>> accessed 8 March 2016.

On the side of the IMF, board minutes show that a near majority of directors around the board table on 9 May 2010 expressed concerns about the plans to bail out Greece.<sup>228</sup> Moreover, some IMF officials were worried about the fact that the IMF was operating as part of a ‘Troika’, in which the EU was maintaining control of the Greek bailout on its own terms. This decision, which was strongly supported by the then Managing-Director of IMF Strauss-Kahn ‘drove the IMF down a route it had never taken before’.<sup>229</sup>

The Greek Government concluded a first bailout package with the European Commission acting on behalf of the Eurogroup, the ECB and the IMF on 3 May 2010. This package took the form of a Memorandum of Understanding (MoU) presenting a three-year financial aid programme, through which the members of the Eurogroup were allowed to pool their bilateral loans to provide 80 billion euros to Greece. In addition, this agreement stated that the loans would be granted ‘in conjunction with the funding from the International Monetary Fund under a standby-arrangement’.<sup>230</sup> The IMF, to which Greece had also requested assistance, added 30 billion euros.

This IMF support to Greece was rather unusual when compared to the general practice of the IMF. In principle, the IMF sets limits on the size of loans for Stand-By-Arrangements or Extended Fund Facilities, which correspond to 200% of the member’s annual quota and 600% of the member’s cumulative quota. In this case, the IMF granted a loan at 3200% of Greece’s quota, which constituted the largest access granted to an IMF Member.<sup>231</sup> It should also be noted that the IMF has continuously pointed out the risks of the Greek programme, particularly with regard to the debt sustainability. Despite its reluctance, the IMF modified its Exceptional Access Policy criterion on debt sustainability to allow the loan to Greece.<sup>232</sup>

In addition to the MoU, an Intercreditor Agreement was concluded between the Eurogroup Member States other than Greece, by which the European Commission was charged with coordinating the pooled bilateral loans and with negotiating the MoU with Greece.<sup>233</sup> The financial assistance was subject to macroeconomic conditions detailed in the MoU and defined in the Loan Facility Agreement as

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<sup>228</sup> Lesley Wroughton, Howard Schneider and Dina Kyriakidou, ‘How the IMF’s misadventure in Greece is changing the fund’, Reuters (28 August 2015) <<http://www.reuters.com/investigates/special-report/imf-greece/>> accessed 9 March 2016.

<sup>229</sup> Ibid.

<sup>230</sup> Loan Facility Agreement between the following member states whose currency is the Euro: Kingdom of Belgium, Ireland, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic and Republic of Finland and the Kreditanstalt für Wiederaufbau, acting in the public interest, subject to the instructions of an with the benefit of the guarantee of the Federal Republic of Germany, as Lenders and The Hellenic Republic as Borrower, the Bank of Greece as Agent to the Borrower, 8 May 2010.

<sup>231</sup> IMF, ‘IMF Reaches Staff-level Agreement with Greece on €30 Billion Stand-By Arrangement’, Press release (2 May 2010) <<http://www.imf.org/external/np/sec/pr/2010/pr10176.htm>> accessed 8 March 2016.

<sup>232</sup> IMF, ‘Country Report: Greece. Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Agreement’ (13 June 2013), IMF Country Report No 13/156, <<https://www.imf.org/external/pubs/ft/scr/2013/cr13156.pdf>> accessed 8 March 2016, 1.

<sup>233</sup> Intercreditor Agreement between Kingdom of Belgium, Federal Republic of Germany, Ireland, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of

[m]easures concerning the coordination and surveillance of the budgetary discipline of Greece and setting out economic policy guidelines for Greece defined in a Council Decision on basis of Article 126(9) and 136 TFEU, and the support granted to Greece is dependent on compliance by Greece with measures consistent which such decision and laid down in a Memorandum of Economic and Financial Policies, Memorandum of Understanding on Specific Economic Policy Conditionality and Technical Memorandum of Understanding (hereinafter referred to together as MoU).<sup>234</sup>

According to the Increditor Agreement,

[b]before each disbursement of a Loan under the Loan Facility Agreement, the Commission will, in liaison with the ECB, present a report to the Parties analysing compliance by the Borrower with the terms and the conditions set out in the MoU and in the Council Decision. The Parties will evaluate such compliance and will unanimously decide on the release of the relevant Loan.<sup>235</sup>

Hence, the disbursement of loans was conditioned to the compliance by Greece with the terms and conditions set out in the MoU. The measures imposed in the MoU did not address the causes of the crisis as such, but rather focused on reducing public expenses, deregulating labour law legislation and transferring wealth from the public to the private sector. These measures have been subject to collective complaints brought before the European Committee of Social Rights, which condemned Greece for violation of Articles 10 and 12 of the European Social Charter.<sup>236</sup> In a similar vein, the International Labour Organization Committee on Freedom of Association was seized with a complaint submitted by the Greek General Confederation of Labour, the Civil Servants' Confederation, the General Federation of Employees of the National Electric Power Corporation, the Greek Federation of Private Employees, and supported by the International Trade Union Confederation, related to austerity measures in Greece adopted according to the international agreement with the Troika and which constituted

repeated and extensive interventions into free and voluntary collective bargaining and an important deficit of social dialogue and thus highlighted the need to promote and strengthen the institutional framework for these key fundamental rights.<sup>237</sup>

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the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic and Republic of Finland, 8 May 2010.

<sup>234</sup> Loan Facility Agreement, preamble, para. 7.

<sup>235</sup> Article 4(1) of the Increditor Agreement.

<sup>236</sup> European Committee of Social Rights, *Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece*, Complaint No. 80/2012 16 Jan. 2012. This case will be further discussed below.

<sup>237</sup> International Labour Organization Committee on Freedom of Association, Complaints against the Government of Greece presented by the Greek General Confederation of Labour, the Civil Servants' Confederation, the General Federation of Employees of the National Electric Power Corporation and the Greek Federation of Private Employees supported by the International Confederation of Trade Unions, Case 2820, para. 995. For further information, see George Katrougalos, 'The Greek Austerity Measures: Violations of Socio-Economic Rights', *Blog of the International Journal of Constitutional Law and Constitution Making* (29 January 2013)

In February 2012, the Greek Government issued a request for additional emergency loans to the President of the Group of Finance Ministers Eurogroup Member States. In the meantime, the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM)<sup>238</sup> had been established by the European Council and the Economic and Financial Affairs Council (ECOFIN). The former was created as a ‘temporary crisis resolution mechanism’<sup>239</sup> by the Eurogroup Member States in 2010 in order to provide financial assistance through the issuance of bonds and debt instruments on capital markets. This temporary mechanism cannot engage in new financing programmes as of 1 July 2013. The latter was established on 8 October 2012 as a ‘permanent rescue mechanism’. Through this mechanism, the Commission may borrow up to € 60 billion in financial markets and lend this amount to the beneficiary Member State. There is a system of guarantees of repayment of the bonds by the EU in case of default by the borrowing Member States and the interest is paid by the Member State via the Commission. Since 2013, the EFSM has been replaced by the ESM.<sup>240</sup> It is remarkable that the Treaty establishing the European Stability Mechanism stipulates that any Member State requesting assistance from the ESM is expected to address, wherever possible, a request for assistance to the IMF.<sup>241</sup> Through this system, the ESM Treaty is encouraging the Member State to involve the IMF in the financial program.

The second rescue plan was approved by ECOFIN on 14 March 2012. The financial assistance operated through the EFSF and was conditional upon Greece’s agreement to the Memorandum of Economic and Financial Policies (MEFP) of 9 March 2012. The new loan took the form of a Master Financial Assistance Facility Agreement (MFFA) covering the undisbursed amounts of the 2010 programme plus 130 billion euros provided for Greece until 28 February 2015, extended until the 30 June 2015. These payments were subject to Greece respecting a number of measures contained in a MoU with the European Commission acting on behalf of the Eurogroup Member States.<sup>242</sup>

Despite this second agreement, it quickly became clear that a third plan would be needed to overcome the Greek crisis. In a 2013 report, the IMF was the first institution to express doubts as to the appropriateness of the measures of the second agreement:

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<<http://www.iconnectblog.com/2013/01/the-greek-austerity-measures-violations-of-socio-economic-rights/>> accessed 22 February 2016.

<sup>238</sup> Council Regulation (EU) No. 407/2010 establishing a European financial stabilisation mechanism (OJ L 118, 12 May 2010, 1).

<sup>239</sup> <<http://www.efsfeuropa.eu/about/index.htm>> accessed 22 February 2016.

<sup>240</sup> Treaty establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, signed on 11 July 2011.

<sup>241</sup> Article 13.7 of the Treaty establishing the European Stability Mechanism.

<sup>242</sup> EFSF Framework Agreement between Kingdom of Belgium, Federal Republic of Germany, Republic of Estonia, Ireland, Hellenic Republic, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic and Republic of Finland and European Financial Stability Facility, preamble para. 2.

Market confidence was not restored, the banking system lost 30 percent of its deposits, and the economy encountered a much-deeper-than-expected recession with exceptionally high unemployment. Public debt remained too high and eventually had to be restructured, with collateral damage for bank balance sheets that were also weakened by the recession.<sup>243</sup>

In June 2015, Greece failed to make a \$1.7 billion payment to the IMF, being the first advanced economy ever to default on the IMF. Furthermore, despite the 240 billion euros received so far in international aid, Greece's economy is still in critical condition.<sup>244</sup> After lengthy negotiations between the Greek Prime Minister Tsipras and the lenders, a new ESM program was concluded through a third bailout agreement on 11 August 2015,<sup>245</sup> by which Europe agreed a further bailout of 81 billion euros.

### **b) *Examination of the Human Rights Obligations of the Three Bodies***

During the three rounds of negotiations for the MoUs, the actors have acted in total disregard of any human rights obligations. They refrained from assessing the potential human rights impact of the austerity measures imposed by the MoUs. This raises the questions about the human rights obligations of the bodies composing the Troika and of the coherence of their actions with broader EU policies on human rights.

It is not the aim of this section to conduct a general and exhaustive review of the human rights obligations of the three bodies involved in the Troika. Such analyses have been conducted in previous FRAME reports, such as FRAME 7.1 and FRAME 7.2, where the human rights obligations of the IMF were extensively discussed. This section rather focuses on specific human rights obligations directly related to this particular subject field and relevant to determining the responsibilities of the three institutions in the Troika.

First, the decision has been taken to focus on the human rights obligations of the European Commission and the ECB in relation to the establishment of the ESM. As a consequence of Article 6, paragraph 1 TEU, the Charter of Fundamental Rights has become a legally binding text for the EU institutions and its

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<sup>243</sup> IMF, 'Country Report: Greece. Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Agreement' (13 June 2013), IMF Country Report No 13/156, <<https://www.imf.org/external/pubs/ft/scr/2013/cr13156.pdf>> accessed 8 March 2016, 1.

<sup>244</sup> Paul Taylor and Toni Reinhold, 'Secret IMF report – Greece needs debt relief far beyond EU plans', Reuters (15 July 2015) <<http://uk.reuters.com/article/uk-eurozone-greece-imf-report-idUKKCN0PO1C920150714>> accessed 9 March 2016.

<sup>245</sup> The MoU was made by and between the European Commission (acting on behalf of the European Stability Mechanism), the Hellenic Republic and the Bank of Greece, <[http://ec.europa.eu/economy\\_finance/assistance\\_eu\\_ms/greek\\_loan\\_facility/pdf/01\\_mou\\_20150811\\_en.pdf](http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/01_mou_20150811_en.pdf)> accessed 22 February 2016.

Member States when they implement EU legislation.<sup>246</sup> The binding scope of the Charter, as far as Member States are concerned, is limited by Article 51 to situations in which the Member States are ‘implementing Union law’, which seriously reduces the reach of the Charter.<sup>247</sup> In the *Pringle* case, the validity of the European Stability Mechanism was challenged before the CJEU.<sup>248</sup> The CJEU confirmed in that case that the EU Member States were not bound by the EU Charter of Fundamental Rights when acting outside EU law. The Court noted that ‘the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where [...] the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism’.<sup>249</sup> This being said, the wording of Article 51(1) of the Charter does not limit the scope of application of the Charter of Fundamental Rights insofar as the mechanisms or institutions established by the EU Treaties are concerned. Hence, institutions are bound to comply with the Charter. Advocate General J. Kokott confirmed this view in the *Pringle* case, where she held that

[t]he Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights.<sup>250</sup>

The Committee on Constitutional Affairs of the European Parliament similarly submitted

that the EU institutions are fully bound by Union law and that within the Troika they are obliged to act in accordance with fundamental rights, which, under Article 51 of the Charter of Fundamental Rights of the European Union, apply at all times.<sup>251</sup>

With the adoption of the Regulation (EU) No. 472/2013 on 12 May 2013 by the European Parliament and the Council,<sup>252</sup> financial mechanisms applying to Member States of the Eurozone placed under ‘enhanced surveillance’ automatically fall within EU law after the 30 May 2013. The matter thus concerns the implementation of EU law and Member States are bound by the Charter of Fundamental Rights, as well as MoUs.<sup>253</sup>

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<sup>246</sup> There is a dispensation to this principle in Protocol 30 of the Lisbon Treaty for the United Kingdom and Poland.

<sup>247</sup> As a consequence of this limitation, the CJEU may not review acts of Member States which do not have a sufficient link with EU law, even if they could be seen as infringing the Charter.

<sup>248</sup> CJEU, *Pringle v. Government of Ireland, Ireland and the Attorney General*, Case C-370/12, paras. 179-180. For further developments on this case, see Jonathan Tomkin, ‘Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy’ (2013) 14 (1) German Law Journal 169.

<sup>249</sup> CJEU, *Pringle v. Government of Ireland, Ireland and the Attorney General*, Case C-370/12, para. 180.

<sup>250</sup> View of Advocate General Kokott, *Pringle v. Government of Ireland, Ireland and the Attorney General*, Case C-370/12, delivered on 26 October 2012, para. 176.

<sup>251</sup> Committee on Constitutional Affairs, Opinion, 11 February 2014, 2013/2277(INI), para. 11.

<sup>252</sup> Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (OJ L140/1, 27 May 2013).

<sup>253</sup> Olivier De Schutter and Margot E. Salomon, ‘Economic Policy Conditionality, Socio-Economic Rights and International Legal Responsibility: The Case of Greece 2010-2015’, Legal Brief prepared for the Special Committee

Second, this section examines the relevance of the European Social Charter to the EU, its institutions and its Member States in this context. Article 151 TFEU states that

[t]he Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

Despite this reference to the European Social Charter in the TFEU, the EU Charter of Fundamental Rights only scarcely borrowed from the European Social Charter ‘as a source of inspiration for its social provisions’ and the impact assessments in relation to legislative proposals of the European Commission ‘do not refer directly to the European Social Charter’.<sup>254</sup> As noted by Olivier De Schutter in a recent study commissioned by the European Parliament, ‘[t]he current lack of coordination creates the risk of conflicting obligations imposed on the EU Member States, respectively as members of the EU and as States parties to the European Social Charter’ and

[t]he failure to take into account the European Social Charter is also the source of tensions that result from the prescriptions addressed to the Euro Area Member States, under the European semester or for Euro Area Member States under financial assistance: thus, the [European Committee on Social Rights] has found that a number of measures adopted by Greece following the bailouts of 2010 and 2012 were in violation of that country's undertakings under the European Social Charter.<sup>255</sup>

Indeed, as a response to a complaint filed by public sector pensioners’ unions in relation to a significant reduction of pensioners’ social protection, the Greek government argued that these measures

approved by the national parliament, are necessary for the protection of public interests, having resulted from Greece’s grave financial situation, and, in addition, result from the Government’s other international obligations, namely those deriving from a financial support mechanism agreed upon by the Government together with the

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of the Hellenic Parliament on the Audit of the Greek Debt (Debt Truth Committee), 15 June 2015, <<http://www.lse.ac.uk/humanRights/documents/2015/SalomonDeSchutterGreekDebtTruth.pdf>> accessed 22 February 2016, 12.

<sup>254</sup> Olivier De Schutter, ‘The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights’, Study for the Afco Committee of the European Parliament (2016) 5 <[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL\\_STU\(2016\)536488\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf)> accessed 25 April 2016.

<sup>255</sup> Ibid, 5.

European Commission, the European Central Bank and the International Monetary Fund ('the Troika') in 2010.<sup>256</sup>

This argument was rejected by the European Committee of Social Rights in its decision of 7 December 2012, where it held that 'the fact that the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of the Charter'.<sup>257</sup> In order to avoid such tensions, the EU and its institutions should take into account the European Social Charter when negotiating Memoranda of Understanding with Member States.<sup>258</sup> Moreover, social rights impact assessments may also avoid such potential conflicts.

Third, as far as the IMF is concerned,<sup>259</sup> it is undeniable that the IMF tends to hide itself behind the provision in its Articles of Agreement requiring the Fund to 'respect the political and social policies' of its Member States.<sup>260</sup> The IMF has argued that these provisions prevented it from applying any political criteria to any lending or surveillance decisions, including any criteria relating to human rights considerations. Given that human rights are not mentioned in its Articles of Agreement and that it is not party to any human rights treaty, the IMF has generally rejected any human rights obligations.<sup>261</sup>

Nevertheless, the IMF has increasingly integrated political considerations in its negotiations – particularly on good governance and transparency<sup>262</sup> – notably through the poverty reduction strategy paper framework.<sup>263</sup> Moreover, as the World Bank former General Counsel R. Dañino admitted, 'human rights and international human rights law have become increasingly relevant to helping the Bank achieve its mission and fulfil its purposes' and that 'it is now evident that human rights are an intrinsic part of the Bank's mission'.<sup>264</sup> While one can argue that the role of the Bank is not that of an enforcer of human rights obligations *per se*, the integration of human rights in the general conduct of its missions may be beneficial for the achievement of its goals. This is not only true for the World Bank, but also for the IMF, which 'has

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<sup>256</sup> Complaint No. 76/2012, decision on the merits of 7 December 2012, para. 10.

<sup>257</sup> Ibid, para. 50.

<sup>258</sup> Olivier De Schutter, 'The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights', Study for the Afco Committee of the European Parliament (2016) 36 <[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL\\_STU\(2016\)536488\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf)> accessed 25 April 2016.

<sup>259</sup> This part is based on Pierre Schmitt, 'The Accountability of the International Monetary Fund for Human Rights Violations', in Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 431.

<sup>260</sup> Article IV, Section 3 of the Articles of Agreement of the International Monetary Fund, 27 December 1945, 60 Stat. 1401, 2 UNTS 39 (as amended in 1969, 1978, 1992 and 2009).

<sup>261</sup> FRAME D7.1, 94.

<sup>262</sup> Daniel D. Bradlow and Claudio Grossman, 'Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF' (1995) 17 Human rights Quarterly 411, 432; Joseph Gold, 'The rule of law in the International Monetary Fund' (1980) 32 International Monetary Fund Pamphlet Series 59.

<sup>263</sup> IMF, 'World Bank and IMF Endorse Country-Owned Poverty Reduction Strategies', Press release n° 99/65 (22 December 1999) <<http://www.imf.org/external/np/sec/pr/1999/PR9965.HTM>> accessed 22 February 2016.

<sup>264</sup> Roberto Dañino, 'Legal Opinion on Human Rights and the Work of the World Bank by the Senior Vice-President and General Counsel' (27 January 2006) <<http://www.ifiwatchnet.org/sites/ifiwatchnet.org/files/DaninoLegalOpinion0106.pdf>> accessed 22 February 2016.

slowly mutated from a monetary organisation into a macro-economically oriented development financing institution'.<sup>265</sup> Although it is continuously denying its role as a development institution,<sup>266</sup> this evolution of the IMF mandate has been accompanied by an increasing awareness of the importance of human rights and their relevance to helping the IMF achieve its goals.<sup>267</sup>

Economic development is progressively considered as a means to promote human rights.<sup>268</sup> Indeed, 'a decent standard of living, adequate nutrition, health care, education and decent work and protection against calamities are not just development goals – they are also human rights'.<sup>269</sup> Reciprocally, research has shown that respect for human rights facilitates economic development.<sup>270</sup> Development is not only measured in economic terms<sup>271</sup> and is to be understood as 'a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals'.<sup>272</sup>

As a consequence, increasing the protection of human rights serves to promote economic growth. Mary Robinson, former UN High Commissioner for Human Rights, declared that while eradicating poverty must be our first goal in this new millennium, poverty cannot be eradicated without the realisation of human rights.<sup>273</sup>

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<sup>265</sup> Daniel D. Bradlow, 'The Governance of the IMF: The Need for Comprehensive Reform' (September 2006) <[www.g24.org/brad0906.pdf](http://www.g24.org/brad0906.pdf)> accessed 22 February 2016, 1-2. See also FRAME D7.1, 94.

<sup>266</sup> IMF, 'What is the IMF?' (30 September 2006) <<http://www.imf.org/external/pubs/ft/exrp/what.htm>> accessed 22 February 2016.

<sup>267</sup> Rodwan Abouharb and David Cingranelli, *Human Rights and Structural Adjustment* (Cambridge University Press 2008).

<sup>268</sup> Bård A. Andreassen and Stephen P. Marks (eds), *Development as a human right* (2<sup>nd</sup> edn, Intersentia 2010); Philip Alston and Mary Robinson (eds), *Human rights and Development. Towards Mutual Reinforcement* (Oxford University Press 2005).

<sup>269</sup> UNDP, 'Report on Human Rights and Development', (2000) 8.

<sup>270</sup> Daniel Kaufmann, 'Human rights and governance: The empirical challenge', in Philip Alston and Mary Robinson (eds), *Human rights and Development. Towards Mutual Reinforcement* (Oxford University Press 2005) 352; Amartya Sen, *Development as freedom* (Knopf 1999). See also Rodwan Abouharb and David Cingranelli, *Human Rights and Structural Adjustment* (Cambridge University Press 2008). Rodwan Abouharb and David Cingranelli conducted a study on the impact of structural adjustment programmes on human rights in 131 developing countries between 1981 and 2003. This study showed that on average structural adjustments had led to less respect for economic and social rights, and worker rights. They concluded that 'equitable economic development efforts would be more efficient and many of the negative impacts of World Bank and IMF loans and grants would be mitigated or eliminated if the IFIs pursued a human-rights based strategy of development assistance'.

<sup>271</sup> Sigrun I. Skogly, 'Structural Adjustment and Development: Human Rights – An Agenda for Change' (1993) 15 (4) *Human Rights Quarterly* 751, 754.

<sup>272</sup> *Declaration on the Right of Development*, adopted by the General Assembly Resolution 41/128 of 4 December 1986.

<sup>273</sup> OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, 2006, HR/PUB/06/12, <<http://www.refworld.org/docid/46ceaef92.html>> accessed 22 February 2016; OHCHR, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, 2002, <<http://www.refworld.org/docid/3f8298544.html>> accessed 22 February 2016.

**c) Human Rights Impacts of the Conditionality Imposed by the Troika**

As mentioned in the introduction to this case study, numerous observers and institutions considered that the conditionality imposed by the Troika upon Greece to overcome the financial crisis has led to devastating cuts in health, pensions, education and public services. In its concluding observations on the second periodic report for Greece published on 27 October 2015, the Committee on Economic, Social and Cultural Rights noted

with concern that, despite the measures taken by the State party to mitigate the economic and social impact of the austerity measures adopted in the framework of the memorandums of understanding in 2010, 2012 and 2015, the financial and economic crisis has had a severe impact on the enjoyment of economic, social and cultural rights, particularly by certain disadvantaged and marginalized groups with regard to the rights to work, to social security and to health.<sup>274</sup>

The European Parliament Report 2009-14 on the inquiry into the role and operations of the Troika with regard to the euro area programme countries similarly acknowledged that

the financial crisis has led to an economic and social crisis; [...] this economic situation and recent developments have had serious and previously unforeseen negative impacts on the quantity and quality of employment, access to credit, income levels, social protection and health and safety standards, and as a result economic and social hardship is unmistakeable; [...] these negative impacts could have been considerably worse without the EU-IMF financial assistance and [...] the action at European level has helped prevent the situation from deteriorating even further.<sup>275</sup>

These observations raise the question of the involvement of the IMF in these decisions and more particularly the weight of the IMF in imposing these decisions, which had negative effects on the human rights protection of Greek citizens. As observed above, the European Commission acts as an agent of the Eurogroup and negotiates the conditions for financial assistance for the Euro area Member States ‘in

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<sup>274</sup> United Nations Committee on Economic, Social and Cultural Rights, Concluding observations on the second periodic report of Greece, 27 October 2015, E/C.12/GRC/C/O/2, para. 7.

<sup>275</sup> European Parliament Report 2009-14 on the inquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277 (INI)), A7-0149/2014, 28 February 2014. See also the Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Mission to Greece, 22-26 April 2013, UN doc. A/HRC/50/15/Add.1, 27 March 2014; Committee on the Elimination of Discrimination against Women, Concluding Observations on the seventh periodic report of Greece, UN doc. CEDAW/C/GRC/CO/7, 1 March 2013; Committee on the Rights of the Child, Concluding Observations on the combined second and third periodic reports of Greece, UN doc. CRC/C/GRC/CO/2-3, 13 August 2012.

liaison with the ECB' and 'wherever possible together with the IMF'.<sup>276</sup> The broad mandate of the European Commission seems to imply that the political influence of the IMF in the decision-making process is only marginal in the Troika arrangement. However, it is extremely difficult to assess this influence in practice, given the scarcity of internal sources describing the positions of the different bodies representing the Troika and of their Member States. In 2015, unreported IMF board minutes dating back to 2010 surfaced and were investigated by journalists. The latter considered that this leak was not accidental but rather that

[t]he failure of the previous Greek bailouts had triggered an intense round of soul-searching inside the IMF and a reappraisal of its approach. Fund officials floated the report in the midst of crucial negotiations to make their view on debt restructuring public, even though it was at odds with their troika partners.<sup>277</sup>

These investigations revealed that James Boughton, a former IMF economist, considered that 'DSK [Strauss-Kahn] made a tactical error in letting the fund get trapped in this troika arrangement', because this mechanism did not provide the IMF sufficient independence.<sup>278</sup> He further stated that '[i]t was absolutely clear in the (IMF) building – not to everybody, but to the vast majority of us – that there was a need for debt restructuring', which would have required the creditors to forgive part of their debts to Greece, but this was opposed by Europeans.<sup>279</sup> As a result, the first bailout package did not include any debt restructuring, nor did the second and the third bailout agreements. However, in this last package, the IMF management expressly requested that an agreement on possible debt relief to ensure debt sustainability be reached prior to considering further financial support for Greece. Managing Director Christine Lagarde repeatedly stressed that debt relief is to be considered as important for Greece as the reforms that the creditors are demanding, notably in relation to the pension system.<sup>280</sup> On 4 February 2016, she summarised her views as follows:

I have always said that the Greek program has to walk on two legs: one is significant reforms and one is debt relief. [...] I really don't like it when we are portrayed as the 'draconian, rigorous terrible IMF'. We do not want draconian fiscal measures to apply to Greece, which have already made a lot of sacrifices. We have said that fiscal consolidation should not be excessive, so that the economy could work and eventually expand. But it needs to add up. And the pension system needs to be reformed, the tax

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<sup>276</sup> European Parliament Report 2009-14 on the inquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277 (INI)), A7-0149/2014 (28 February 2014) para. 59.

<sup>277</sup> Lesley Wroughton, Howard Schneider and Dina Kyriakidou, 'How the IMF's misadventure in Greece is changing the fund', Reuters (28 August 2015) <<http://www.reuters.com/investigates/special-report/imf-greece/>> accessed 9 March 2016.

<sup>278</sup> Ibid.

<sup>279</sup> Ibid.

<sup>280</sup> Paul Taylor and Toni Reinhold, 'Secret IMF report – Greece needs debt relief far beyond EU plans', Reuters (15 July 2015) <<http://uk.reuters.com/article/uk-eurozone-greece-imf-report-idUKKCN0PO1C920150714>> accessed 9 March 2016.

collection needs to be improved so that revenue comes in and evasion is stopped. And the debt relief by the other Europeans must accompany that process. We will be very attentive to the sustainability of the reforms, to the fact that it needs to add up, and to walk on two legs. That will be our compass for Greece. But we want that country to succeed at the end of the day, but it has to succeed in real life, not on paper.<sup>281</sup>

Interestingly, Greek Prime Minister Tsipras said in December 2015 that the participation of the IMF in the third bailout was not necessary and that the program could be handled by the Eurogroup alone. Yet, the German Chancellor was opposed to this argument and reportedly feared that the European Commission would be too lenient in terms of reform implementation. In early January 2016, the Greek Government submitted its pensions reform plan to Brussels. The debt relief talks should start once the Eurogroup ministers agree with the package of reforms. According to a statement by the head of the Eurogroup Jeroen Dijsselbloem, Greece has fully accepted the role of the IMF in this third bailout.<sup>282</sup>

The view defended by the IMF to restructure the debt has been welcomed by the United Nations Independent Expert on foreign debt and human rights, Juan Pablo Bohoslavsky. Such relief would reduce Greece's dependence on creditor institutions and bring the country back to sustainability. More generally, this Expert urged the European institutions, the IMF and the Greek Government to 'fully assess the impact on human rights of possible new austerity measures to ensure that they do not come as a cost to human rights'.<sup>283</sup>

We recommend that lenders conduct human rights impact assessments prior to the disbursement of the loans. This recommendation corresponds with paragraph 40 of the Guiding Principles on Foreign Debt and Human Rights adopted by the UN Human Rights Council in 2012, according to which lenders should not finance projects or activities which may violate human rights in the borrowing State. In order to avoid such violation, lenders should conduct credible human rights impact assessments as a prerequisite to providing a new loan.<sup>284</sup> This principle has also been acknowledged in a recent study commissioned by the European Parliament on the impact of the crisis on fundamental rights across Member States of the EU. In the country report on Greece, the authors of this study recommended that this requirement of human rights impact assessments be extended to the borrower State, Greece, in order to

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<sup>281</sup> IMF, 'Online Q&A Session on Emerging Market Economies with Christine Lagarde' (4 February 2016) <<https://www.imf.org/external/np/tr/2016/tr020516.htm>> accessed 9 March 2016.

<sup>282</sup> Jm/Jil (Reuters), 'Greece accepts role of IMF in third bailout, according to Eurogroup chief Dijsselbloem' (14 January 2016) <<http://www.dw.com/en/greece-accepts-role-of-imf-in-third-bailout-according-to-eurogroup-chief-dijsselbloem/a-18981020>> accessed 9 March 2016.

<sup>283</sup> United Nations Human Rights, Office of the High Commissioner, "Not at the cost of human rights" – UN expert warns against more austerity measures for Greece (15 July 2015) <<http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16238&LangID=E>> accessed 9 March 2016.

<sup>284</sup> The Guiding Principles on Foreign Debt and Human Rights were submitted to the Human Rights Council in June 2012 and endorsed by its resolution 20/10 on 18 July 2012.

fully comprehend the impacts such measures may have and identify possible ways to avoid them. In this respect, [Greece and its international creditors] should first explore and prove with concrete references that all alternative measures were exhausted; where no other alternatives are available, it should be demonstrated that the measures to be adopted were the least detrimental for the realisation of fundamental rights.<sup>285</sup>

No such human rights impact assessments were conducted in relation to the Greek financial assistance programs. Given that the European Commission was in charge of negotiating the conditions of the assistance and that the political influence of the IMF in the decision-making process was limited in the Troika arrangement, the European Commission should have taken the lead in this area and conducted appropriate human rights impact assessments of the measures foreseen in the different bailout packages. In addition, the European Commission should have conducted periodical reviews of the human rights impact of the measures in order to recommend eventual corrections in terms of human rights impacts. It is interesting to note in this regard that, in the Council implementing decision on granting Union financial assistance to Portugal, it was specifically requested that

[i]n order to ensure the smooth implementation of the Programme's conditionality, and to help to correct imbalances in a sustainable way, the Commission shall provide continued advice and guidance on fiscal, financial market and structural reforms. Within the framework of the assistance to be provided to Portugal, together with the IMF and in liaison with the ECB, the Commission shall periodically review the effectiveness and economic and social impact of the agreed measures, and shall recommend necessary corrections with a view to enhancing growth and job creation, securing the necessary fiscal consolidation and minimising harmful social impacts, particularly on the most vulnerable parts of Portuguese society.<sup>286</sup>

No similar provision is to be found in the case of Greece's request for financial assistance. Moreover, the MoU concerning Portugal required that 'reforms in labour and social security legislation will be implemented after consultation of social partners, taking into account possible constitutional implications, and in respect of EU Directives and Core Labour Standards'.<sup>287</sup> The second MoU concluded

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<sup>285</sup> Styliani Kaltouni, Athina Kosma and Nikos Frangakis, 'The impact of the crisis on fundamental rights across Member States of the EU, Country Report on Greece', Study for the LIBE Committee (2015), <[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510014/IPOL\\_STU\(2015\)510014\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510014/IPOL_STU(2015)510014_EN.pdf)> accessed 22 February 2016. See also Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina', Addendum – Mission to Greece (22 – 27 April 2013), 7 March 2014, A/HRC/25/50/Add.1, para. 92; FIDH and Hellenic League for Human Rights Report, 'Downgrading rights: the cost of austerity in Greece', December 2014, <<https://www.fidh.org/IMG/pdf/greece646a2014.pdf>> accessed 22 February 2016, 69.

<sup>286</sup> Council implementing decision on granting Union financial assistance to Portugal, /\* COM/2011/0273 final - NLE 2011/0122 \*/, Article 3, para. 9.

<sup>287</sup> Portugal: Memorandum of Understanding on Specific Economic Policy Conditionality (3 May 2011), <[http://economico.sapo.pt/public/uploads/memorandotroika\\_04-05-2011.pdf](http://economico.sapo.pt/public/uploads/memorandotroika_04-05-2011.pdf)> accessed 22 February 2016.

with Greece in 2012 contained a similar provision on the right to consultation. However, it did not request the Commission to take into account the results of the consultation.

As mentioned below, such duties to conduct human rights impact assessments impact upon both creditors and on borrowers – in this case on Greece itself. In the *Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece* case, the European Committee of Social Rights considered that the Greek Government had violated the European Social Charter of 1961 *inter alia* because

the Government has not conducted the minimum level of research and analysis into the effects of such far-reaching measures that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society. Neither has it discussed the available studies with the organisations concerned, despite the fact that they represent the interests of many of the groups most affected by the measures at issue.<sup>288</sup>

In order to assess the impact of austerity measures on human rights, Greece should apply the detailed compliance criteria provided by the UN office of the High Commission for Human Rights in a 2012 report on the imposition of austerity measures taking into account human rights. These criteria should also inspire the European Commission and, more generally, the Troika in its decisions to impose austerity measures.

Where austerity measures result in retrogressive steps affecting the realization or implementation of human rights, the burden of proof shifts to the implementing State to provide justification for such retrogressive measures. In ensuring compliance with their human rights obligations when adopting austerity measures, States should demonstrate:

- (1) the existence of a compelling State interest;
- (2) the necessity, reasonableness, temporariness and proportionality of the austerity measures;
- (3) the exhaustion of alternative and less restrictive measures;
- (4) the non-discriminatory nature of the proposed measures;
- (5) protection of a minimum core content of the rights; and
- (6) genuine participation of affected groups and individuals in decision-making processes.<sup>289</sup>

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<sup>288</sup> European Committee of Social Rights, *Pensioners' Union of the Agricultural Bank of Greece (ATE) v. Greece*, Complaint, Complaint No. 80/2012 16 Jan. 2012, para. 74.

<sup>289</sup> UN Office of the High Commissioner, 'Report on austerity measures and economic and social rights' (2012), <[http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82\\_en.pdf](http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf)> accessed 22 February 2016.

#### **d) Accountability Mechanisms**

It has been noted above that the austerity measures imposed by the Troika on Greece have weakened human rights protection there. These human rights infringements are a direct consequence of the conditionality imposed by the Troika in the MoUs and the fact that no human rights impact assessments were conducted by the Troika prior to the imposition of the conditionality. However, the Troika has no legal personality and may consequently not be held responsible for human rights violations. Instead, the responsibility of other subjects of international law may be taken into consideration, namely the Member States – not only with regard to the implementation measures, but also as they are represented in the ESM Board of Governors and in the IMF Board of Governors. In addition, one commentator considers that the EU should be held jointly responsible

since EU institutions were involved in the negotiation of the MoUs with the Commission and the ECB in accordance with Article 13 of the ESM Treaty, through a specific form of delegation of functions in which responsibility was not fully transferred.<sup>290</sup>

In order to further determine responsibilities, there has to be a clearly responsible actor. An IMF country report on Greece in 2013 noted that in the framework of the Troika, there was neither a clear division of labour, nor clarity in the assignment of responsibilities across the Troika.<sup>291</sup> The IMF further complained that the European Commission had to be involved in all aspects of the program in order to guarantee its conformity with European laws and regulations, while the Fund had specialist knowledge and experience in many of these aspects. For instance,

[w]hile the Fund had experience designing fiscal adjustment, the [Commission] had its own fiscal targets from Maastricht. The [Commission] had structural reforms expertise, but so too did the Fund, particularly in the fiscal area. And from the Fund's perspective, the [Commission], with the focus of its reforms more on compliance with EU norms than on growth impact, was not able to contribute much to identifying growth enhancing structural reforms. In the financial sector, the ECB had an obvious claim to take the lead, but was not expert in bank supervision where the Fund had specialist knowledge.<sup>292</sup>

Furthermore, the European institutions adopted an integrated view to examine the Greek economy and the extent of spill over effects within Europe, while the IMF took a country perspective, at least initially. Finally, and more fundamentally, the IMF report revealed that

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<sup>290</sup> Andreas Fischer-Lescano, 'Human Rights in Times of Austerity Policy. The EU institutions and the conclusion of Memoranda of Understanding' (17 February 2014) 7 <[https://www.etuc.org/sites/www.etuc.org/files/press-release/files/legal\\_opinion\\_human\\_rights\\_in\\_times\\_of\\_austerity\\_policy\\_final.pdf](https://www.etuc.org/sites/www.etuc.org/files/press-release/files/legal_opinion_human_rights_in_times_of_austerity_policy_final.pdf)> accessed 9 March 2016.

<sup>291</sup> IMF, 'Country Report: Greece. Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Agreement' (13 June 2013), IMF Country Report No 13/156, 31<<https://www.imf.org/external/pubs/ft/scr/2013/cr13156.pdf>> accessed 8 March 2016.

<sup>292</sup> Ibid.

[n]one of the partners seemed to view the arrangement as ideal. There were occasionally marked differences of view within the Troika, particularly with regard to the growth projections. However, the Troika in general seems to have pre-bargained positions so that differences were not on display to the authorities and did not risk slowing the program negotiations. The three institutions also have different internal procedures and the program documentation is voluminous, overlapping, and subject to varying degrees of secrecy. Nonetheless, coordination seems to have been quite good under the circumstances.<sup>293</sup>

This critical description of the Troika's internal functioning demonstrates the difficulty with identifying any clear responsibilities within the different institutions in the Troika. We recommend that the division of tasks should be clarified for future negotiations in order to increase the transparency of the decision-making process and to allow for the determination of eventual responsibilities. In the following paragraphs, we briefly discuss the human rights accountability mechanisms of the three bodies in the Troika.

According to the ESM Treaty (Article 37), any dispute between the parties or between the parties and the ESM on the interpretation and application of the ESM Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with that Treaty, may be brought to the CJEU. The Greek Government could use this procedure to bring a case against the ESM before the CJEU. Next to this possibility, individuals of whatever nationality or residence could also bring an action for annulment before the CJEU against decisions addressed to them or which are of direct and individual concern. However, this procedure entails strict requirements, starting with a short time limit to launch proceedings – two months. Moreover, only acts of EU institutions in the sense of Article 263 TFEU may be subject to such actions. Hence, one may wonder whether MoUs may qualify as such acts. In this regard, it should be noted that the payment conditions established by the Commission and the ECB bind the ESM and the States. Indeed, the CJEU stated in *Pringle* that ‘the activities pursued by those two institutions within the ESM Treaty [...] commit the ESM’.<sup>294</sup> One may thus conclude that MoUs qualify as ‘acts’ in the sense of Article 263 TFEU.<sup>295</sup> Finally, the *locus standi* requirements of EU law constitute a major stumbling block for any action. This requirement does not concern privileged plaintiffs, such as the EU Member States, the Council, the Commission and the European Parliament, but individuals, who will have to prove that they are directly and individually concerned by the MoU. Finally, the non-contractual liability of the EU could

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<sup>293</sup> Ibid.

<sup>294</sup> CJEU, *Pringle v. Government of Ireland, Ireland and the Attorney General*, Case C-370/12, para. 161.

<sup>295</sup> Andreas Fischer-Lescano, ‘Human Rights in Times of Austerity Policy. The EU institutions and the conclusion of Memoranda of Understanding’, Legal opinion commissioned by the Chamber of Labour, Vienna (in cooperation with the Austrian Trade Union Federation, the European Trade Union Confederation and the European Trade Union Institute) (17 February 2014) 54.

eventually be invoked pursuant to Article 340, paragraph 2 TFEU. Article 268 TFEU confers the exclusive jurisdiction in such disputes on the CJEU.<sup>296</sup>

In addition to these judicial mechanisms, another instrument introduced by the Treaty of Lisbon deserves further attention: the citizens' initiative. On 13 July 2012, a Greek national, Mr Alexios Anagnostakis, submitted a European citizens' initiative 'One million signatures for "a Europe of solidarity"' to the European Commission. The objective of this initiative was to enshrine in EU legislation the principle of 'state of necessity' under which '[w]hen the financial and the political existence of a State is in danger because of the serving of the abhorrent debt the refusal of its payment is necessary and justifiable'. In other words, a State should be allowed not to pay its own debts if such payment would jeopardise the existence of that State. The legal basis for its adoption was allegedly to be found in the economic and monetary policy of Articles 119 to 144 TFEU.

Yet, by decision of 6 September 2012, the Commission refused to register the proposal because it fell manifestly outside the framework of its powers.<sup>297</sup> Subsequently, Mr Anagnostakis brought proceedings before the General Court in order to ask for the annulment of the Commission's decision.

On 30 September 2015, the General Court rejected the case and agreed with the Commission that the initiative was outside the framework of the EU Treaties and not covered by Article 11 TEU.<sup>298</sup> The General Court notably held that

[t]he adoption of a legislative act authorising a Member State not to repay its debt, however, far from constituting economic policy guidance within the meaning of Article 136(1)(b) TFEU, which is the provision on which the present complaint is based, would in fact result in replacing the free will of contracting parties with a legislative mechanism for the unilateral writing-off of sovereign debt, which is something that the provision clearly does not authorise.<sup>299</sup>

This statement seems to imply that any kind of reduction of government debt should be precluded, even by consensus of the Member States. An appeal was brought on 30 November 2015 against this judgment on the ground that the General Court overlooked the fact that the initiative exclusively concerned the part of the public debt which is considered as 'abhorrent'. The appeal procedure is currently pending before the CJEU.<sup>300</sup>

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<sup>296</sup> The latter adopted a restrictive approach of this provision in order to safeguard the effective exercise of the normative power and to not hinder the European integration process. For further information, see Koen Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 (4) *The International and Comparative Law Quarterly* 873, 892; Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (6<sup>th</sup> edn, Sweet Maxwell 2009) 519.

<sup>297</sup> Commission Decision C(2012) 6289 final of 6 September 2012 rejecting the request for registration of the citizens' initiative 'One million signatures for "a Europe of solidarity"', submitted to the Commission on 13 July 2012.

<sup>298</sup> General Court, Case T-450/12, *Alexios Anagnostakis v European Commission*, 30 September 2015.

<sup>299</sup> General Court, Case T-450/12, *Alexios Anagnostakis v European Commission*, 30 September 2015, para. 58.

<sup>300</sup> CJEU, Case C-589/15 P, *Anagnostakis v European Commission*.

Accountability mechanisms to challenge the European Commission and the ECB are not limited to the CJEU, but also include the European Ombudsman.<sup>301</sup> The Ombudsman conducts inquiries and in cases of maladministration, the matter is referred to the institution, body, office or agency concerned. The latter has three months to inform the Ombudsman of its views. The Ombudsman then forwards a report to the European Parliament and to the institution, body, office or agency concerned. The complainant is also informed of the outcome of these inquiries.

However, there is no external accountability mechanism specifically competent for human rights violations, where individuals could submit their complaints. The accession of the EU to the ECHR would have paved the way for individuals to bring cases to the ECtHR in cases of violations of human rights by the EU,<sup>302</sup> but the accession process has been suspended by the CJEU in its Opinion 2/13.<sup>303</sup>

As far as the IMF is concerned, its Independent Evaluation Office (IEO) stated in 2008 that

accountability is probably the weakest aspect of IMF governance. There are no agreed standards against which to assess the actions of the IMF and no adequate mechanisms for the organisation and its governing bodies to be held accountable by the membership or by appropriate stakeholders.<sup>304</sup>

With regard to its human rights obligations, the IMF has consequently enjoyed unaccountable freedom over the past 70 years.<sup>305</sup> Bahram Ghazi notes that the actual lack of any possibility of bringing a claim for a violation of human rights by the IMF constitutes a denial of justice.<sup>306</sup> People may only inform Governors, Executive Directors, the IEO or parliamentarians and hope that these channels will produce effective results.<sup>307</sup> Several actions have been suggested to improve the accountability of the IMF, both through internal and external accountability mechanisms.

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<sup>301</sup> Article 228 TFEU.

<sup>302</sup> Tobias Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts', 8 *The Law of International Courts and Tribunals* (2009) 375-398. See also Council of Europe, 8<sup>th</sup> Working meeting of the CDDH Informal Working Group on the accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission, Draft legal instruments on the accession of the European Union to the European Convention on Human Rights (20-24 June 2011) 11, <[http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE\\_documents/CDDH-UE\\_2011\\_16\\_final\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_documents/CDDH-UE_2011_16_final_en.pdf)> accessed 22 February 2016.

<sup>303</sup> CJEU, *Opinion 2/13* (18 December 2014) <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=ls&t&dir=&occ=first&part=1&cid=21713>> accessed 9 March 2016.

<sup>304</sup> IMF, IEO, 'Governance of the IMF – an evaluation', 2008, 400 <[http://www.ieu-imf.org/eval/complete/pdf/05212008/CG\\_main.pdf](http://www.ieu-imf.org/eval/complete/pdf/05212008/CG_main.pdf)> accessed 22 February 2016.

<sup>305</sup> Céline Tan, 'Mandating Rights and Limiting Mission Creep: Holding the World Bank and International Monetary Fund Accountable for Human Rights' (2008) 2 (1) *Human rights & international legal discourse* 79, 86.

<sup>306</sup> Bahram Ghazi, *The IMF, the World Bank Group and the Question of Human Rights* (Transnational 2005) 240.

<sup>307</sup> Jan Aarte Scholte, 'Civil Society and IMF Accountability', CSGR Working Paper 244/08 (May 2008) <<http://www2.warwick.ac.uk/fac/soc/csgr/research/workingpapers/2008/24408.pdf>> accessed 22 February 2016.

The IMF has tried to avoid external accountability by developing self-regulatory mechanisms. In 2000, the IMF established the IEO to systematically conduct objective and independent evaluations of its activities.<sup>308</sup> It reviews compliance with operational policies and makes recommendations to the Executive Board for remedial action and/or revision of the operational policies. Yet, its mandate does not permit interested parties to challenge IMF programs but solely to address public concerns about accountability. Consequently, there is still a need to establish a complaint office.<sup>309</sup> Moreover, the IEO may not be considered as a human rights mechanism, since its terms of reference do not explicitly refer to human rights and it fails to provide access to victims.<sup>310</sup>

Actions have to be taken to correct this situation, which should include the creation of an external mechanism. Certain authors have suggested that the IMF should establish an Ombudsman procedure or an Inspection Panel, which could be assigned to receive and investigate complaints brought by any person, organisation, or State, against the IMF. An internal Ombudsperson has existed since 1999 to handle employment-related problems for IMF staff,<sup>311</sup> but there is no specific office where external stakeholders can submit allegations of harm or misconduct. Bradlow argues '[t]he model that is most suited to the IMF's needs is an ombudsman'.<sup>312</sup> In his view, the Ombudsman would not only be entitled to exercise the function of an Inspection Panel – the compliance review – but also to engage in solving problems of affected people and to give the IMF the possibility of learning lessons about the real consequences of its operations. Such an Ombudsman should be independent of the IMF Board and Management and be entitled to receive and investigate complaints launched by any person, organisation, or State, against the IMF.

Yet, one may counter-argue that an Ombudsman office would be too weak, as many civil society organisations argued during the debates preceding the establishment of an Inspection Panel at the World Bank.<sup>313</sup> Although an Ombudsman is a very flexible mechanism, which allows for mediation and is generally oriented towards conflict resolution, there is a fear that it would not have sufficient enforcement power to constitute an effective dispute settlement mechanism. Another argument against this procedure, which is more related to the human rights aspect, is that the jurisdiction of the Ombudsman would probably be limited to cases of non-compliance with the institution's operational policies and procedures. Since the IMF has not adopted any human rights policy, this limited jurisdiction

<sup>308</sup> IMF, IEO, 'Governance of the IMF – an evaluation', 2008, available at <[http://www.ieo-imf.org/eval/complete/pdf/05212008/CG\\_main.pdf](http://www.ieo-imf.org/eval/complete/pdf/05212008/CG_main.pdf)> accessed 22 February 2016, 400.

<sup>309</sup> Willem van Genugten, 'Tilburg Guiding Principles on World Bank, IMF and Human rights', in Willem van Genugten, Paul Hunt and Susan Mathews (eds), *World Bank, IMF and Human Rights* (Wolf Legal Publishers 2003) 247-255.

<sup>310</sup> FRAME D7.1, 96.

<sup>311</sup> IMF, 'Ombudsperson's Terms of Reference', December 2007, available at <<http://www.imf.org/external/hrd/ombuds.htm>> accessed 22 February 2016.

<sup>312</sup> Daniel D. Bradlow, 'Operational Policies and Procedures and an Ombudsman', in B. Carin and A. Wood (eds), *Accountability of the International Monetary Fund* (Ashgate and the International Development Research Centre 2005) 88-107, 105.

<sup>313</sup> Susan Park, 'Designing accountability, international economic organisations and the World Bank's Inspection Panel' (2010) 64 Australian Journal of International Affairs 13, 27.

would consequently preclude the Ombudsman from constituting an effective accountability mechanism in the field of human rights.

Any dispute settlement mechanism adopted, should provide certain due process guarantees as to its independence and impartiality and it should have strong powers to bind the international organisation. In order to clearly function as a human rights mechanism, an express reference to human rights should be included in its mandate.<sup>314</sup>

#### *e) Conclusions and Recommendations to Strengthen the Engagement on the Protection and Promotion of Human Rights*

As the European Parliament noted in its 2009-14 report, ‘the EU institutions are fully bound by Union law and that within the Troika they are obliged to act in accordance with fundamental rights, which, under Article 51 of the Charter of Fundamental Rights of the European Union, apply at all times’. These obligations are not suspended in times of financial crisis. Given the involvement of the European Commission and the ECB in the MoUs, these institutions have infringed several human rights, such as the right to social security (Article 34 of the Charter on Fundamental Rights) and the right to education (Article 14 of the Charter). As far as the IMF is concerned, we are still far from seeing ‘internalisation’ of human rights in their processes, but the interdependency of economic development and human rights and the growing references to human rights by the IMF in its policies, reinforce the argument that human rights should be integrated within the policies of the IMF.<sup>315</sup>

In order to avoid engaging their responsibility for these human rights infringements, the three bodies in the Troika should conduct human rights impact assessments prior to the disbursement of the loans in order to evaluate the impact of the conditionality imposed in the MoU on human rights in general and more particularly on vulnerable groups in the country concerned by the assistance. Given the specific position of the European Commission as agent of the Eurogroup and the institution responsible for conducting the negotiations with the borrower State, it seems that the European Commission should similarly conduct human rights impact assessments in order to evaluate the human rights impact of the conditionality.

If these bodies fail to conduct such assessments and if the human rights of individuals are consequently infringed as a result of the MoUs concluded with these bodies, accountability mechanisms should be available to challenge these measures. As far as the European Commission and the ECB are concerned, actions for annulment could be brought by privileged plaintiffs, such as the European Parliament. Individuals could only bring such cases if they could prove their direct and individual concern. Outside of this avenue for redress, they could launch their complaint with the European Ombudsman. In relation to

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<sup>314</sup> Pierre Schmitt, ‘The Accountability of the International Monetary Fund for Human Rights Violations’, in Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 431.

<sup>315</sup> FRAME D7.1, 94.

the IMF, there are currently no accountability mechanisms where IMF measures could be tackled. The IMF should establish an independent review mechanism where both individuals and Member States could challenge policies and measures adopted by the IMF.

More generally, the Troika would benefit from more streamlining in its process. In its 2013 country report on Greece, the IMF concluded with a number of lessons to be drawn from the Greek case. It stated

[a] clear division of labor of responsibilities within the Troika is difficult given the overlapping responsibilities of the institutions. There are also synergies arising from cooperation in areas with shared expertise. Nevertheless, European institutions have comparative advantage in certain structural issues that are beyond the Fund's core areas of expertise. Options for dividing up work on areas that are not macrocritical should therefore be explored. There may also be some scope for streamlining procedures and documents to reduce the burden on the authorities.<sup>316</sup>

Moreover, this case study has demonstrated the fact that the representation in the Troika of three different institutions may pose a number of coordination problems, especially with regard to negotiations on detailed conditionality.<sup>317</sup> As the leader of the negotiations, the European Commission should strive to coordinate and to better integrate human rights in the discussions.

It is noteworthy that the European Parliament, in its 2014 inquiry on the role and operations of the Troika, considered that the European institutions had acquired the necessary know-how to implement financial programs themselves. Hence, the Parliament called 'for any future involvement of the IMF in the euro area to remain optional'. Moreover, it called on the IMF 'to redefine the scope of any future involvement on its part in EU-related assistance programmes, such that it becomes a catalytic lender providing minimum financing and expertise to the borrowing country and the EU institutions while retaining the option of exit in case of disagreement'.<sup>318</sup> If these recommendations are to be followed in practice, the responsibility for the human rights impacts of conditionality will be concentrated within the European institutions responsible for the negotiations of the EU assistance programs.

In a communication published by the European Commission on 8 March 2016, the Commission announced that '[t]he euro area is drawing the lessons from the crisis of recent years and has embarked on a process of further integration and consolidation. This necessarily includes a social dimension'.<sup>319</sup> On the same date, the European Commission issued a first preliminary outline of 'the European Pillar of Social Rights'.

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<sup>316</sup> IMF, 'Country Report: Greece. Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Agreement' (13 June 2013), IMF Country Report No 13/156, 34 <<https://www.imf.org/external/pubs/ft/scr/2013/cr13156.pdf>> accessed 8 March 2016.

<sup>317</sup> Ibid, 50.

<sup>318</sup> European Parliament Report 2009-14 on the inquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries (2013/2277 (INI)), A7-0149/2014 (28 February 2014) paras. 96-100.

<sup>319</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Launching a consultation on a European Pillar of Social Rights', COM(2016) 127 final (8 March 2016).

This initiative has been launched within the euro area, but other Member States will be allowed to join if they wish to do so.<sup>320</sup>

This Pillar aims to identify essential principles common to euro area Member States in relation to employment and social policies in order to move towards a deeper and fairer Economic and Monetary Union. The European Commission's work on the Economic and Monetary Union is based on the Five Presidents' Report of 22 June 2015, setting out four areas where work is needed: an Economic Union, a Financial Union, a Fiscal Union and a Political Union. In relation to the latter, and more particularly to the representation of the Economic and Monetary Union, it is observed that

in the international financial institutions, the EU and the euro area are still not represented as one. This fragmented voice means the EU is punching below its political and economic weight as each euro area Member State speaks individually. This is particularly true in the case of the IMF despite the efforts made to coordinate European positions.<sup>321</sup>

In addition to the work needed in these four policy areas, a deeper and fairer Economic and Monetary Union also requires work on a social dimension: the European Pillar of Social Rights. This Pillar should build on, and complement, the EU social 'acquis'. In order to define the content and the role of the European Pillar of Social Rights, a broad online consultation is currently being conducted – until the end of 2016 – to gather views from other European institutions, national authorities, social partners, civil society, experts from academia and citizens.<sup>322</sup>

In her presentation of the first outline of the European Pillar of Social Rights, Commissioner Thyssen declared that the latter 'will serve as a compass for more convergence within the euro area. The Economic and Monetary Union needs to become stronger and more stable, both economically and socially. Economic growth and social progress need to go hand in hand'.<sup>323</sup>

Once established, this Pillar will become the reference framework in which Member States' employment and social performance will be screened. Given that the Pillar will build on the common values and principles shared at national, European and international levels, the Charter of Fundamental Rights as well as in international instruments such as the Social Charter adopted by the Council of Europe and

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<sup>320</sup> President of the European Commission Jean-Claude Juncker, 'State of the Union 2015: Time for Honesty, Unity and Solidarity' (9 September 2015) <[http://europa.eu/rapid/press-release\\_SPEECH-15-5614\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm)> accessed 14 March 2016.

<sup>321</sup> Report by Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, 'Completing Europe's Economic and Monetary Union' (22 June 2015) <[http://ec.europa.eu/priorities/sites/beta-political/files/5-presidents-report\\_en.pdf](http://ec.europa.eu/priorities/sites/beta-political/files/5-presidents-report_en.pdf)> accessed 14 March 2016.

<sup>322</sup> For further information, see <<http://ec.europa.eu/social/main.jsp?langId=en&catId=699&consultId=22&visib=0&furtherConsult=yes>> accessed 14 March 2016.

<sup>323</sup> European Commission, 'Commissioner Thyssen presents Commission's Social Package: First outline of the European Pillar of Social Rights and reform of the Posting of Workers Directive' (8 March 2016) <[http://europa.eu/rapid/press-release\\_SPEECH-16-682\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-16-682_en.htm)> accessed 14 March 2016.

recommendations from the ILO should be included into this framework as well.<sup>324</sup> Hence, this system should in principle systematise social rights impact assessments of measures taken to overcome the financial crisis.

We recommend that, once established, the European Commission uses this reference framework in order to assess the impact of the measures negotiated between the Troika on the one hand and the Member States on the other hand.

## B. Strengthening Engagement with Businesses on Human Rights: the Multistakeholder Forum on CSR

The EU's multistakeholder forum on CSR serves as a key forum facilitating the EU's engagement with other stakeholders, such as businesses, CSOs and government organisations, on the topic of CSR. As such it is a lightning rod for engagement on the subject of business and human rights with non-state actors and will be analysed extensively in this report as we look at ways that the EU can strengthen engagement with NSAs. In advance of the forum, the EU issued a public consultation on the subject of CSR, gathering the opinions of businesses, CSOs, academics etc.<sup>325</sup> This was beneficial in establishing the *status quo* within Europe at the time, although in our previous report we concluded that the report was 'largely a statistical exercise' and could have offered more qualitative analysis.<sup>326</sup> One issue that clearly emerged from the survey was the need for greater engagement with SMEs on the subject of business and human rights and we will look at this issue further in the following sections. There was an impressive array of attendants at the multistakeholder forum in 2015, which is a testament to the EU's commitment to engagement. However, consumer groups and trade unions were strikingly absent from the forum.<sup>327</sup> The forum also

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<sup>324</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Launching a consultation on a European Pillar of Social Rights', COM(2016) 127 final (8 March 2016).

<sup>325</sup> European Commission, 'The Corporate Social Responsibility Strategy of the European Commission: Results of the Public Consultation Carried out between 30 April and 15 August 2014' (DG Enterprise & Industry, 21 November 2014) <<http://ec.europa.eu/DocsRoom/documents/8021/attachments/1/translations/en/renditions/native>> accessed 11 January 2016.

<sup>326</sup> FRAME D7.2, 27.

<sup>327</sup> European Coalition for Corporate Justice, 'European Forum on CSR: The old feuds are haunting the European Corporate Social Responsibility debate and stifling progress' <[http://www.corporatejustice.org/spip.php?page=article&id\\_article=2062&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=internal&utm\\_term=2015-03](http://www.corporatejustice.org/spip.php?page=article&id_article=2062&utm_source=newsletter&utm_medium=email&utm_campaign=internal&utm_term=2015-03)> accessed 5 March 2015; Tomás Sercovich, 'Multistakeholder Forum on CSR: Are there signs of a new European strategy?' (17 March 2015) <<http://www.crandsustainability.telefonica.com/blog/2015/03/17/multistakeholder-forum-on-csr-are-there-signs-of-a-new-european-strategy/#.VmWgSbiyNBD>> accessed 7 December 2015.

lacked input from Commissioners and the perceived lack of political support for the subject did not go unnoticed. We will address each of these issues in detail in the sections that follow.

## 1. Engagement with Trade Unions

The EU's engagement with trade unions on the subject of CSR has steadily deteriorated over the years. While the ETUC is a member of the Coordination Committee of the European Multistakeholder Forum on CSR and the door is open to engagement, trade union engagement with the forum has been extremely limited.<sup>328</sup> Of the hundreds of participants at the multistakeholder forum, trade unions accounted for 10 out of 507 participants at the 2015 multistakeholder forum on CSR.<sup>329</sup> Trade unions across the EU have adopted differing positions on CSR and there are also divergences of opinion between different unions within EU states.<sup>330</sup> In Finland, for example, the trade unions have a notably positive attitude to CSR,<sup>331</sup> while the unions in other EU States, such as Poland, have often been more circumspect about CSR.<sup>332</sup> Finland has well established interaction patterns between employers and trade unions and collective regulation is generally accepted there.<sup>333</sup> It also has a very high level of union membership, 74% of its workers are members of unions. By contrast, Poland has a very low level of union membership, only 12% of its workers are members of unions.<sup>334</sup> Poland is relatively new to the concept of CSR and many trade unionists there are quite cautious about CSR seeing it as a long term threat rather than an opportunity.<sup>335</sup> Thus, it is difficult to reflect the full range of opinion that exists among different unions in the EU and we will instead try to identify the overarching themes.

At first glance one can see a strong degree of overlap between the subjects addressed by CSR and those which interest trade unions. As one union representative responding to an ETUC survey put it 'trade unions have thought about the problems of CSR for a long time, but the term itself is rather recent'.<sup>336</sup> Yet this convergence has not encouraged trade unions to engage with CSR, in fact it has had the opposite

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<sup>328</sup> European Commission, 'Coordination Committee of the European Multistakeholder Forum on CSR' <<http://ec.europa.eu/DocsRoom/documents/11862/attachments/1/translations/en/renditions/native>> accessed 7 December 2015.

<sup>329</sup> Statistical analysis based 'List of Participants' circulated to delegates at the multistakeholder forum on CSR in Brussels on 3-4 February 2015. The majority of the trade union delegates were from the Italian union, Unioncamere, but there were also delegates from the ETUC and ITUC.

<sup>330</sup> There are sharp divergences in Sweden for example, see Lutz Preuss, Michael Gold, Chris Rees (eds), *Corporate Social Responsibility and Trade Unions: Perspectives Across Europe* (Routledge 2015) 209.

<sup>331</sup> Lutz Preuss, Michael Gold and Chris Rees (eds), *Corporate Social Responsibility and Trade Unions: Perspectives Across Europe* (Routledge 2015) 203.

<sup>332</sup> Ibid, 212.

<sup>333</sup> Ibid, 203-204.

<sup>334</sup> European Trade Union Institute, 'Union Density' <[http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Trade-Unions2#note\\_2](http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Trade-Unions2#note_2)> accessed 12 April 2016.

<sup>335</sup> Lutz Preuss, Michael Gold, Chris Rees (eds), *Corporate Social Responsibility and Trade Unions: Perspectives Across Europe* (Routledge 2015) 118-119.

<sup>336</sup> François Beaujolin, *European Trade Unions and Corporate Social Responsibility: Final Report to the European Trade Union Confederation* (ETUC 2004) 13.

effect in many ways. One of the key concerns trade unions have about CSR is that it undermines the existing and established frameworks through which they can influence corporate decision making.<sup>337</sup> There is a desire among trade unions to maintain the traditional patterns of industrial relations in the face of CSR.<sup>338</sup> This is motivated in part by a fear that the employees represented by trade unions will lose their special status vis-a-vis other stakeholders.<sup>339</sup> This view was reflected in a survey carried out by the ETUC in 2004 on the views of trade unions on CSR, a German trade union stated that:

If unions engage in softer CSR-style agreements they may unintentionally erode their ability to claim binding regulations in the future. [...] There is, however, a realistic danger of CSR being seen as something that might replace existing structures of workforce representation.<sup>340</sup>

In essence CSR is perceived as a threat to the preferential status given to trade unions and has prompted a fear that unions and employees will be relegated to just another stakeholder.

Unions also view CSR as a self-serving exercise. Doane identifies four key drivers behind companies adopting CSR programmes: managing risk and reputation; protecting human capital assets; responding to consumer demands; and avoiding regulation.<sup>341</sup> This feeds into union views that CSR is used as 'a marketing tool' and to 'enhance its image',<sup>342</sup> rather than for the greater good of society. Unions argue that the voluntary nature of CSR is problematic as it facilitates the avoidance of regulation. An ETUC study analysing the attitudes of European trade unions to CSR in 2013 concluded that: 'according to most unions, it is illusory to think that companies will assume their responsibilities voluntarily'.<sup>343</sup> An earlier study presented the views of an Austrian trade union that 'CSR ambitions must not be allowed to undermine legal or contractual frameworks and may not replace or supersede binding agreements'.<sup>344</sup> This perception is fuelled in part by the view that many companies are currently failing to fully comply with existing binding legal obligations, such as those set out in the ILO conventions.<sup>345</sup> Companies should

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<sup>337</sup> Lutz Preuss, Axel Haunschild and Dirk Matten, 'Trade unions and CSR: a European research agenda', 6 *Journal of Public Affairs* (2006) 256, 258; Lutz Preuss, 'A reluctant stakeholder? On the perception of corporate social responsibility among European trade unions' 17(2) *Business Ethics: A European Review* (2008) 149, 149-150.

<sup>338</sup> Lutz Preuss, 'A reluctant stakeholder? On the perception of corporate social responsibility among European trade unions' (2008) 17(2) *Business Ethics: A European Review* 149, 157.

<sup>339</sup> Ibid, 157.

<sup>340</sup> François Beaujolin, *European Trade Unions and Corporate Social Responsibility: Final Report to the European Trade Union Confederation* (ETUC 2004) 23.

<sup>341</sup> Deborah Doane, 'Beyond corporate social responsibility: minnows, mammoths and markets' (2005) 37 *Futures* 215, 217.

<sup>342</sup> François Beaujolin, *European Trade Unions and Corporate Social Responsibility: Final Report to the European Trade Union Confederation* (ETUC 2004) 24; European Trade Union Confederation, *Final report - Corporate Social Responsibility - Union Thinking on the EU Strategy 2011-2014 for Corporate Social Responsibility* (ETUC 2013), 12.

<sup>343</sup> European Trade Union Confederation, *Final report - Corporate Social Responsibility - Union Thinking on the EU Strategy 2011-2014 for Corporate Social Responsibility* (ETUC 2013) 13.

<sup>344</sup> François Beaujolin, *European Trade Unions and Corporate Social Responsibility: Final Report to the European Trade Union Confederation* (ETUC 2004) 22.

<sup>345</sup> Ibid, 27.

comply with these existing agreements before even contemplating additional voluntary measures and unions have questioned the added value CSR can bring to the debate over labour standards.

Overall many European trade unions view CSR as an imported or foreign concept, which is more relevant for larger companies, and characterised by a degree of informality and superficiality which severely weakens its impact.<sup>346</sup> Unions feel that CSR has thus far failed to reduce the adverse impacts of companies on society and the environment, that reporting by companies on CSR has been substandard and the refusal of enterprises to accept outside judgment or scrutiny of their CSR policies has limited their efficacy.<sup>347</sup>

Many of these concerns are reflected in the ETUC's official position on CSR, which states that:

The ETUC demands that CSR must not be used to avoid dialogue with workers organised in trade unions, or as an alternative to labour legislation and collective bargaining. Nor should it be merely a public relations exercise, but it requires sustained and challenging effort. [...] the quality of industrial relations within a company must be the prime concern of CSR.<sup>348</sup>

Admittedly there are legitimate questions about the degree to which unions represent the interests of all workers. Statistics show that fewer than one in four workers across the EU are members of trade unions and union membership has fallen over recent years. Furthermore, the levels vary widely from state to state, with very high levels of union membership in states like Finland and very low membership in places like France, which further limit their capacity to speak on behalf of 'European' workers. Yet even with these shortcomings, trade unions still represent a significant number of workers within Europe, many of whom may have been the victims of human rights abuses perpetrated by companies. They also have substantial experience in industrial relations and labour rights. This makes them a necessary and important partner for the EU in developing and elucidating CSR policy. If the EU wants to strengthen engagement with non-state actors, a good start would be to encourage greater trade union participation in the CSR debate. The EU can do this by challenging some of the narratives that trade unions present about CSR.

## 2. Responding to the Concerns of Trade Unions

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<sup>346</sup> Lutz Preuss, Michael Gold and Chris Rees (eds), *Corporate Social Responsibility and Trade Unions: Perspectives Across Europe* (Routledge 2015) 216.

<sup>347</sup> European Trade Union Confederation, *Final report - Corporate Social Responsibility - Union Thinking on the EU Strategy 2011-2014 for Corporate Social Responsibility* (ETUC 2013) 12.

<sup>348</sup> European Trade Union Confederation, 'Corporate Social Responsibility' <<https://www.etuc.org/corporate-social-responsibility>> accessed 7 December 2015.

The EU needs to tackle the perception that CSR is entirely voluntary directly. In the past the EU has repeatedly referred to the voluntary nature of CSR in its policy documents on CSR. In its 2001 Green Paper on CSR, the Commission defined CSR as ‘a concept whereby companies integrate social and environmental concern in their business operations and in their interaction in their stakeholders on a voluntary basis’.<sup>349</sup> This has been described as a very limited, and business-oriented definition of CSR.<sup>350</sup> However, there has since been an official shift away from this definition within the Commission and CSR is now defined more broadly as ‘the responsibility of enterprises for their impacts on society’.<sup>351</sup> While the previous definition supported the trade unions’ narrative on voluntarism, the same cannot be said of the new definition of CSR. The situation is not black and white, voluntary and mandatory, but rather various shades of grey. Buhmann argues that the normative links between CSR and law are numerous and of a character that negate an inflexible understanding of CSR as only requirements beyond law.<sup>352</sup> The EU itself stresses the role that complementary regulation plays in CSR and that there should be a smart mix of voluntary measures and complementary regulation.<sup>353</sup> In fact, the EU’s most significant recent example of action on CSR introduced mandatory non-financial reporting rules for companies. As Osuji put it this ‘reflects a shift from pure voluntarism to tacit acknowledgement of some roles for regulation’.<sup>354</sup> There is thus significant scope for the EU to challenge this narrative.

However, the EU achieved the opposite result at the CSR forum in 2015 by presenting a very contradictory message in the opening round of speeches. Pierre Delsaux, Deputy Director General of DG GROW, stood before the forum and stated that the Commission’s view was that nothing mandatory should be expected to come out from the new CSR strategy, which should remain business-driven and non-prescriptive.<sup>355</sup> In stark contrast moments later Richard Howitt MEP stated that the consensus that there should be a smart mix of voluntary and mandatory measures was not broken.<sup>356</sup> The absence of a unified message here and the perceived unwillingness of the Commission to even contemplate non-voluntary measures simply

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<sup>349</sup> European Commission, ‘Green Paper: Promoting a European framework for Corporate Social Responsibility’ COM(2001) 366 final, 6.

<sup>350</sup> Sorcha MacLeod, ‘Corporate Social Responsibility within the European Union Framework’, 23 *Wisconsin International Law Journal* (2005) 541,545.

<sup>351</sup> European Commission, ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’ (Communication) COM (2011) 681 final, 6.

<sup>352</sup> Karin Buhmann, ‘Integrating human rights in emerging regulation of Corporate Social Responsibility: the EU case’ (2011) 7(2) *International Journal of Law in Context* 139, 150.

<sup>353</sup> European Commission, ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’ (Communication) COM (2011) 681 final, 5.

<sup>354</sup> Onyeka Osuji, ‘Corporate social responsibility, juridification and globalisation: ‘inventive interventionism’ for a ‘paradox’’ (2015) 11(3) *International Journal of Law in Context* 265, 268.

<sup>355</sup> Pierre Delsaux, ‘Opening Speech’ (EU Multistakeholder forum on CSR, Brussels, 3 February 2015). See also Francois Paquay, ‘CSR: Commission turns away from regulatory approach’ (4 February 2015) <[https://www.contexte.com/article/entreprise/csr-commission-turns-away-from-regulatory-approach\\_38883.html](https://www.contexte.com/article/entreprise/csr-commission-turns-away-from-regulatory-approach_38883.html)> accessed 7 December 2015.

<sup>356</sup> Richard Howitt, ‘Keynote Speech’ (EU Multistakeholder forum on CSR, Brussels, 3 February 2015). See European Coalition for Corporate Justice, ‘Opening Speech of Richard Howitt MEP at the European Commission Multi-Stakeholder Forum on Corporate Social Responsibility’ <<http://www.corporatejustice.org/Opening-Speech-of-Richard-Howitt.html>> accessed 7 December 2015.

feeds into the trade unions' narrative.<sup>357</sup> There appears to be a tension between the Commission and Parliament on this issue, which recently manifested itself in the Parliament's refusal to endorse a voluntary, self-certification scheme proposed by the Commission in the draft Conflict Minerals Regulation.<sup>358</sup> The absence of a unified position within the EU here is clearly detrimental as it offers the trade unions an excuse not to participate.

The EU should also be careful with the terminology it uses. The term CSR is itself divisive and trade unions view it as a concept that has been defined solely by and for companies, and have suggested that the name itself does not encourage workers to participate in the debate, but instead is rather exclusive.<sup>359</sup> The EU has consistently referred to its activities in this field of business and human rights as CSR, despite the fact that this term naturally connotes voluntarism and carries ideological baggage. In practice the EU seeks to incorporate a broad range of instruments in its CSR policy. The 2011 communication, for example, states that EU action to promote CSR should be fully consistent with the UN Guiding Principles on Business and Human Rights, the ILO Tripartite Declaration, the UN Global Compact and the OECD Guidelines for Multi-National Enterprises. The Commission recently issued a staff working document on their progress in implementing UNGPs.<sup>360</sup> It also encourages member states to put in place national action plans as part of their obligation to implement the UNGPs.<sup>361</sup> By referring to CSR, rather than the broader, more neutral, category of business and human rights, the EU further feeds the narrative of voluntarism advanced by the trade unions.

The EU should also challenge the perception that CSR in the EU will undermine existing channels of dialogue between trade unions and businesses. The EU has made an official commitment to the UNGPs, which stipulate that grievance mechanisms aimed at addressing human rights concerns at the company level should be:

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<sup>357</sup> It also prompted criticism from CSOs at the forum who stated that 'The current statement made was a clear threat to the "smart mix" of legislative and voluntary measures that was at the centre of the previous strategy in 2011-2014' - European Coalition for Corporate Justice, 'European Forum on CSR: The old feuds are haunting the European Corporate Social Responsibility debate and stifling progress' <[http://www.corporatejustice.org/spip.php?page=article&id\\_article=2062&utm\\_source=newletter&utm\\_medium=email&utm\\_campaign=internal&utm\\_term=2015-03](http://www.corporatejustice.org/spip.php?page=article&id_article=2062&utm_source=newletter&utm_medium=email&utm_campaign=internal&utm_term=2015-03)> accessed 5 March 2015.

<sup>358</sup> European Parliament, 'Conflict minerals: MEPs ask for mandatory certification of EU importers' <<http://www.europarl.europa.eu/news/en/news-room/content/20150513IPR55318/html/Conflict-minerals-MEPs-ask-for-mandatory-certification-of-EU-importers>> accessed 7 December 2015.

<sup>359</sup> Lutz Preuss, Michael Gold and Chris Rees (eds), *Corporate Social Responsibility and Trade Unions: Perspectives Across Europe* (Routledge 2015) 209.

<sup>360</sup> European Commission, 'Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play' SWD(2015) 144 final.

<sup>361</sup> Ibid, 7.

Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.<sup>362</sup>

The UNGPs also support the early remediation of issues before they become more serious human rights abuses,<sup>363</sup> which further supports dialogue. The trade unions merely need to show that dialogue with them is an effective means of resolving human rights issues with companies and the UNGPs advocate strongly in favour of using this channel. The idea that CSR initiatives consistent with the UNGPs could undermine or render obsolete other channels of engagement, such as the long established social partnership at the EU level, which also has a basis in the treaties,<sup>364</sup> seems far-fetched. The EU's initiatives in the field of business and human rights should be viewed as complementing and supplementing the actions of the social partners rather than superseding them.

The EU also needs to do a better job of promoting the benefits of engaging with the business and human rights agenda to trade unions. The business and human rights agenda is now an established part of the business landscape, if unions decline to engage, a critical voice, which could temper the negative impacts of business and human rights, will be absent from the discussion. Equally if the unions consider that CSR allows businesses to brand their activities in a more palatable way, can the unions not do the same by repackaging their objectives in a more fashionable way? Furthermore unions have consistently criticised the lack of transparency in the activities of companies and their poor reporting practices.<sup>365</sup> Yet, the EU's CSR agenda has generated significant improvements in this regard through the non-financial reporting directive. The unions are not fully convinced that the non-financial reporting directive will be effective, criticising the 'comply or explain' approach adopted in the directive.<sup>366</sup> However, if the EU can follow through on the promise of the directive, creating meaningful, objective reporting, it can leverage this success to engage unions. Finally, the EU needs to stress the smart mix approach of the UNGPs. Voluntary measures should be used as a means of piloting best practice, while legislative measures should underpin the minimum standards on business and human rights. This would garner the support of trade unions, and be consistent with the UNGPs.<sup>367</sup>

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<sup>362</sup> UNHRC, 'Report by Special Representative John Ruggie on Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) UN Doc A/HRC/17/31, Principle 31 (h).

<sup>363</sup> Ibid, Principle 29.

<sup>364</sup> Treaty on the Functioning of the European Union Protocol (No. 5) on the Statute of the European Investment Bank [2012] OJ C 326/47, article 152.

<sup>365</sup> Lutz Preuss, 'A reluctant stakeholder? On the perception of corporate social responsibility among European trade unions' (2008) 17(2) *Business Ethics: A European Review* 149, 156-157.

<sup>366</sup> European Trade Union Confederation, *Final report - Corporate Social Responsibility - Union Thinking on the EU Strategy 2011-2014 for Corporate Social Responsibility* (ETUC 2013) 13.

<sup>367</sup> François Beaujolin, *European Trade Unions and Corporate Social Responsibility: Final Report to the European Trade Union Confederation* (ETUC 2004) 32.

### 3. Engagement with Consumer Groups

Consumers and the groups that represent them can exercise significant influence in the sphere of corporate social responsibility. The benefits for a company of adopting CSR policies depend to a large extent on consumer activism. This is necessary firstly to maintain proper monitoring of the activities of companies to ensure they abide by their commitments,<sup>368</sup> and secondly for consumers to make ethical choices supporting companies with good records on CSR.<sup>369</sup> Without this consumer activism De Schutter argues that CSR will not pay and there will be limited incentives for companies to behave ethically or move beyond minimum standards.

The EU recognised from as early as 2001 that pressure from consumer groups was driving companies to adopt codes of conduct covering working conditions, human rights and environmental aspects of their operations. A key driver in these developments was the ‘risk of negative consumer reaction’.<sup>370</sup> The research the EU carried out at the time also indicated that consumers do not only want good and safe products, but they also want to know if they are produced in a socially responsible manner. These considerations are important for European consumers and create a market incentive for greater CSR activity.<sup>371</sup>

The role consumers play in this sphere was expressly recognised in the EU’s 2002 Communication on CSR where it stated that:

The EU success in promoting CSR ultimately depends on widespread ‘ownership’ of the principles of CSR by businesses, *social partners, civil society, including consumer organisations*, and public authorities, including from third countries, which should be based on comprehensive partnership with representatives of society at large. *The involvement of all affected stakeholders is key to ensure acceptance and credibility of CSR and better compliance with its principles* (emphasis added).<sup>372</sup>

Thus at the outset of the EU’s actions on CSR, consumer groups were viewed as an integral part of developing and fostering CSR.

The consumer groups themselves played an active role in the CSR agenda within Europe early on. At the European level, the European Consumer Organisation (BEUC) took a leading role. BEUC is an umbrella organisation representing a host of national consumer groups at the European level and defending the interests of European consumers as a whole.<sup>373</sup> It lobbies the EU on consumer issues and is particularly

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<sup>368</sup> Olivier De Schutter, ‘Corporate Social Responsibility European Style’ (2008) 14 European Law Journal 203, 227.

<sup>369</sup> Ibid, 221.

<sup>370</sup> European Commission, ‘Green Paper on Promoting a European framework for corporate social responsibility’ (Communication) COM (2001) 0366 final at [54].

<sup>371</sup> Ibid, at [79].

<sup>372</sup> European Commission, ‘Communication concerning Corporate Social Responsibility: A business contribution to Sustainable Development’ (Communication) COM (2002) 0347 final at [6].

<sup>373</sup> BEUC, ‘Who We Are’ <<http://www.beuc.eu/about-beuc/who-we-are>> accessed 7 January 2016.

active on issues such as health and safety and sustainability, which have a strong resonance in human rights and CSR. BEUC has been a member of the co-ordination committee for the multistakeholder forum on CSR from the outset.<sup>374</sup> It was an active member of the forum in the past.<sup>375</sup> In 2003, for example, Charlotte de Roo addressed the forum on behalf of BEUC.<sup>376</sup> In her address she noted the important role consumers play in improving and enforcing corporate social responsibility. She also described the European round table on CSR as an interesting initiative indicating that European consumer organisations were very willing to share their experiences in this area. In 2005, the BEUC President stated that CSR has become 'extremely important', but that the system was based too much on trust and needed verification measures.<sup>377</sup>

In 2006, however, BEUC joined a group of NGOs in boycotting the CSR forum. The boycott was motivated by the perceived lack of progress on CSR and the establishment by the EU of the European Alliance on CSR, which largely excluded civil society.<sup>378</sup> The NGOs and trade unions began to engage with the forum again in 2010,<sup>379</sup> but it seems that BEUC has remained outside the fold since 2006, while it still holds a place on the coordination committee for the multistakeholder forum on CSR, it is listed as an inactive member.

The case for strengthening engagement here is compelling. The participation of consumer groups is indispensable if the EU wishes to develop a coherent and inclusive business and human rights policy. As we already noted above the success of the business and human rights agenda depends on the actions of consumers and the EU itself recognises the role consumer groups play in identifying problems with CSR, driving improvements and helping companies to build solutions to the problems they identify.<sup>380</sup> The absence of consumer groups from the forum in 2015 was conspicuous. If the EU wishes to strengthen engagement with businesses and CSOs in the context of business and human rights, it should make concerted efforts to re-engage with consumer groups and address the concerns that keep them from active participation in forums like the multistakeholder forum on CSR.

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<sup>374</sup> European Commission, 'Co-ordination Committee of the European Multistakeholder Forum on CSR' <<http://ec.europa.eu/DocsRoom/documents/11862/attachments/1/translations/en/renditions/native>> accessed 7 January 2016.

<sup>375</sup> European Commission, 'European Multistakeholder Forum on CSR: Final Results and Recommendations' (European Commission, 29 June 2004) <[http://www.corporatejustice.org/IMG/pdf/CSR\\_20Forum\\_20final\\_20report.pdf](http://www.corporatejustice.org/IMG/pdf/CSR_20Forum_20final_20report.pdf)> accessed 7 January 2016.

<sup>376</sup> European Commission, 'EU Multi-Stakeholder Forum on Corporate Social Responsibility (CSR EMS Forum)' Directorate-General for Employment and Social Affairs, 1 August 2003, KE-11-03-003-EN-C.indd, 31-32.

<sup>377</sup> Euractiv, 'BEUC President: industry has gained more influence' (Euractiv, 8 February 2005) <<http://www.euractiv.com/health/beuc-president-industry-gained-i-news-213273>> accessed 7 January 2016.

<sup>378</sup> FRAME D7.2, 16-17; European Trade Union Confederation, *Final report - Corporate Social Responsibility - Union Thinking on the EU Strategy 2011-2014 for Corporate Social Responsibility* (ETUC 2013) 6.

<sup>379</sup> FRAME D7.2, 17.

<sup>380</sup> European Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' (Communication) COM (2011) 681 final, 7.

#### 4. Political Support

The multistakeholder forum on CSR received very limited political support from the Commission in 2015. This is in stark contrast to previous years when the forum has received a large amount of political support and has been attended by numerous commissioners. At the very first multistakeholder forum in October 2002, the Commissioner for Employment and Social Affairs at the time, Anna Diamantopoulou, addressed the forum.<sup>381</sup> She also addressed the mid-term review of the forum in November 2003.<sup>382</sup> In 2004, Stavros Dimas, then Commissioner for Employment and Social Affairs, gave the opening speech of the forum and chaired the final meeting, while Mr. Erkki Liikanen, then Commissioner for Enterprise and Information Society, gave the closing speech at the forum.<sup>383</sup> In February 2009, Vladimir Spidla, then European Commissioner for Employment, Social Affairs and Equal Opportunities, gave the opening speech to the forum, while the Vice-President of the Commission, Günter Verheugen, closed the forum.<sup>384</sup> In 2010, László Andor, then Commissioner for Employment, Social Affairs and Inclusion addressed the forum,<sup>385</sup> while Michel Barnier, Commissioner for Internal Market and Services, closed the forum.<sup>386</sup> These are just a few examples of the political engagement of the Commission with the forum and we can see there is a long history of political patronage here.

Yet in 2015, not a single commissioner attended the forum, let alone addressed it. The absence of high-level political engagement from the Commission is all the more striking when one considers the context. Firstly, since its emergence in the EU's agenda, CSR has expanded to encompass a huge range of policy areas and touches directly on the policy remits of numerous commissioners including Elżbieta

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<sup>381</sup> Anna Diamantopoulou, 'Making CSR a win-win strategy for business and all stakeholders' (European Multistakeholder Forum on CSR, Brussels, 16 October 2002) <[http://europa.eu/rapid/press-release\\_SPEECH-02-485\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-02-485_en.htm)> accessed 8 January 2016.

<sup>382</sup> Anna Diamantopoulou, 'Dialogue and partnership: the key to successful CSR' (European Multi-Stakeholder Forum on Corporate Social Responsibility, Venice, 13 November 2003) <[http://europa.eu/rapid/press-release\\_SPEECH-03-538\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-03-538_en.htm)> accessed 8 January 2016.

<sup>383</sup> Thomas Loew, 'The Results of the European Multistakeholder Forum on CSR in the view of Business, NGO and Science' 2005 Institute for Sustainability Discussion Paper, 13-18 <<http://www.4sustainability.de/fileadmin/redakteur/bilder/Publikationen/Loew-2005-Results-of-the-EMS-Forum-in-the-View-of-Business-N..pdf>> accessed 8 January 2016.

<sup>384</sup> European Commission, 'CSR Multistakeholder Forum – Review Meeting Agenda' (10 February 2009) <[http://www.hermes-osr.com/attachments/220\\_agenda.pdf](http://www.hermes-osr.com/attachments/220_agenda.pdf)> accessed 8 January 2016.

<sup>385</sup> László Andor, 'Remarks at the Corporate Social Responsibility (CSR) European Multi-Stakeholder Forum' (Plenary Meeting of the European Multi-Stakeholder Forum for CSR, Brussels, 29 November 2010) <[http://europa.eu/rapid/press-release\\_SPEECH-10-695\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-10-695_en.htm)> accessed 8 January 2016.

<sup>386</sup> Michel Barnier, 'Closing Remarks' (Plenary Meeting of the European Multi-Stakeholder Forum for CSR, Brussels, 29 November 2010).

Bieńkowska,<sup>387</sup> Jyrki Katainen<sup>388</sup> and Marianne Thyssen.<sup>389</sup> Secondly, the CSR forum had not been held for a number of years, mainly because the EU had defined its policy from 2011-2014. The forum was also occurring at a crucial time for the EU as it sought to renew its policy on CSR for the next number of years. Given that it was happening at such a crucial time and had not occurred in a few years, during which time a number of huge developments occurred in the field of business and human rights, one would expect that Commissioners would have made the time to attend it.

Thirdly, this event was, by our reckoning, the largest plenary session of the multistakeholder forum on CSR in the history of the EU. In 2006, approximately 150 representatives attended the forum.<sup>390</sup> In 2010, over 200 representatives attended the forum.<sup>391</sup> In 2015, there were over 500 representatives at the forum.<sup>392</sup> The absence of the Commissioners who would normally attend the forum, namely the Commissioner for the Internal Market, Industry, Entrepreneurship and SMEs, Elżbieta Bieńkowska and the European Commissioner for Employment, Social Affairs, Skills and Labour Mobility, Marianne Thyssen, is highly unusual. Instead of attending the forum the diaries of the commissioners indicate Elżbieta Bieńkowska met with The European Steel Association (EUROFER) to discuss challenges facing the steel industry,<sup>393</sup> while Marianne Thyssen met representatives from Nestle on youth employability and apprenticeships. When one considers the sheer volume of businesses, CSOs and other stakeholders attending the forum, their absence in favour of these meetings is remarkable. The absence of the Commissioners did not go unnoticed by the attendees either and one member of the co-ordination committee for the multistakeholder forum on CSR, after observing that the commissioners had not deigned to attend the forum, stated that: 'one has to seriously question the political commitment in

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<sup>387</sup> Elżbieta Bieńkowska is commissioner for the Internal Market, Industry, Entrepreneurship and SMEs. Her policy areas directly include improving the business environment and working as an SME envoy - [https://ec.europa.eu/commission/2014-2019/bienkowska\\_en](https://ec.europa.eu/commission/2014-2019/bienkowska_en).

<sup>388</sup> Jyrki Katainen is commissioner for Jobs, Growth, Investment and Competitiveness. His policy areas directly include helping improve the business environment to make Europe a more attractive place in which to work and invest. [https://ec.europa.eu/commission/2014-2019/katainen\\_en](https://ec.europa.eu/commission/2014-2019/katainen_en).

<sup>389</sup> Marianne Thyssen is commissioner for Employment, Social Affairs, Skills and Labour Mobility. Her policy areas directly include ensuring decent and safe working conditions and equal opportunities for all on the labour market; stepping up the struggle against inequality and poverty and ensuring that all Commission proposals and activities take the impact on employment and social issues fully into account [https://ec.europa.eu/commission/2014-2019/thyssen\\_en](https://ec.europa.eu/commission/2014-2019/thyssen_en).

<sup>390</sup> European Coalition for Corporate Justice, 'Last meeting of the Multistakeholder Forum confirms ECCJ's suspicion' (ECCJ, 8 December 2007) <<http://www.corporatejustice.org/last-meeting-of-the,079.html>> accessed 8 January 2016.

<sup>391</sup> Telefonica, 'The main messages from the CSR Multistakeholder Forum' (Telefonica, 9 December 2010) <[http://www.rcysostenibilidad.telefonica.com/blog/2010/12/09/the-main-messages-from-the-csr-multistakeholder-forum/#.Vo\\_hV\\_mLSUI](http://www.rcysostenibilidad.telefonica.com/blog/2010/12/09/the-main-messages-from-the-csr-multistakeholder-forum/#.Vo_hV_mLSUI)> accessed 8 January 2015.

<sup>392</sup> Statistical analysis based 'List of Participants' circulated to delegates at the multistakeholder forum on CSR in Brussels on 3-4 February 2015.

<sup>393</sup> European Commission, 'Meetings of Commissioner Elżbieta Bieńkowska with organisations and self-employed individuals' <<http://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=e8354e80-dd05-4cb8-ba46-0dbb02ee2d88&d=6679426-p=4>> accessed 12 January 2016.

Europe about the role of CSR in developing a competitive and at the same time responsible EU economy'.<sup>394</sup>

The CSOs that attended the FRAME workshop for this work package also expressed dismay at the lack of political leadership on this issue within the EU. A representative from the European Coalition for Corporate Justice (ECCJ) remarked that CSR was a 'non-issue' for the Commission, 'the cabinet doesn't care, the Commission so far has shown absolutely no interest'.<sup>395</sup> It is difficult to know exactly why the political leadership has diminished in recent times, but there are a few possible reasons. Firstly, the representative from ECCJ indicated that recent legislative moves to introduce the non-financial reporting directive and the conflict minerals regulation may have a bearing. He noted that the introduction of the non-financial reporting directive is seen by some in the EU as 'the end of the debate for a few years'.<sup>396</sup> This may have led the political leadership in the Commission to push the issue to the side. Secondly, this reduction in political leadership coincides with the Commission portfolio changes implemented by Jean Claude Juncker. The Juncker Commission made huge changes to the structure and mandate of what was DG Enterprise and Industry, effectively merging it with the Directorate General responsible for the Internal Market - DG MARKT.<sup>397</sup> It is possible that with this expansion of the DG's mandate CSR has fallen by the wayside. Thirdly, as the issue of CSR has become a concern for different DGs and institutions, the DGs who took the lead on the issue in the past, employment and enterprise, may no longer see themselves as the policy leaders for this area. Regardless of the reason, the multistakeholder forum represented a prime opportunity to demonstrate renewed commitment to the business and human rights agenda at the political level within the EU, which was lamentably lost.

## 5. Engagement with SMEs

In its 2011 communication on CSR, the EU made an official policy commitment to support capacity-building for SME intermediary organisations to improve the quality and availability of CSR advice for SMEs.<sup>398</sup> The Commission also noted in its communication that it will at all times take account of the particular characteristics of SMEs, especially their limited resources, and avoid creating unnecessary administrative burdens on them.<sup>399</sup> This communication arguably set a gloomy tone for the EU's efforts in

<sup>394</sup> Cooperatives Europe, 'EU Multi-Stakeholder Forum on Corporate Social Responsibility' (Cooperatives Europe, 5 December 2015) <<https://coopseurope.coop/resources/news/eu-multi-stakeholder-forum-corporate-social-responsibility>> accessed 12 January 2016.

<sup>395</sup> Jerome Chaplier, 'CSR Sprawl – Maintaining Control and Coherency over a Diverse Policy' (FRAME WP7 Workshop, London, 3 July 2015).

<sup>396</sup> Ibid.

<sup>397</sup> European Commission, 'The Juncker Commission: A strong and experienced team standing for change' (Brussels, 10 September 2014) <[http://europa.eu/rapid/press-release\\_IP-14-984\\_en.htm](http://europa.eu/rapid/press-release_IP-14-984_en.htm)> accessed 12 April 2016.

<sup>398</sup> European Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' (Communication) COM (2011) 681, 8.

<sup>399</sup> Ibid.

this field by focusing on the negatives, such as lack of resources and fear of regulation rather than focusing on the more positive aspects,<sup>400</sup> such as the fact that SMEs tend to be much more adaptable and capable of innovation in CSR than larger companies. The Commission has made some positive steps in following through on its promises, for example, by issuing a Green Action Plan for SMEs,<sup>401</sup> and a guide on implementing the UN Guiding Principles on Business and Human Rights for SMEs.<sup>402</sup> The guide is written in accessible language, addresses frequently asked questions and offers step-by-step guidance on how to implement the UNGPs, including some common examples. However, the guide itself is difficult to locate following changes to the Commission's website, and it does not feature at all on the SME section of DG GROW's website.<sup>403</sup>

The EU's approach to CSR for SMEs has been the subject of some criticism. The recent public consultation on the Corporate Social Responsibility Strategy of the European Commission contained a number of comments on the approach to SMEs.<sup>404</sup> The most significant shortcoming identified in the EU's previous communication on CSR, according to the report, was 'not enough focus on SMEs'.<sup>405</sup> The report also concluded that the EU needs to do more to support SMEs on CSR issues,<sup>406</sup> and focus more on SMEs in terms of capacity building and support.<sup>407</sup> There is thus a perception that the EU has not done enough to foster CSR among SMEs, it clearly needs to strengthen its engagement with SMEs on the subject of CSR/business and human rights. There is a strong case for strengthening engagement. The economic role that SMEs play in Europe is colossal. Statistics from 2014 indicate that SMEs account for the vast majority of businesses in the EU, over 99% of businesses are SMEs. They are also responsible for over 66% of EU total employment.<sup>408</sup> As such they are powerful economic actors that can have profound human rights impacts.

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<sup>400</sup> Dimosthenis Mousiolis, Apostolos Zaridisb, Kostas Karamanisc, Athina Rontogiannid, 'Corporate Social Responsibility in SMEs and MNEs. The Different Strategic Decision Making' (2015) 175 Social and Behavioral Sciences 579, 580.

<sup>401</sup> Commission, 'Green Action Plan for SMEs' (DG Grow) <[http://ec.europa.eu/growth/smes/business-friendly-environment/green-action-plan/index\\_en.htm](http://ec.europa.eu/growth/smes/business-friendly-environment/green-action-plan/index_en.htm)> accessed 11 January 2016.

<sup>402</sup> European Commission, 'My business and human rights: A guide to human rights for small and medium-sized enterprises' (DG Enterprise and Industry, 1 December 2012) <<http://ec.europa.eu/DocsRoom/documents/10375/attachments/1/translations/en/renditions/native>> accessed 11 January 2016.

<sup>403</sup> Commission, 'Entrepreneurship and Small and medium-sized enterprises (SMEs)' (DG Grow) <[http://ec.europa.eu/growth/smes/index\\_en.htm](http://ec.europa.eu/growth/smes/index_en.htm)> accessed 11 January 2016.

<sup>404</sup> Commission, 'The Corporate Social Responsibility Strategy of the European Commission: Results of the Public Consultation Carried out between 30 April and 15 August 2014' (DG Enterprise & Industry, 21 November 2014) <<http://ec.europa.eu/DocsRoom/documents/8021/attachments/1/translations/en/renditions/native>> accessed 11 January 2016.

<sup>405</sup> Ibid, 3.

<sup>406</sup> Ibid, 3.

<sup>407</sup> Ibid, 26.

<sup>408</sup> European Commission, *Annual Report on European SMEs 2014/2015* (European Union, 2015) 3.

**a) The Language of CSR**

The first issue the EU should address is the perception of CSR among SMEs and this relates back to the point made earlier about language and terminology. The term corporate social responsibility has numerous negative connotations for SMEs and using another term may be more beneficial.<sup>409</sup> SMEs are uncomfortable identifying with the concept of CSR and see it as being linked to large companies. This is a reasonable conclusion too. The very word corporate, implies incorporation, the establishment of a company as a separate legal entity from its owners. Incorporation typically only occurs when a company reaches a certain size and does not reflect the experience of many SME owners, who have very personal relationships to their businesses and with their customers. SMEs are a group that does not feel represented by the concept of CSR and rarely use the language of CSR to describe what they are doing, even where their actions clearly fall within its remit.<sup>410</sup> Murillo and Lozano conclude that the terminology of CSR appears 'distant and even possibly inoperative or counterproductive' to SMEs.<sup>411</sup> Thus, if the EU wishes to strengthen engagement with SMEs on the subject matter of CSR e.g. socially responsible, human-rights compliant business conduct, it should start by changing the language it uses.

**b) Tailoring the Approach**

The second issue the EU needs to address in order to strengthen engagement is tailoring its approach to the issue of human rights for SMEs. The focus of the literature on CSR has been disproportionately aimed at large organisations and multi-national enterprises, with limited focus on SMEs.<sup>412</sup> This has fuelled the perception, identified above, that CSR is something that is only relevant for big companies. The EU itself has contributed to this and its recent flagship legislation in this field, the non-financial reporting directive, is specifically directed at large companies not SMEs.<sup>413</sup> There is an assumption that, in comparison to SMEs, larger companies are better equipped to invest in CSR as they have more resources and are also

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<sup>409</sup> See above, section III.B.2.

<sup>410</sup> David Murillo and Josep Lozano, 'SMEs and CSR: An Approach to CSR in their Own Words' (2006) 67 *Journal of Business Ethics* 227, 237; Francesco Perrini, Angeloantonio Russo and Antonio Tencati 'CSR Strategies of SMEs and Large Firms: Evidence from Italy' (2007) 74 *Journal of Business Ethics* 285, 285.

<sup>411</sup> David Murillo and Josep Lozano, 'SMEs and CSR: An approach to CSR in their own words' (2006) 67 *Journal of Business Ethics* 227, 232.

<sup>412</sup> Aditya Jain, Nicholas Andreou and Stavroula Leka, 'Defining Social responsibility Interventions for Grounded Networking in Machine Tools Sector' (2013) 12 <[http://www.csreurope.org/sites/default/files/DESIGN-MTS\\_D1%202\\_%20European%20Best%20Practices%20Report.pdf](http://www.csreurope.org/sites/default/files/DESIGN-MTS_D1%202_%20European%20Best%20Practices%20Report.pdf)> accessed 15 December 2015; David Murillo and Josep Lozano, 'SMEs and CSR: An approach to CSR in their own words', 67 *Journal of Business Ethics* (2006) 227, 232; Francesco Perrini, Angeloantonio Russo and Antonio Tencati 'CSR Strategies of SMEs and Large Firms: Evidence from Italy' (2007) 74 *Journal of Business Ethics* 285, 285.

<sup>413</sup> The directive is aimed at enterprises which have an average number of 500 employees see European Parliament and Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1.

subject to more media attention, meaning there is a greater incentive for them to engage in CSR.<sup>414</sup> In practice this results in very different approaches to CSR between large companies and SMEs. Large enterprises tend to have more formalised approaches to CSR through mechanisms like ethical codes, reports or CSR indicators. SMEs do not tend to have the necessary resources to continuously generate knowledge about CSR. Furthermore, such mechanisms generally require a larger proportionate investment of time, finances and energy from small firms than from large firms and as a result are less accessible and effective tools for SMEs.<sup>415</sup> At the SME level, the process of CSR is likely to remain informal and intuitive when compared to the approaches of larger companies.<sup>416</sup> Many SMEs will already be engaged in socially responsible activities within their communities, but will not use the term CSR to describe these activities,<sup>417</sup> which again emphasises the alienating effect of the language.

Any policy on human rights for SMEs must take into account their different circumstances and drivers. It should recognise and exploit the closer proximity and bonds between the owners/management and employees. The closer proximity between the management and workers of SMEs makes it easier to engender a commitment to human rights.<sup>418</sup> As owners/managers are closer to their employees, the key motivation for socially responsible practices in a small firm is the concern for the employees' health and welfare.<sup>419</sup> A greater reliance upon, and proximity to, the communities they work in could also serve as a driver to adopt more socially responsible practices. Equally, as greater pressure is applied to larger companies to act in more socially responsible ways, this will likely translate into similar pressure on the SMEs supplying them,<sup>420</sup> leading to a trickledown effect.

<sup>414</sup> Craig Smith, 'When It Comes to CSR, Size Matters' (Forbes, 14 August 2013) <<http://www.forbes.com/sites/insead/2013/08/14/when-it-comes-to-csr-size-matters/#2715e4857a0b2ba747c41b6f>> accessed 14 January 2016; Dimosthenis Mousiolis, Apostolos Zaridisb, Kostas Karamanisc, Athina Rontogiannid, 'Corporate Social Responsibility in SMEs and MNEs. The Different Strategic Decision Making' (2015) 175 *Social and Behavioral Sciences* 579, 580.

<sup>415</sup> Francesco Perrini, Angeloantonio Russo and Antonio Tencati 'CSR Strategies of SMEs and Large Firms: Evidence from Italy' (2007) 74 *Journal of Business Ethics* 285, 286.

<sup>416</sup> European Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' (Communication) COM (2011) 681 final, 6; Aditya Jain, Nicholas Andreou and Stavroula Leka, 'Defining Social responsibility Interventions for Grounded Networking in Machine Tools Sector' (2013) 25 <[http://www.csreurope.org/sites/default/files/DESIGN-MTS\\_D1%202\\_%20European%20Best%20Practices%20Report.pdf](http://www.csreurope.org/sites/default/files/DESIGN-MTS_D1%202_%20European%20Best%20Practices%20Report.pdf)> accessed 15 December 2015.

<sup>417</sup> Francesco Perrini, Angeloantonio Russo and Antonio Tencati 'CSR Strategies of SMEs and Large Firms: Evidence from Italy' (2007) 74 *Journal of Business Ethics* 285, 287.

<sup>418</sup> Craig Smith, 'When It Comes to CSR, Size Matters' (Forbes, 14 August 2013) <<http://www.forbes.com/sites/insead/2013/08/14/when-it-comes-to-csr-size-matters/#2715e4857a0b2ba747c41b6f>> accessed 14 January 2016.

<sup>419</sup> David Murillo and Josep Lozano, 'SMEs and CSR: An approach to CSR in their own words' (2006) 67 *Journal of Business Ethics* 227, 229.

<sup>420</sup> Dimosthenis Mousiolis, Apostolos Zaridisb, Kostas Karamanisc, Athina Rontogiannid, 'Corporate Social Responsibility in SMEs and MNEs. The Different Strategic Decision Making', 175 *Social and Behavioral Sciences* (2015) 579, 580; Aditya Jain, Nicholas Andreou and Stavroula Leka, 'Defining Social responsibility Interventions for Grounded Networking in Machine Tools Sector' (2013) 27 <[http://www.csreurope.org/sites/default/files/DESIGN-MTS\\_D1%202\\_%20European%20Best%20Practices%20Report.pdf](http://www.csreurope.org/sites/default/files/DESIGN-MTS_D1%202_%20European%20Best%20Practices%20Report.pdf)> accessed 15 December 2015.

SMEs are often described as taking an intuitive and informal approach to business and human rights issues. While this is undoubtedly true, it implicitly discounts the idea that more formalised approaches are possible or should be taken. The reality is that as the research and focus has aimed at the biggest companies, smaller enterprises have been left to their own devices.<sup>421</sup> If we look at the non-financial reporting directive as an example, the immediate assumption is that SMEs would view any similar reporting obligation as an unnecessary administrative burden, which should not be applied to them. Yet, the EU's communication on CSR recognised that 'SMEs often communicate [social and environmental information] informally and on a voluntary basis'.<sup>422</sup> At the same time, according to a recent public consultation on CSR, SMEs themselves strongly supported improving company disclosure of social and environmental information.<sup>423</sup> Thus, the SMEs themselves are not averse to the aim or the principle of reporting. The problem is, as before, the focus has been on larger companies and a one size fits all approach, which is inadequate for SMEs.<sup>424</sup> Instead the reporting obligation needs to be tailored to the specific circumstances of SMEs. The situation can be likened to financial reporting between large companies and small companies, large companies must file detailed accounts each year, while smaller companies must report similar information, but may file more truncated, abridged accounting information.

We already noted that SMEs often lack the time and resources necessary to generate knowledge on business and human rights and we see this is a key area where the EU can strengthen engagement. It can play a significant role in providing information and bridging this knowledge gap. The EU has taken positive steps in this regard by developing a guide on business and human rights for SMEs,<sup>425</sup> but the EU needs to build on this positive start. A number of suggestions were made at the 2015 multistakeholder forum on CSR, which should be taken forward. It was suggested that the Commission should work with business associations to provide SMEs with advice and information.<sup>426</sup> It was also suggested that the Commission

<sup>421</sup> Aditya Jain, Nicholas Andreou and Stavroula Leka, 'Defining Social responsibility Interventions for Grounded Networking in Machine Tools Sector' (2013) 16 <[http://www.csreurope.org/sites/default/files/DESIGN-MTS\\_D1%202\\_%20European%20Best%20Practices%20Report.pdf](http://www.csreurope.org/sites/default/files/DESIGN-MTS_D1%202_%20European%20Best%20Practices%20Report.pdf)> accessed 15 December 2015.

<sup>422</sup> European Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' (Communication) COM (2011) 681 final, 11.

<sup>423</sup> European Commission, 'The Corporate Social Responsibility Strategy of the European Commission: Results of the Public Consultation Carried out between 30 April and 15 August 2014' (DG Enterprise & Industry, 21 November 2014) 20 <<http://ec.europa.eu/DocsRoom/documents/8021/attachments/1/translations/en/renditions/native>> accessed 11 January 2016.

<sup>424</sup> Dimosthenis Mousiolis, Apostolos Zaridisb, Kostas Karamanisc, Athina Rontogiannid, 'Corporate Social Responsibility in SMEs and MNEs. The Different Strategic Decision Making' (2015) 175 Social and Behavioral Sciences 579, 580.

<sup>425</sup> European Commission, 'My business and human rights: A guide to human rights for small and medium-sized enterprises' (DG Enterprise and Industry, 1 December 2012) <<http://ec.europa.eu/DocsRoom/documents/10375/attachments/1/translations/en/renditions/native>> accessed 11 January 2016.

<sup>426</sup> European Commission, 'Executive Summary' (EU Multi Stakeholder Forum on Corporate Social Responsibility, Brussels 3-4 February 2015) 1 <<http://ec.europa.eu/DocsRoom/documents/8774/attachments/1/translations/en/renditions/native>> accessed 29 January 2016.

should reinforce visibility and social recognition of CSR through, for example, a CSR award for SMEs.<sup>427</sup> While the EU previously supported a CSR award scheme in conjunction with CSR Europe in 2012, it was not directed specifically at SMEs and does not seem to be still in operation.<sup>428</sup> We would recommend that the EU combine these two activities. It should work with civil society to identify best practices, encourage SMEs to put forward their projects and practices that support CSR, offer awards to the best, but crucially collate a database of best practices across different sectors of the practices put forward for awards. Compiling a database would serve two purposes, firstly it would bridge a gap in the research concerning how to tailor CSR to SMEs and secondly it would provide practical, accessible knowledge in a single source that could be accessed by SMEs interested in adopting business and human rights policies.

The EU also needs to work to create a business environment which is more conducive to business and human rights activities.<sup>429</sup> There are many things that the EU can do in this regard. The EU can continue to use mechanisms, such as the European Social Funds, to sponsor SME projects on CSR.<sup>430</sup> The EU has already recognised the role complementary regulation can play in creating a human rights friendly business environment.<sup>431</sup> At the multistakeholder forum, it was suggested that the EU and its Member States should encourage responsible corporate conduct through procurement policy and investment criteria for pension and sovereign wealth funds.<sup>432</sup> It was also suggested that the Commission should provide guidance notes for investors on "responsible investment" practices and examples of both risks involving finance and human rights.<sup>433</sup> It is imperative that environmental, social and governance criteria become central to investment decisions. The EU has taken some positive steps in this regard by bringing forward amendments to the shareholders rights directive,<sup>434</sup> which were broadly welcomed by the business and investment delegates at the forum.

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<sup>427</sup> European Commission, 'Parallel Session III: Promoting CSR among European SMEs – National Perspectives on Day 2' (EU Multi Stakeholder Forum on Corporate Social Responsibility, Brussels 4 February 2015).

<sup>428</sup> CSR Europe, 'European CSR Awards' <<http://www.csreurope.org/european-csr-awards>> accessed 29 January 2016.

<sup>429</sup> Aditya Jain, Nicholas Andreou and Stavroula Leka, 'Defining Social responsibility Interventions for Grounded Networking in Machine Tools Sector' (2013) 13 <[http://www.csreurope.org/sites/default/files/DESIGN-MTS\\_D1%202\\_%20European%20Best%20Practices%20Report.pdf](http://www.csreurope.org/sites/default/files/DESIGN-MTS_D1%202_%20European%20Best%20Practices%20Report.pdf)> accessed 15 December 2015.

<sup>430</sup> European Commission, 'The Corporate Social Responsibility Strategy of the European Commission: Results of the Public Consultation Carried out between 30 April and 15 August 2014' (DG Enterprise & Industry, 21 November 2014) 26 <<http://ec.europa.eu/DocsRoom/documents/8021/attachments/1/translations/en/renditions/native>> accessed 11 January 2016.

<sup>431</sup> European Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' (Communication) COM (2011) 681 final, 5.

<sup>432</sup> European Commission, 'Executive Summary' (EU Multi Stakeholder Forum on Corporate Social Responsibility, Brussels 3-4 February 2015) 2 <<http://ec.europa.eu/DocsRoom/documents/8774/attachments/1/translations/en/renditions/native>> accessed 29 January 2016.

<sup>433</sup> Ibid, 6-7.

<sup>434</sup> European Commission, 'Shareholder's Rights' (European Commission, 15 May 2014) <[http://ec.europa.eu/internal\\_market/company/shareholders/index\\_en.htm](http://ec.europa.eu/internal_market/company/shareholders/index_en.htm)> accessed 3 February 2016.

## 6. Conclusion - Multistakeholder Forum

As the focal point of EU engagement with businesses, CSOs and HRDs on business and human rights, the multistakeholder forum has been a success in some respects and a failure in others. The EU should be commended for undertaking a public consultation to evaluate the views of stakeholders before embarking on the most recent forum. Although the resulting report was lacking in some respects,<sup>435</sup> it was a beneficial exercise to lay the ground for the forum that followed.

In terms of the conduct of the forum itself, the EU's ongoing failure to fully engage with trade unions and consumer groups in the context of the forum impacts upon the credibility of the EU's CSR/ business and human rights policy overall. The EU needs trade unions and consumer associations to engage in the CSR agenda to bolster its legitimacy. The EU should make a concerted effort to engage these groups in their flagship CSR engagement forum, if that requires changes to the structure, approach etc. the EU should be open to considering them.

There is a lack of clear direction of the CSR agenda at the political level within the EU. The failure of a single commissioner to attend the 2015 multistakeholder forum did not go unnoticed by the attendees. It indicates at best a lack of interest on the part of the Commission in the portfolio and at worst wilful neglect. There is also a pronounced difference in approach to the issue of CSR and business and human rights between the Commission and the Parliament, who appear to be politically at odds with each other over CSR policy.

The Commission should be commended for issuing a detailed follow up summary document after the forum was completed, as CSOs have been requesting the creation of such documents for some time.<sup>436</sup> However, a year after the event there is still no indication of what tangible outcomes there will be from the forum. There have not been any updates from DG GROW on outcomes of the forum and when the authors of this report approached the Commission directly, we were advised that an updated action plan on CSR/RBC is still under discussion among EU services. Given the lapse of time since the forum and the fact that the previous communication ran only until 2014, this is a lamentable state of affairs. Demonstrating that the EU is responsive to the input of stakeholders and transparent in its actions is central to strengthening engagement with business and CSOs on this subject and these two factors have been notably absent in aftermath of the forum.

## C. Strengthening Engagement with CSOs on Human Rights

### 1. General Context

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<sup>435</sup> FRAME D7.2, 27-29.

<sup>436</sup> FRAME D7.2, 134-136.

**a)      *Definition of CSOs***

In this part we will build on the research in FRAME D7.1 and D7.2 on the role of CSOs in advancing human rights and the effectiveness of the EU's methods of engagement on human rights with diverse groups of CSOs. We will identify and evaluate the tools used by the EU to stimulate and strengthen its institutional engagement with CSOs through improvements in consultation, dialogue, operational support, financing and other forms of structured and interactive participation. One particular feature of our study, following up concerns raised in the previous reports, is to identify opportunities to enhance the effectiveness of engagement by diversifying CSO representation at all levels of policy development and delivery. Ideas to be developed include much wider use of information and communication technology, which can foster inclusiveness and transparency, and addressing practical issues such as facilitating access to visas. We have also included a case study on the EU's bipartite engagement with the social partners as an example of deep, structured civil society participation in the formulation and implementation of policies. In turn, the depth of this engagement raises issues about the democratic legitimacy of the process and the representativeness of the parties. Dialogue with the social partners is highly specialised but there is considerable potential for mutual learning of methodologies of engagement with other institutional and civil society actors.

Turning to the definition of CSOs for the purposes of engagement, we have followed the approach of FRAME D7.1 and D7.2, which analysed the various definitions of CSOs.<sup>437</sup> The Commission's definition of CSOs will be adopted for the purposes of this report. The Commission views civil society as composed of 'the principal structures of society outside of government and public administration'.<sup>438</sup> This is sufficiently wide to incorporate labour market players, social and economic organisations, community-based organisations and religious communities.<sup>439</sup> As with FRAME D7.2, reference is made to CSOs in this report except where a more specific reference needs to be made to NGOs.

**b)      *Roles of CSOs***

CSOs play a variety of important roles as human rights actors. Elodie Fazi and Jeremy Smith outline three key CSO functions: democratic functions, stabilising functions and economic functions.<sup>440</sup> Within these

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<sup>437</sup> See FRAME D7.2, 94–96; see also FRAME D7.1, Chapter VII.

<sup>438</sup> European Commission, 'Towards a reinforced culture of consultation and dialogue—General principles and minimum standards for consultation of interested parties by the Commission' (Communication) COM (2002) 704 final, 6.

<sup>439</sup> European Commission, 'Towards a reinforced culture of consultation and dialogue—General principles and minimum standards for consultation of interested parties by the Commission' (Communication) COM (2002) 704 final, 6.

<sup>440</sup> Elodie Fazi and Jeremy Smith, 'Civil dialogue: making it work better' (2009) 16 <<http://act4europe.horus.be/module/FileLib/Civil%20dialogue,%20making%20it%20work%20better.pdf>> accessed 31 July 2015.

functions, FRAME D7.1 identified the positive and negative impacts of CSOs on human rights.<sup>441</sup> Positive impacts of CSOs that were identified include providing services such as education, providing a link to citizens,<sup>442</sup> as well as scrutinising and monitoring public actions.<sup>443</sup>

The EU has moved towards greater acknowledgement of the positive roles played by CSOs as human rights' actors. CSOs are regarded as indispensable in legitimising governance,<sup>444</sup> and as partners, not mere service deliverers, in the field of development cooperation.<sup>445</sup> Within the European neighbourhood, the Arab Spring acted as a catalyst for enhanced engagement between the EU and civil society.<sup>446</sup> The Arab Spring not only allowed CSOs new roles in the political and social sphere,<sup>447</sup> but also prompted the EU to prioritise broadening engagement beyond investing in relations with governments.<sup>448</sup> Diversification is essential if civil society is to become the centre of a newly defined partnership for democracy and shared prosperity.<sup>449</sup>

### c) EU's Engagement with CSOs

Strengthening engagement can enhance the positive impacts of CSOs in protecting and promoting human rights, as they are given space and capacity to achieve their potential. The EU currently has a range of tools to engage with civil society both internal and external.<sup>450</sup> Empowering civil society is best achieved

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<sup>441</sup> See FRAME D7.1, Chapter VII.

<sup>442</sup> European CSOs were said to represent the 'plurality of interests, values and tastes of the Europeans' in Beate Kohler-Koch, 'The Three worlds of European civil society - What role for civil society for what kind of Europe?' (2009) 28(1) Policy and Society 47, 50.

<sup>443</sup> See FRAME D7.1, 84-85; See also Julius Court, Enrique Mendizabal, David Osborne and John Young, 'Policy Engagement: How Civil Society Can be More Effective' (Research and Policy in Development, Overseas Development Institute, 2006) <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/200.pdf>> accessed 01 September 2015.

<sup>444</sup> Marco Mascia, *Participatory Democracy for Global Governance: Civil Society Organisations in the European Union* (vol 2, Human Rights Studies 2012) 103.

<sup>445</sup> European Commission, 'Participation of Non-State Actors in Development Policy' (Communication) COM (2002) 598 final. Service delivery includes providing public services, see FRAME D7.1, 84-85.

<sup>446</sup> See further, Amin Saikal and Amitav Acharya (ed), *Democracy and Reform in the Middle East and Asia: Social Protest and Authoritarian Rule after the Arab Spring* (I.B.Tauris 2014).

<sup>447</sup> Timo Behr and Aaretti Siitonen, 'Building Bridges or Digging Trenches? Civil Society Engagement after the Arab Spring' (January 2013) 77 FIIA Working Paper, 14 <<http://www.fiiia.fi/assets/publications/wp77.pdf>> accessed 21 August 2015.

<sup>448</sup> Iskra Kirova and Sabine Feizer, 'Civil Society Voices: How the EU Should Engage its Eastern Neighbours' (2015) Open Society European Policy Institute, 18 <<http://www.csdialogue.eu/sites/default/files/civil-society-voices-eastern-neighbours-20150511.pdf>> accessed 20 August 2015.

<sup>449</sup> Dr Narine Ghazaryan, 'Roundtable Discussion' (Towards More Effective Engagement between the EU and Non-State Actors on Human Rights Workshop, London, 3 July 2015).

<sup>450</sup> For a comprehensive overview of the different implementation instruments see FRAME D7.2, 105-115.

by cooperation with CSOs, engagement in transnational networks, and shaping civil dialogue.<sup>451</sup> Civil society dialogue allows for regular, structured dialogue between the EU and CSOs, permitting civil society entrance to the arena as promoters of democracy and human rights.<sup>452</sup>

Within the EU's external relations, the EU has made a commitment to valuing a 'dynamic, pluralistic and competent civil society'.<sup>453</sup> EU priorities in CSO engagement are: firstly, to enhance efforts to promote a conducive environment for CSOs in partner countries, secondly, to promote meaningful and structured participation of CSOs and, thirdly, to increase the capacity of local CSOs to perform their roles as independent actors including in the fields of development and human rights.<sup>454</sup> This commitment to a more ambitious EU-CSO partnership has been welcomed by the European Parliament.<sup>455</sup>

As part of this commitment, EU roadmaps for engagement with CSOs at country level have been developed. These give country-specific contexts to CSO operations, a pre-requisite for effective EU-CSO engagement.<sup>456</sup> The roadmaps also lay down the long-term objectives of EU-CSO engagement, encompassing dialogue, operational support and appropriate working modalities.<sup>457</sup> EU roadmaps have been recognised as beneficial for engagement by CSOs.<sup>458</sup> CONCORD views the roadmaps as a 'step in the right direction' for EU Delegation (EUD) and CSO engagement.<sup>459</sup> As such, it is important to assess these roadmaps as tools to stimulate effective engagement.

The plan for the roadmaps is divided into five detailed sections intended to be comprehensive and all-encompassing. The first two sections provide an analytical foundation by assessing the state of civil society and the current EU engagement. Sections three and four define the EU's priorities and action for

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<sup>451</sup> Cristiano Bee and Roberta Guerrina, 'Framing Civic Engagement, Political Participation and Active Citizenship in Europe' (2014) 10(1) *Journal of Civil Society* 1, 2.

<sup>452</sup> Marco Mascia, *Participatory Democracy for Global Governance: Civil Society Organisations in the European Union* (vol 2, Human Rights Studies 2012) 107.

<sup>453</sup> European Commission, 'The Roots of Democracy and Sustainable Development: Europe's Engagement with Civil Society in External Relations' (Communication) COM (2012) 492 final, 4.

<sup>454</sup> Ibid, 4.

<sup>455</sup> European Parliament Resolution of 22 October 2013 on local authorities and civil society: Europe's engagement in support of sustainable development 2012/2288 (INI) <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-432>> accessed 27 July 2015.

<sup>456</sup> European Commission, 'The Roots of Democracy and Sustainable Development: Europe's Engagement with Civil Society in External Relations' (Communication) COM (2012) 492 final, 9 and 7.

<sup>457</sup> Ibid, 9.

<sup>458</sup> See FRAME D7.2: Interview A9 (CSO Representative).

<sup>459</sup> CONCORD, 'Mutual Engagement Between EU Delegations and Civil Society Organisations: Lessons from the field' (2015)

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<[http://www.concordeurope.org/publications/item/download/385\\_0f51bc348b8678d58c4729a97aaaba7c](http://www.concordeurope.org/publications/item/download/385_0f51bc348b8678d58c4729a97aaaba7c)> accessed 29 July 2015. CONCORD is the European NGO confederation for Relief and Development, and is one of the main interlocutors with the EU on development policy. CONCORD is made up of member organisations, CONCORD, 'About Us' <<http://www.concordeurope.org/about-us>> accessed 07 September 2015.

engagement with civil society. Section five contains a framework for tracking the roadmaps.<sup>460</sup> Taking into account previous civil society mapping studies, a EuropeAid report identifies four general principles for effective mapping exercises: a sense of collective ownership and civil society participation; transparency and accountability; a mix of methodologies; and the need to take a ‘dynamic approach’.<sup>461</sup>

Firstly, civil society needs to be committed to the mapping process. CSO-led assessments have been encouraged as they give CSOs a greater opportunity to learn from the assessment process.<sup>462</sup> While the roadmaps are not CSO-led, dialogue and consultation with civil society is a key aspect of developing them. As part of CSO engagement in the roadmap process, ongoing feedback is vital to civil society participation.<sup>463</sup> Secondly, roadmaps must be transparent, and published where appropriate at the country level, with EUDs making use of press releases and websites.<sup>464</sup> Thirdly, it is important to consider that methodologies used by each EUD will vary. Where availability of data is scarce, or poor communication and infrastructure can make it difficult to conduct surveys or interviews, alternative sources of information should be used, such as case studies or focus groups as representative samples.<sup>465</sup> The EUD in Namibia, for example, utilised a variety of sources including the local media, CSO studies, books and surveys.<sup>466</sup> Fourthly, review of the roadmaps is an ongoing process and the roadmaps will be renewed. The second generation of roadmaps will cover the period 2018-2020.

## 2. Diversifying Representation

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<sup>460</sup> Thomas Hansen, ‘EU Country Roadmaps for Engagement with Civil Society’ (capacity 4 dev, 10 April 2014) <<http://capacity4dev.ec.europa.eu/public-governance-civilsociety/minisite/eu-country-roadmaps-engagement-civil-society-introduction>> accessed 27 July 2015.

<sup>461</sup> EuropeAid, ‘Mappings and Civil Society assessments: A study of past, present and future trends’ (Tools and Methods Concept Paper No.3, September 2012) 45 <[http://capacity4dev.ec.europa.eu/sites/default/files/file/15/02/2013\\_-\\_1047/mapping\\_cs\\_web.pdf](http://capacity4dev.ec.europa.eu/sites/default/files/file/15/02/2013_-_1047/mapping_cs_web.pdf)> accessed 27 July 2015.

<sup>462</sup> Ibid, 34.

<sup>463</sup> Coordination Team, ‘Voices and Views: Roadmaps to Engage Civil Society’ (capacity4dev, 22 July 2014) <<http://capacity4dev.ec.europa.eu/article/roadmaps-engage-civil-society>> accessed 27 July 2015.

<sup>464</sup> Thomas Hansen, ‘EU Country Roadmaps for Engagement with Civil Society’ (capacity 4 dev, 10 April 2014) <<http://capacity4dev.ec.europa.eu/public-governance-civilsociety/minisite/eu-country-roadmaps-engagement-civil-society-introduction>> accessed 27 July 2015.

<sup>465</sup> EuropeAid, ‘Mappings and Civil Society assessments: A study of past, present and future trends’ (Tools and Methods Concept Paper No.3, September 2012) 49 <[http://capacity4dev.ec.europa.eu/sites/default/files/file/15/02/2013\\_-\\_1047/mapping\\_cs\\_web.pdf](http://capacity4dev.ec.europa.eu/sites/default/files/file/15/02/2013_-_1047/mapping_cs_web.pdf)> accessed 27 July 2015.

<sup>466</sup> See Namibia, ‘EU Country Roadmap for Engagement with Civil Society 2014-2017’ (April 2015) 52-53 <[http://capacity4dev.ec.europa.eu/sites/default/files/file/22/06/2015\\_-\\_1528/roadmap\\_-\\_namibia\\_.pdf](http://capacity4dev.ec.europa.eu/sites/default/files/file/22/06/2015_-_1528/roadmap_-_namibia_.pdf)>5 accessed 3 August 2015.

Civil society within the EU is perceived as part of the political community of the Union and a mechanism for bringing Europe closer to the people.<sup>467</sup> In FRAME D7.2, a bias towards large, professional, institutionalised, Brussels-based platforms of CSOs over grassroots, local organisations was identified.<sup>468</sup> This elitist expanse has been described as the ‘Brussels bubble’.<sup>469</sup> As a result, there have been criticisms over whether the civil society that the EU engages with is representative of citizens.<sup>470</sup> Dialogues are thought to be restrictive in that only a small number of organisations participate.<sup>471</sup> Therefore, it can be said that the key to success in civil society engagement is where dialogue is bottom-up, public and open to the whole of society.<sup>472</sup> The EU needs to bring new energy into dialogue by diversifying the CSOs it engages with.<sup>473</sup> This will involve empowering actors that are not involved in typical EU consultation, and actively reaching out to these groups.<sup>474</sup>

Engaging with a wider and more diverse range of CSOs is an achievable goal for the EU. The EU’s engagement with CSOs in the process leading up to the UN Convention on the Rights of Persons with Disabilities (2006) established an important precedent.<sup>475</sup> There was a diverse group of CSOs participating in the drafting process of the Convention, including individuals with disabilities and CSOs from developing countries. As a result, the Convention was based on the social model conception of disability preferred by many CSOs representing people with disabilities.<sup>476</sup>

#### a) Preferential Treatment

<sup>467</sup> Beate Kohler-Koch and Vanessa Buth, ‘Civil Society in EU Governance – Lobby Groups Like Any Other?’ (2009) 108 TranState Working Papers 1 <[http://edoc.vifapol.de/opus/volltexte/2013/4151/pdf/AP\\_108\\_2009.pdf](http://edoc.vifapol.de/opus/volltexte/2013/4151/pdf/AP_108_2009.pdf)> accessed 12 August 2015.

<sup>468</sup> Grassroots organisations are those with a stronger connection to the citizens, usually with smaller constituencies and resources, see FRAME D7.2, 122.

<sup>469</sup> Gautier Busschaert, ‘Participatory Democracy in the European Union: A Civil Perspective’ (DPhil thesis, University of Leicester 2013) 131.

<sup>470</sup> See FRAME D7.2, 123.

<sup>471</sup> European Economic and Social Committee, ‘Civil dialogue and participatory democracy in the practice of the European Union institutions’ (European Union 2015) 77 <<http://www.eesc.europa.eu/resources/docs/qe-02-15-397-en-n.pdf>> accessed 19 August 2015.

<sup>472</sup> Beate Kohler-Koch and Vanessa Buth, ‘Civil Society in EU Governance – Lobby Groups Like Any Other?’ (2009) 108 TranState Working Papers, 5 <[http://edoc.vifapol.de/opus/volltexte/2013/4151/pdf/AP\\_108\\_2009.pdf](http://edoc.vifapol.de/opus/volltexte/2013/4151/pdf/AP_108_2009.pdf)> accessed 12 August 2015.

<sup>473</sup> Jerome Chaplier, ‘Panel 1: Business and EU Human Rights’ (Towards More Effective Engagement between the EU and Non-State Actors on Human Rights Workshop, London, 3 July 2015).

<sup>474</sup> Nicolas Hachez, ‘Roundtable Discussion and Conclusion’ (Towards More Effective Engagement between the EU and Non-State Actors on Human Rights Workshop, London, 3 July 2015).

<sup>475</sup> See FRAME D7.1, 79 and 80.

<sup>476</sup> Gráinne de Búrca, ‘The European Union in the negotiation of the UN Disability Convention’ (2010) 35 European Law Review 174.

Preferential treatment of specific CSOs or groups of CSOs is problematic because it may operate in a way that is in conflict with the EU's principles of equality of citizens and representative democracy.<sup>477</sup> Generally, preferential treatment occurs in selecting members for correspondence, and is given to beneficiaries (EU implementation partners), certain CSO groups and those who are Brussels-based or sympathetic to EU objectives.<sup>478</sup> Preferential treatment needs to be tackled by a transparent and unbiased approach to selection of CSOs for participation in dialogue. Diversification requires actively going beyond entrenched practices of selectively choosing CSOs for the process of engagement.

Some have argued that expert groups are elitist and exclusive.<sup>479</sup> These are groups that provide the EU with advice and expertise,<sup>480</sup> contributing to rational political decisions.<sup>481</sup> Expert groups have the potential to enhance the EU's output legitimacy, which is the ability of a political system to deliver outputs with a relationship between policy outputs and the collective preference of the citizens.<sup>482</sup> The groups themselves consist of a diversity of members, yet the existence of overlapping memberships makes them closed. One study found that Commission DGs have flexibility in making choices, and have asked Member States representatives in Brussels or EU associations to identify candidates, or given preference to groups they already know and can trust.<sup>483</sup> More weight has been attached to balancing nationalities than incorporating a variety of stakeholder groups.<sup>484</sup>

<sup>477</sup> See Articles 9-11 TEU. In particular, Article 11 gives representative associations the opportunity to make known and exchange their views in all areas of Union action, maintaining an open, transparent and regular dialogue with representative associations and carrying out broad consultations with parties concerned to ensure that the Union's actions are coherent and transparent. See also, Justin Greenwood, 'Organized Civil Society and Democratic Legitimacy in the European Union' (2007) 37 (2) British Journal of Political Science 333, 334.

<sup>478</sup> See FRAME D7.2, 124. For more information about the process of selecting members for dialogue, see Carlo Rizza, 'EU-Society Relations and Interest Intermediation: A Contribution to the Debate' in Beate Kohler-Koch and Fabrice Larat (eds), *Efficient and Democratic Governance in the European Union* (CONNEX Report Series Nr.09 2008) 307.

<sup>479</sup> John R. Moodie and Cathrine Holst, 'For the sake of democracy? The European Commission's justifications for democratising expertise' 297, in Cathrine Holst (ed), *Expertise and Democracy* (ARENA Report No 1/14, 2014) <<http://www.sv.uio.no/arena/english/research/publications/arena-publications/reports/2014/report-01-14.pdf>> accessed 10 August 2015.

<sup>480</sup> For more information see European Commission, 'Expert groups Explained' <<http://ec.europa.eu/transparency/regexpert/index.cfm?do=faq.faq&aide=2>> accessed 5 August 2015.

<sup>481</sup> Cathrine Holst, 'Why not epistocracy? Political legitimacy and the 'fact of expertise' 2, in Cathrine Holst (ed), *Expertise and Democracy* (ARENA Report No 1/14, 2014) <<http://www.sv.uio.no/arena/english/research/publications/arena-publications/reports/2014/report-01-14.pdf>> accessed 10 August 2015.

<sup>482</sup> Julia Metz, 'EU Commission Expert Groups, between inclusive and effective policy-making', 267, in Cathrine Holst (ed), *Expertise and Democracy* (ARENA Report No 1/14, 2014) <<http://www.sv.uio.no/arena/english/research/publications/arena-publications/reports/2014/report-01-14.pdf>> accessed 10 August 2015.

<sup>483</sup> Ibid, 278-280; See also Commission, 'Framework for Commission Expert Groups: Horizontal Rules and Public Register' COM (2010) 7649 final, 9.

<sup>484</sup> Julia Metz, 'EU Commission Expert Groups, between inclusive and effective policy-making' 278-280, in Cathrine Holst (ed), *Expertise and Democracy* (ARENA Report No 1/14, 2014) <<http://www.sv.uio.no/arena/english/research/publications/arena-publications/reports/2014/report-01-14.pdf>> accessed 10 August 2015.

The Commission has taken some action to tackle the charge of elitism. It has published status reports, introduced a transparent open calls system and provided information about the expert groups.<sup>485</sup> Increasing the formality of selection procedures with more mandatory guidelines is recommended, indeed, the EU Ombudsman has suggested the Commission adopt a decision laying down a framework for expert groups.<sup>486</sup> The Commission considers that the existing rules on expert groups already ‘provide for a well-functioning and coherent framework’ but has agreed to some suggestions made by the Ombudsman to improve a number of aspects of the expert groups.<sup>487</sup>

The importance of having a framework for selecting members for dialogue cannot be stressed enough, including both selection criteria and a procedure for selection. Selection criteria allow for better structuring of the dialogue, preventing fragmentation and ensuring equal representation.<sup>488</sup> Criteria could include expertise in a specific area, particularly if the dialogue is subject-specific.<sup>489</sup> Other criteria could be based on representation, for example, where there is a democratic structure of the organisation and proof of working on a European level, but should not place too much emphasis on financial, age or other criteria that excludes EU citizens or groups.<sup>490</sup> Additionally, it must be remembered that there may be cases where it is not possible to have a single representative standard for CSOs, and here criteria such as group size, transparency and efficiency could be implemented.<sup>491</sup>

The selection procedure itself is important. In place of leaving institutional officials in the driving seat, selection could be considered through either public announcement or through networks. In the former, a public announcement could advertise openings for nominations, which could be via relevant websites,

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<sup>485</sup> John R. Moodie, ‘Resistant to Change? An Analysis of the European Commission’s Response to External Challenge and Criticism of its Expert Group System’ (2014) ARENA Centre for EU Studies, 19-20 <<http://ecpr.eu/Filestore/PaperProposal/e3438da3-123f-4863-919e-0e74dd7fcf5c.pdf>> accessed 10 August 2015.

<sup>486</sup> Letter of the European Ombudsman to the President of the European Commission Jean Claude Juncker (27 January 2015) <<http://www.ombudsman.europa.eu/de/cases/correspondence.faces/en/58861/html.bookmark>> accessed 19 August 2015.

<sup>487</sup> European Commission, ‘Opinion of the European Commission in the European Ombudsman’s own-initiative inquiry OI/6/2014/NF concerning the composition of Commission expert groups’ <<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/60019/html.bookmark>> accessed 09 September 2015.

<sup>488</sup> European Economic and Social Committee, ‘Civil dialogue and participatory democracy in the practice of the European Union institutions’ (European Union 2015) 87 <<http://www.eesc.europa.eu/resources/docs/qe-02-15-397-en-n.pdf>> accessed 19 August 2015.

<sup>489</sup> Emina Nuredinovska and Katerina Hadzi-Miceva Ewans, ‘Criteria and Procedures for Selection of Civil society Organisations in Cross-Sector Bodies’ (2011) Skopje, 43 <[http://ecnl.org.hu/dindocuments/414\\_Criteria%20and%20procedures\\_EN.pdf](http://ecnl.org.hu/dindocuments/414_Criteria%20and%20procedures_EN.pdf)> accessed 12 August 2015.

<sup>490</sup> European Economic and Social Committee, ‘Civil dialogue and participatory democracy in the practice of the European Union institutions’ (European Union 2015) 87-88 <<http://www.eesc.europa.eu/resources/docs/qe-02-15-397-en-n.pdf>> accessed 19 August 2015.

<sup>491</sup> Mascia Marco, *Participatory Democracy for Global Governance: Civil Society Organisations in the European Union* (vol 2, Human Rights Studies 2012) 133-134.

newspapers or CSO newsletters.<sup>492</sup> Nominations could be put forward for candidate organisations before either voting on nominations or permitting the dialogue body to decide. The latter, selection through networks, would occur predominantly where the EU has established connections with umbrella organisations. Selection could be by invitation to those networks to nominate organisations for participation.<sup>493</sup>

The Eastern Partnership Civil Society Forum (EaP CSF), part of the European Neighbourhood Instrument, provides an example of how preferential treatment could be tackled. Wide CSO participation has contributed to the success of this Forum. In 2009 and 2010, over 300 CSOs benefited from involvement.<sup>494</sup> The Forum's achievements include enhancing the network for CSOs, providing a greater understanding of the Eastern Partnership and allowing for exchange of information.<sup>495</sup>

The organisation of the EaP CSF is both sophisticated and specific. There are five working groups, the largest one addresses democracy, human rights, good governance and stability. This is sub-divided into nine groups dealing with specific issues.<sup>496</sup> The EaP CSF also includes national platforms in connection with country-specific activities, and there is an EaP CSF Steering Committee.<sup>497</sup> Participants approve of the current rules and procedures of selecting the Forum participants and electing Steering Committee members. These consist of assessing the CSO's diversity in the spheres of activity, involvement in ENP, nationality, and participation in a previous forum.<sup>498</sup> Members are appointed for one year, and the Forum's participants are selected through a system of rotation, which ensures access for new organisations. Whilst this rotation is beneficial, it has been thought too frequent,<sup>499</sup> and risks eliminating

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<sup>492</sup> Emina Nuredinovska and Katerina Hadzi-Miceva Ewans, 'Criteria and Procedures for Selection of Civil society Organisations in Cross-Sector Bodies' (2011) Skenpoint, Skopje, 40 <[http://ecnl.org.hu/dindocuments/414\\_Criteria%20and%20procedures\\_EN.pdf](http://ecnl.org.hu/dindocuments/414_Criteria%20and%20procedures_EN.pdf)> accessed 12 August 2015.

<sup>493</sup> Ibid, 41-42.

<sup>494</sup> Institut de Relations Internationales et Stratégiques, 'Improving the EU's Support for the Civil Society in its Neighbourhood: Rethinking Procedures, Ensuring that Practices Evolve' (2012) 26-27 <[http://pasos.org/wp-content/uploads/2012/08/study\\_iris.pdf](http://pasos.org/wp-content/uploads/2012/08/study_iris.pdf)> accessed 5 August 2015.

<sup>495</sup> Elżbieta Kaca, Jacek Kucharczyk and Agnieszka Łada, 'Eastern Partnership Civil Society Forum & How to Improve it' (2011) The Institute of Public Affairs, 2 <[http://eap-csf.eu/assets/files/Downloads/english/SCFEaP\\_how\\_to%20improveit\\_Pol-2011.pdf](http://eap-csf.eu/assets/files/Downloads/english/SCFEaP_how_to%20improveit_Pol-2011.pdf)> accessed 5 August 2015.

<sup>496</sup> See Eastern Partnership Civil Society Forum, 'Working Groups' <<http://eap-csf.eu/en/working-groups/wg1-democracy-human-rights/>> accessed 20 August 2015.

<sup>497</sup> See Eastern Partnership Civil Society Forum, 'National Platforms' <<http://eap-csf.eu/en/national-platforms/national-platforms/>> accessed 20 August 2015'; See also 'Steering Committee' <<http://eap-csf.eu/en/steering-committee1/st/>> accessed 20 August 2015.

<sup>498</sup> Elżbieta Kaca, Jacek Kucharczyk and Agnieszka Łada, 'Eastern Partnership Civil Society Forum & How to Improve it' (2011) The Institute of Public Affairs 5 <[http://eap-csf.eu/assets/files/Downloads/english/SCFEaP\\_how\\_to%20improveit\\_Pol-2011.pdf](http://eap-csf.eu/assets/files/Downloads/english/SCFEaP_how_to%20improveit_Pol-2011.pdf)> accessed 5 August 2015.

<sup>499</sup> Institut de Relations Internationales et Stratégiques, 'Improving the EU's Support for the Civil Society in its Neighbourhood: Rethinking Procedures, Ensuring that Practices Evolve' (2012) 20 <[http://pasos.org/wp-content/uploads/2012/08/study\\_iris.pdf](http://pasos.org/wp-content/uploads/2012/08/study_iris.pdf)> accessed 5 August 2015. Participation on annual terms also prevents continuity, see Matthias Thorn, 'Panel 1: Business and EU Human Rights' (Towards More Effective Engagement between the EU and Non-State Actors on Human Rights Workshop, London, 3 July 2015).

valuable members, so a mechanism for keeping the stronger members should be in place.<sup>500</sup> This should strike a balance between permitting greater involvement of those members and avoiding entrenchment of their position in dialogue. A suggestion here is longer-term rotation as opposed to permanent positions for these members. Additionally, there must be a transparent method of electing stronger members, perhaps by nomination within the forum.

### b) Diversifying CSOs for engagement

Ensuring a diversity of members is vital to effective CSO engagement. An example of a diverse group that has been suggested is DG Trade's Civil Society Dialogue (CSD), which is formed of a variety of members, including not-for-profit and for-profit groups, Government representatives, advocacy groups and industry associations.<sup>501</sup> Jarman describes this interest group as an 'experimentalist' policy mechanism,<sup>502</sup> establishing a different pattern to the European norm and thus an 'opportunity to test for the presence of a 'professional European lobbying class'.<sup>503</sup> The following subsections identify opportunities to enhance the scope and therefore the effectiveness of EU engagement with CSOs in the development and implementation of human rights policies.

#### (1) Roadmaps

Only 49% of CSO respondents in a CONCORD survey were aware that their EUD was developing a roadmap.<sup>504</sup> EUDs must expand the scope of CSOs they engage with beyond the typical connections,

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<sup>500</sup> Elżbieta Kaca, Jacek Kucharczyk and Agnieszka Łada, 'Eastern Partnership Civil Society Forum & How to Improve it' (2011) The Institute of Public Affairs 3 <[http://eap-csf.eu/assets/files/Downloads/english/SCFEaP\\_how\\_to%20improveit\\_Pol-2011.pdf](http://eap-csf.eu/assets/files/Downloads/english/SCFEaP_how_to%20improveit_Pol-2011.pdf)> accessed 5 August 2015.

<sup>501</sup> Holly Jarman, 'Collaboration and Consultation: Functional Representation in EU Stakeholder Dialogues' (2011) 33(4) Journal of European Integration 385, 386.

<sup>502</sup> Experimentalist governance is considered a recent phenomenon within the EU, characterised by deliberative, multi-level decision making. The theories of experimentalist governance within the EU are assessed in Charles F. Sabel and Jonathan Zeitlin (eds) *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press 2010).

<sup>503</sup> Holly Jarman, 'Collaboration and Consultation: Functional Representation in EU Stakeholder Dialogues' (2011) 33(4) Journal of European Integration 385, 386, 387 and 393.

<sup>504</sup> CONCORD, 'Mutual Engagement Between EU Delegations and Civil Society Organisations: Lessons from the field' (2015) 28 <[http://www.concordeurope.org/publications/item/download/385\\_0f51bc348b8678d58c4729a97aaaba7c](http://www.concordeurope.org/publications/item/download/385_0f51bc348b8678d58c4729a97aaaba7c)> accessed 29 July 2015.

namely beneficiaries of EU grants, international NGOs and organisations with a similar political outlook to the EU.<sup>505</sup> A method of instigating wider CSO engagement could be by developing a database or portal which lists CSOs with thematic and country expertise that could be complimentary to the roadmaps.<sup>506</sup>

The roadmap consultations generally took place in the EUDs, which limited the scope of participation by local CSOs operating in rural environments. Decentralised in-country workshops should be considered, such as in Kenya, where the roadmap was prepared in consultation with grassroots CSOs alongside consultation with 65 CSOs of various types and a meeting with the Chairman of the NGO Board of Kenya.<sup>507</sup> These methods are important for gaining grassroots responses. To ensure diversity of representation in countries with security crises or civil society restrictions, consultations could be organised by the CSOs themselves, or CSOs might be consulted during events as opposed to conducting specific dialogue.<sup>508</sup> Additionally, it is important to take account of local CSOs that may not have the necessary language skills for participation where consultations are in a European language.<sup>509</sup> This could be addressed by ensuring that there are members of staff within EUDs that are able to translate, or, preferably, by EUDs being willing to hold consultations in local languages.

## (2) Action Plan on Human Rights and Democracy

A further mechanism that has the potential to strengthen EU engagement with a variety of actors is the EU's 2015-2019 Action Plan on Human Rights and Democracy, which has made a commitment to boosting the ownership of local actors.<sup>510</sup> Under the Action Plan, there is an objective to invigorate civil society, including by improving the quality of consultations at the local level and encouraging multi-stakeholder

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<sup>505</sup> Ibid, 28.

<sup>506</sup> Human Rights and Democracy Network, 'Meeting in the Middle: How to improve the Partnership between Civil Society Organisations and the European External Action Service' (HRDN December 2012) 4 <[http://www.servicewolontaire.org/userfiles/www.hrdn.eu/files/Public/HRDN\\_Statement\\_How\\_to\\_improve\\_the\\_partnership\\_between\\_CSOs\\_and\\_the\\_EEAS.pdf](http://www.servicewolontaire.org/userfiles/www.hrdn.eu/files/Public/HRDN_Statement_How_to_improve_the_partnership_between_CSOs_and_the_EEAS.pdf)> accessed 31 July 2015.

<sup>507</sup> Kenya, 'EU Country Roadmap for Engagement with Civil Society 2014-2017' (August 2014) 7; See also Zimbabwe, 'EU Country Roadmap for Engagement with Civil Society 2014-2017' which engaged consultations with local civil society via 15 consultative meetings held in various regions.

<sup>508</sup> CONCORD, 'Mutual Engagement Between EU Delegations and Civil Society Organisations: Lessons from the field' (2015) 28 <[http://www.concordeurope.org/publications/item/download/385\\_0f51bc348b8678d58c4729a97aaaba7c](http://www.concordeurope.org/publications/item/download/385_0f51bc348b8678d58c4729a97aaaba7c)> accessed 31 July 2015; See also Věra Řiháčková, 'Walking the tightrope of democracy aid, The long and winding road towards 'flexible', well-targeted EU funding for democracy and human rights' (1 June 2010) Policy brief No.3 Policy Association for an Open Society, 8 <[http://pasos.org/wp-content/archive/PASOS\\_EIDHR\\_policybrief1June2010.pdf](http://pasos.org/wp-content/archive/PASOS_EIDHR_policybrief1June2010.pdf)> accessed 11 August 2015.

<sup>509</sup> Věra Řiháčková, 'Walking the tightrope of democracy aid, The long and winding road towards 'flexible', well-targeted EU funding for democracy and human rights' (1 June 2010) Policy brief No.3, Policy Association for an Open Society, 8 <[http://pasos.org/wp-content/archive/PASOS\\_EIDHR\\_policybrief1June2010.pdf](http://pasos.org/wp-content/archive/PASOS_EIDHR_policybrief1June2010.pdf)> accessed 11 August 2015.

<sup>510</sup> EU Council, *EU Strategic Framework and Action Plan on Human Rights and Democracy 2015-2019* (European Union 2015) 10897/15, 6.

dialogues (authorities, CSOs, EU and other actors) as part of the EUDs' country roadmaps.<sup>511</sup> Whilst the range of human rights issues and measures are welcomed, 'there is a need for concrete action and a clear division of roles and responsibilities so that the EU can manage to work effectively on the full scope of issues it confronts globally'.<sup>512</sup> These actions need to be backed by political ambition, greater transparency and accountability. The EU should take account of these pointers to effectively cast the net beyond the norm of CSO engagement. What is needed is 'concrete, coherent and results-orientated actions across the world'.<sup>513</sup>

### (3) Umbrella Organisations

The previous report in this work package, FRAME D7.2, noted that the EU actively seeks contact with larger umbrella groups of CSOs.<sup>514</sup> The demand to form these groups has been described as isomorphism, a process where EU influence propels CSOs into groupings by, for example, providing funding and broadening consultation.<sup>515</sup> Umbrella groups are also generally formed in response to infrastructural challenges as smaller CSOs fail to access European institutions.<sup>516</sup> These organisations have been described as depicting model civil society participation,<sup>517</sup> and are viewed as privileged EU partners. The need to create such structured groups combining member strength whilst respecting member autonomy has increased in relation both to civil dialogue and the new EU competences concerning human rights.<sup>518</sup> The benefits of forming platforms have also been stressed in light of the financial and economic crisis, during which platforms have maintained a strong position within the EU, while smaller members have been hit by significant funding cuts.<sup>519</sup>

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<sup>511</sup> Ibid, 9.

<sup>512</sup> Human Rights & Democracy Network, 'HRDN reaction to the Council Conclusions on the action plan on human rights and democracy 2015-2019' (30 July 2015) 1 <[http://www.servicewolontaire.org/userfiles/www.hrdn.eu/files/Public/HRDN\\_Statement\\_HRDN\\_Reaction\\_to\\_Council\\_Conclusions\\_on\\_Human\\_Rights\\_Action\\_Plan\\_2015-2019.pdf](http://www.servicewolontaire.org/userfiles/www.hrdn.eu/files/Public/HRDN_Statement_HRDN_Reaction_to_Council_Conclusions_on_Human_Rights_Action_Plan_2015-2019.pdf)> accessed 24 August 2015.

<sup>513</sup> Ibid, 2.

<sup>514</sup> See FRAME D7.2, 123.

<sup>515</sup> Rosa Sánchez-Salgado, 'Giving a European Dimension to Civil Society Organisations' (2007) 3(3) *Journal of Civil Society* 253, 255 and 257.

<sup>516</sup> Christian Marxsen, 'Open Stakeholder Consultations at the European Level-Voice of the Citizens?' (2015) 21(2) *European Law Journal* 257, 278; See also Marco Mascia, *Participatory Democracy for Global Governance: Civil Society Organisations in the European Union* (vol 2, *Human Rights Studies* 2012) 133.

<sup>517</sup> Petra Guasti, 'A Panacea for Democratic Legitimation? Assessing the Engagement of Civil Society within EU Treaty Reform Politics' in Ulrika Liebert, Alexander Gattig and Tatjana Eves (eds), *Democratising the EU from Below? Citizenship, Civil Society and the Public Sphere* (Ashgate 2013) 135, 140.

<sup>518</sup> Marco Mascia, *Participatory Democracy for Global Governance: Civil Society Organisations in the European Union* (vol 2, *Human Rights Studies* 2012) 123.

<sup>519</sup> Institute for European Studies, 'Study on the Impact of the Crisis on Civil Society Organizations in the EU – Risks and Opportunities' (2013) 2, 3 <[http://ec.europa.eu/citizenship/pdf/eesc\\_qe-32-12-548-en-c\\_en.pdf](http://ec.europa.eu/citizenship/pdf/eesc_qe-32-12-548-en-c_en.pdf)> accessed 28 July 2015.

One such umbrella platform is the Human Rights and Democracy Network (HRDN), consisting of 45 European and national members. This network is highly visible and influential in its dialogue with EU institutions. Members such as Amnesty International have a huge lobbying capacity. It takes part in dialogue with members of the Council Working Group on Human Rights in order to discuss themes on the agenda of the UN's Human Rights Council. The HRDN also takes part in the European Human Rights Forum, an instrument for dialogue between EU institutions and NGOs in the field of human rights, a forum which has gained visibility and political influence in the EU.<sup>520</sup>

Encouraging the formation of these umbrella organisations, and giving them recognition, can be seen as a step towards more effective, strengthened EU-CSO engagement on human rights. Part of Priority 2 of the EU's new Thematic programme, Civil Society Organisations and Local Authorities' Multi-annual Indicative Programme (MIP) 2014-2020, is dedicated to strengthening regional, EU and global umbrella organisations of CSOs. The basis of this is to allow the EU to develop strategic partnerships with umbrella organisations.<sup>521</sup> Support will be aimed at strengthening the capacities and representativeness of CSO networks for further engagement with local CSOs, and regional and global civil society networks.<sup>522</sup> This may, also, deal with the need for Brussels-based platforms to build links outside of the EU.<sup>523</sup>

Whilst these platforms clearly have their benefits, '[c]oncentration of power and access in the hand of strong transnational umbrella organisations ultimately reduces the opportunities for weaker groups to influence public policies and make their voices heard at the European level'.<sup>524</sup> The top-down pressure to unite and create these somewhat artificial platforms can be viewed as counterproductive, contributing to the gap between the organisations and the civil society they represent.<sup>525</sup> The criticism is that CSOs have

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<sup>520</sup> Marco Mascia, *Participatory Democracy for Global Governance: Civil Society Organisations in the European Union* (vol 2, Human Rights Studies 2012) 123.

<sup>521</sup> 'Multi-Annual Indicative Programme 2014-2020 for the 'Civil Society Organisations and Local Authorities' Thematic Programme'  
[<http://ec.europa.eu/transparency/regcomitology/index.cfm?do=Search.getPDF&8CSS00HzyDWzDjCfwUSuAlqBB7f14EnisQ1BdEU08vC5VAw47eF02NzJJLXFB77kGvLzo2Pu5uyjPyPE0HGhn1Yyu8a5hceFqN5ixnqYI=>](http://ec.europa.eu/transparency/regcomitology/index.cfm?do=Search.getPDF&8CSS00HzyDWzDjCfwUSuAlqBB7f14EnisQ1BdEU08vC5VAw47eF02NzJJLXFB77kGvLzo2Pu5uyjPyPE0HGhn1Yyu8a5hceFqN5ixnqYI=>) Accessed 28 July 2015.

<sup>522</sup> 'Multi-Annual Indicative Programme 2014-2020 for the 'Civil Society Organisations and Local Authorities' Thematic Programme'  
[<http://ec.europa.eu/transparency/regcomitology/index.cfm?do=Search.getPDF&8CSS00HzyDWzDjCfwUSuAlqBB7f14EnisQ1BdEU08vC5VAw47eF02NzJJLXFB77kGvLzo2Pu5uyjPyPE0HGhn1Yyu8a5hceFqN5ixnqYI=>](http://ec.europa.eu/transparency/regcomitology/index.cfm?do=Search.getPDF&8CSS00HzyDWzDjCfwUSuAlqBB7f14EnisQ1BdEU08vC5VAw47eF02NzJJLXFB77kGvLzo2Pu5uyjPyPE0HGhn1Yyu8a5hceFqN5ixnqYI=>) Accessed 28 July 2015.

<sup>523</sup> Marilyn Croser, 'Panel 2: Civil Society Organisations and Human Rights Defenders' (Towards More Effective Engagement between the EU and Non-State Actors on Human Rights Workshop, London, 3 July 2015).

<sup>524</sup> Cristiano Bee and Roberta Guerrina, 'Participation, Dialogue and Civic Engagement: Understanding the Role of Organized Civil Society in Promoting Active Citizenship in the European Union' (2014) 10(1) *Journal of Civil Society* 29, 37.

<sup>525</sup> Human Rights and Democracy Network, 'Meeting in the Middle: How to improve the Partnership between Civil Society Organisations and the European External Action Service' (HRDN December 2012) 2  
[<http://www.servicevolontaire.org/userfiles/www.hrdn.eu/files/Public/HRDN\\_Statement\\_How\\_to\\_improve\\_the\\_partnership\\_between\\_CSOs\\_and\\_the\\_EEAS.pdf.>](http://www.servicevolontaire.org/userfiles/www.hrdn.eu/files/Public/HRDN_Statement_How_to_improve_the_partnership_between_CSOs_and_the_EEAS.pdf.>) accessed 31 July 2015. The issue that forcing people into consortiums and coalitions is counterproductive and inefficient was raised in the workshop, see, Andrew Anderson

become professionalised and detached from their members.<sup>526</sup> A balance needs to be struck, therefore, between over-emphasising the role for joint platforms and networks, and recognising the benefits of these platforms.<sup>527</sup> The EU could consider carrying out field-based evaluations of CSOs when providing funding.<sup>528</sup> Dialogue should also ensure that there is a balance between platforms and local, grassroots organisations.

#### (4) Information and Communication Technology

The increased use of information technology could deal with the demands felt by CSOs to form platforms. This could include online consultations that do not require CSOs to utilise as many resources as moving to Brussels or forming platforms.<sup>529</sup> The European Economic and Social Committee (ECOSOC) has recommended an online ‘Eleven-Two-Tool’ to be addressed exclusively to vertical civil dialogue (EU and CSOs) to enable Europe-wide participation of dialogue partners. This should be a Commission-wide instrument, comprehensive and open to all willing to participate.<sup>530</sup> ECOSOC also suggests resolving language problems by installing integrated and interlinked sub-platforms.<sup>531</sup>

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‘Panel 2: Civil Society Organisations and Human Rights Defenders’ (Towards More Effective Engagement between the EU and Non-State Actors on Human Rights Workshop, London, 3 July 2015).

<sup>526</sup> Meike Rodekamp, ‘Representing Their Members? Civil Society Organisations and the EU’s External Dimension’ in Sandra Kroger and Dawid Friedrich (eds), *The Challenge of Democratic Representation In the European Union* (Palgrave Macmillan 2012) 74; See also Beate Kohler-Koch, ‘Civil Society and EU democracy: ‘astroturf’ representation?’ (2010) *Journal of European Public Policy* 100.

<sup>527</sup> Human Rights and Democracy Network, ‘Meeting in the Middle: How to improve the Partnership between Civil Society Organisations and the European External Action Service’ (HRDN December 2012) 2 <[http://www.servicevolontaire.org/userfiles/www.hrdn.eu/files//Public/HRDN\\_Statement\\_How\\_to\\_improve\\_the\\_partnership\\_between\\_CSOs\\_and\\_the\\_EEAS.pdf](http://www.servicevolontaire.org/userfiles/www.hrdn.eu/files//Public/HRDN_Statement_How_to_improve_the_partnership_between_CSOs_and_the_EEAS.pdf)> accessed 31 July 2015.

<sup>528</sup> Andrew Anderson ‘Panel 2: Civil Society Organisations and Human Rights Defenders’ (Towards More Effective Engagement between the EU and Non-State Actors on Human Rights Workshop, London, 3 July 2015).

<sup>529</sup> Eva G. Heidbreder, ‘Civil Society participation in EU governance’ (2012) 7(2) *Living Reviews in European Governance* 16 <<http://www.livingreviews.org/lreg-2012-2>> accessed 29 July 2015.

<sup>530</sup> European Economic and Social Committee, ‘Civil dialogue and participatory democracy in the practice of the European Union institutions’ (European Union 2015) 108 <<http://www.eesc.europa.eu/resources/docs/qe-02-15-397-en-n.pdf>> accessed 19 August 2015.

<sup>531</sup> Ibid, 107.

The EU needs to place weight on ensuring sufficient inclusiveness and transparency in any dialogue.<sup>532</sup> This can be ensured by advertising workshops or dialogues, which could be on the EUD websites.<sup>533</sup> In Tanzania, consultations under the 11<sup>th</sup> National Indicative Programme (a programme that defines the strategy and priorities for EU aid under the European Development Fund) were centred on meetings in two cities, alongside an online consultation publicised on the EUD website and Facebook page and workshops.<sup>534</sup> CSO platforms could also be utilised to publicise and provide information about consultations.<sup>535</sup> The EU needs to be aware that some online methods such as surveys can restrict the scope for CSOs to give meaningful contributions, and in these situations website-based direct dialogues may be more appropriate.<sup>536</sup> Using local languages must be considered, which would enable participation by indigenous CSOs that may lack the necessary language skills. In Armenia, for example, a website with a platform enables civil society actors to exchange views on issues in both English and Armenian, and the EUD holds web-based consultations on a regular basis.<sup>537</sup> Dialogue should be user-friendly, and tools such as the Civil Society Helpdesk are important in improving EU-CSO engagement.<sup>538</sup> These tools should be multiplied to provide assistance to CSOs looking to access dialogue.

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<sup>532</sup> See Christine Quittkat, 'The European Commission's Online Consultations: A Success Story?' (2011) 49 Journal of Common Market Studies 653 which outlines that often online consultation takes the form of questionnaires which reduce scope for elaboration. Many CSOs may be unaware of the online surveys; see CONCORD, 'Mutual Engagement Between EU Delegations and Civil Society Organisations: Lessons from the field' (2015) 28 <[http://www.concordeurope.org/publications/item/download/385\\_0f51bc348b8678d58c4729a97aaaba7c](http://www.concordeurope.org/publications/item/download/385_0f51bc348b8678d58c4729a97aaaba7c)> accessed 31 July 2015.

<sup>533</sup> CONCORD, 'EU Delegations' Engagement with Civil Society Organisations on Geographic Programming 2014-2020' (August 2013) 6 <[http://www.concordeurope.org/civil-society/funding-for-ngo-s/item/download/221\\_18b48613dea83748a2f3d2305a595862](http://www.concordeurope.org/civil-society/funding-for-ngo-s/item/download/221_18b48613dea83748a2f3d2305a595862)> accessed 28 July 2015.

<sup>534</sup> PLAN (Promoting child rights to end child poverty), Interview with EU Head of Cooperation in the Delegation of the European Union to Tanzania (5<sup>th</sup> February 2014) <[http://www.plan-eu.org/unlisted/interview-eud\\_tanzania/](http://www.plan-eu.org/unlisted/interview-eud_tanzania/)> accessed 3 August 2015.

<sup>535</sup> The process tracker introduced by the Social Platform to enable members to trace consultations was identified as beneficial here, see Elodie Fazi and Jeremy Smith, 'Civil dialogue: making it work better' (2006) 41 <<http://act4europe.horus.be/module/FileLib/Civil%20dialogue,%20making%20it%20work%20better.pdf>> accessed 30 July 2015.

<sup>536</sup> Coffey International Development and Deloitte, 'Evaluation of DG TRADE's Civil Dialogue: Final Report' (European Union 2014) 28-29 <[http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc\\_152927.pdf](http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152927.pdf)> accessed 31 July 2015.

<sup>537</sup> Armenia, 'EU Country Roadmap for Engagement with Civil Society 2014-2017' (July 2014) 11 <[http://capacity4dev.ec.europa.eu/sites/default/files/file/13/03/2015\\_-\\_0913/armenia\\_rm.pdf](http://capacity4dev.ec.europa.eu/sites/default/files/file/13/03/2015_-_0913/armenia_rm.pdf)> accessed 3 August 2015. In Nepal online surveys are used by the EUD owing to the large civil society, see CONCORD, 'Mutual Engagement Between EU Delegations and Civil Society Organisations: Lessons from the field' (2015) 31 <[http://www.concordeurope.org/publications/item/download/385\\_0f51bc348b8678d58c4729a97aaaba7c](http://www.concordeurope.org/publications/item/download/385_0f51bc348b8678d58c4729a97aaaba7c)> accessed 31 July 2015.

<sup>538</sup> DG for External Policies, 'Improving the EU's Support for the Civil Society in its Neighbourhood: Rethinking Procedures, Ensuring that Practices Evolve' (2012) 18 <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET\\_ET\(2012\)433693\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET_ET(2012)433693_EN.pdf)> accessed 4 August 2015. See also <[http://webgate.ec.europa.eu/fpfis/mwikis/aidco/index.php/Main\\_Page](http://webgate.ec.europa.eu/fpfis/mwikis/aidco/index.php/Main_Page)> accessed 4 August 2015.

## (5) Inter-Parliamentary Delegation Visits

European inter-parliamentary delegation visits provide opportunities to effectively engage with local civil society.<sup>539</sup> These are considered successful, and the HRDN has gone so far as calling for a ‘non-negotiable policy that all high level EU officials travelling to third countries should meet with civil society’ to ensure participation of rural civil society.<sup>540</sup> Indeed, the EaP CSF also recommended that the meetings become regular for all EU top figures to support the local civil society. Their success is down to providing opportunities to publicise the EU’s presence and reflect the EU’s support for civil society alongside enabling the CSOs themselves to gain publicity and higher standing.<sup>541</sup> In Myanmar, for example, delegations supported the democratisation process.<sup>542</sup> If the EU wishes to fully utilise this tool of engagement, sensitivity to the local context is key, especially where there is a country with a negative human rights record or restrictions on civil society.<sup>543</sup> Visits also need to strike an appropriate balance between engaging with grassroots and urban organisations.

## (6) Visa Facilitation

Issues with obtaining visas are inhibiting engagement with a range of CSOs. Visa problems in the neighbourhood, for example, have led to criticisms that the EU-South relationship lacks the character of genuine partnership. Difficulties obtaining visas mean that non-EU country CSOs often cannot participate in Brussels-based dialogue. In practice this limits the range of CSOs the EU engages with and, ultimately, the effectiveness of the dialogue. For example, participation in the second Civil Society Forum of the

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<sup>539</sup> Inter-parliamentary delegations were identified as responsible for relations with third parties, and missions to third countries often include meetings with local NGOs and CSOs, see FRAME D7.2, 112-113.

<sup>540</sup> Human Rights and Democracy Network, ‘The EU Strategic Framework and Action Plan on Human rights and Democracy: Time for more collective ambition’ (June 2014) 3 <[http://www.servicivolontaire.org/userfiles/www.hrdn.eu/files/Public/HRDN\\_Statement\\_Two\\_Year\\_Anniversary\\_of\\_the\\_EU\\_Strategic\\_Framework\\_and\\_Action\\_Plan\\_on\\_Human\\_Rights\\_and\\_Democracy.pdf](http://www.servicivolontaire.org/userfiles/www.hrdn.eu/files/Public/HRDN_Statement_Two_Year_Anniversary_of_the_EU_Strategic_Framework_and_Action_Plan_on_Human_Rights_and_Democracy.pdf)> accessed 31 July 2015.

<sup>541</sup> DG for External Policies, ‘Improving the EU’s Support for the Civil Society in its Neighbourhood: Rethinking Procedures, Ensuring that Practices Evolve’ (2012) 17 <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET\\_ET\(2012\)433693\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET_ET(2012)433693_EN.pdf)> accessed 4 August 2015.

<sup>542</sup> European Parliament, ‘Report on EU-Myanmar Task Force’ (2013) 5-6 <[http://www.isabelledurant.eu/wp-content/uploads/2013/12/Report-EU-Myanmar-Task-Force-13-15-November-2013\\_final.pdf](http://www.isabelledurant.eu/wp-content/uploads/2013/12/Report-EU-Myanmar-Task-Force-13-15-November-2013_final.pdf)> accessed 30 July 2015.

<sup>543</sup> DG for External Policies, ‘Improving the EU’s Support for the Civil Society in its Neighbourhood: Rethinking Procedures, Ensuring that Practices Evolve’ (2012) 9 <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET\\_ET\(2012\)433693\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET_ET(2012)433693_EN.pdf)> accessed 4 August 2015.

Southern Neighbourhood in Brussels was negatively impacted by the inability of some participants to gain a visa.<sup>544</sup>

Visa liberalisation in the neighbourhood is a method of dealing with this issue. There have been moves towards visa liberalisation, and this has been recognised by the EaP CSF as ‘one of the most powerful tools of European Union policy in steering fundamental reforms in the Eastern Partnership countries in areas such as human rights, freedom, security and justice’.<sup>545</sup> Not only would visa liberalisation allow for greater participation in EU-based dialogue, but it would also contribute towards the strengthening of human rights in the neighbourhood, as liberalisation only occurs when particular standards or laws are met or implemented (such as anti-discrimination laws).<sup>546</sup> Visa issues between the EU and non-EU countries could be addressed by greater cooperation between the EU and the relevant Member State giving the visas. Visa waiver agreements between the EU and the relevant CSO’s state might also be considered to be applied solely for CSO representatives. For ease of access and information, the CSO representatives affected by visa issues could be included in a database.

### 3. Streamlining Forums/Streamlined and Coherent Approaches towards Engagement

The EU’s engagement with civil society can be described as a patchwork of dialogues.<sup>547</sup> The predominant approach of the EU towards civil society has been reactionary, resulting in a proliferation of ad hoc dialogue mechanisms. How these correlate is unclear, and there is a lack of coherence in the EU’s approaches toward civil society.<sup>548</sup> Practices of dialogue vary between institutions and policy areas. The Commission, for example, engages in more structured forms of interaction, whilst the European

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<sup>544</sup> EU Neighbourhood Info Service ‘Report: Civil Society Forum-Southern Neighbourhood 28-29 May 2015’ (Report) 3 <<http://www.enpi-info.eu/files/publications/Civ.Soc.%20Forum%202015%20-%20Report%20EN.pdf>> accessed 7 August 2015. The issue of obtaining visas has been raised alongside issues of providing funding for non-EU participants to attend, see Marilyn Croser, ‘Panel 2: Civil Society Organisations and Human Rights Defenders’ (Towards More Effective Engagement between the EU and Non-State Actors on Human Rights Workshop, London, 3 July 2015).

<sup>545</sup> Eastern Partnership Civil Society Forum, ‘Resolution of the Eastern Partnership Civil Society Forum Towards a Visa Free Europe – Making the Dream Real!’ (2013) 1 <[http://eap-csf.eu/assets/files/Chisinau/Resolutions/RESOLUTION\\_Visa\\_free\\_Europe\(3\).pdf](http://eap-csf.eu/assets/files/Chisinau/Resolutions/RESOLUTION_Visa_free_Europe(3).pdf)> accessed 7 August 2015.

<sup>546</sup> Iskra Kirova and Sabine Feizer, ‘Civil Society Voices: How the EU Should Engage its Eastern Neighbours’ (2015) Open Society European Policy Institute, 12 <<http://www.csdialogue.eu/sites/default/files/civil-society-voices-eastern-neighbours-20150511.pdf>> accessed 20 August 2015.

<sup>547</sup> Elodie Fazi and Jeremy Smith, ‘Civil dialogue: making it work better’ (2006) 27 <<http://act4europe.horus.be/module/FileLib/Civil%20dialogue,%20making%20it%20work%20better.pdf>> accessed 30 July 2015.

<sup>548</sup> Dr Narine Ghazaryan, ‘Roundtable Discussion and Conclusion’ (Towards More Effective Engagement between the EU and Non-State Actors on Human Rights Workshop, London, 3 July 2015).

Parliament holds mainly informal interactions.<sup>549</sup> The challenge for the EU is to provide efficient and effective dialogue structures that are not replicated, and are consistent and coherent across the EU institutions.<sup>550</sup>

There are an increasing number of dialogue mechanisms within the EU. The Civil Society Platform against trafficking in human beings is an issue-based platform established in response to the EU's recognition of the importance of the issue.<sup>551</sup> Discussions concerning trafficking also occur through the COHOM and EUDs have been asked to organise consultation meetings with civil society to engage with this issue.<sup>552</sup> The issue similarly arises in dialogue mechanisms such as the ACP-EU Dialogue on trafficking and the EU-Asia Dialogue.<sup>553</sup> Due to the expanse of issue-based platforms and dialogues, the EU should consider ways of forming links and enhancing cooperation between the various dialogue mechanisms. This would encourage streamlining and exchange of information across platforms, whilst improving links both vertically, between the EU institutions and CSOs, and horizontally, between CSOs.

EU committees provide one of the more transparent examples of the need for streamlining. Expert groups are one of the three main types of EU committees alongside Council working parties and committees. These groups can be permanent or temporary, formal or informal. They provide the Commission with advice in relation to legislative proposals or delegated acts.<sup>554</sup> As a result, the expert groups are transient and often end when the legislation is adopted, or when their 'mission is accomplished'.<sup>555</sup> There is a rapid and simplified procedure for dissolving these groups.<sup>556</sup> The expert group system has consequently been described as 'a rather flexible part of the administrative space in which groups can be established and

<sup>549</sup> Elodie Fazi and Jeremy Smith, 'Civil dialogue: making it work better' (2006) 7 <<http://act4europe.horus.be/module/FileLib/Civil%20dialogue,%20making%20it%20work%20better.pdf>> accessed 30 July 2015.

<sup>550</sup> Ibid, 7.

<sup>551</sup> Commission, 'The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016' (Communication) COM (2012) 286 final, 2.

<sup>552</sup> Commission, 'Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings' (Staff Working Document) (COM) (2014) 635 final, 15 <[https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/commission\\_staff\\_working\\_document\\_-\\_mid-term\\_report\\_on\\_the\\_implementation\\_of\\_the\\_eu\\_strategy\\_towards\\_the\\_ereadication\\_of\\_trafficking\\_in\\_human\\_beings.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/commission_staff_working_document_-_mid-term_report_on_the_implementation_of_the_eu_strategy_towards_the_ereadication_of_trafficking_in_human_beings.pdf)> accessed 18 August 2015.

<sup>553</sup> Council of the European Union, 'ACP-EU Joint Document' (ACP-EU Dialogue on migration and development, Recommendations from the ACP-EU experts' meeting on trafficking in human beings and smuggling of migrants, 11 May 2015) ACP-UE 2111/15 <<http://data.consilium.europa.eu/doc/document/ST-2111-2015-INIT/en/pdf>> accessed 01 September 2015; See also, EU-Asia Dialogue, 'Human Trafficking' <<http://www.eu-asia.eu/the-topics/human-trafficking/>> accessed 01 September 2015.

<sup>554</sup> European Commission, 'Expert Groups Explained' <<http://ec.europa.eu/transparency/regexpert/index.cfm?do=faq.faq&aide=2>> accessed 27 August 2015.

<sup>555</sup> Åse Gornitzka and Ulf Sverdrup, 'Who consults? The configuration of expert groups in the European Union' (2008) 31(4) West European Politics 725, 728. For example, the High Level Steering Board for the European Innovation Partnership was closed, see Commission, 'High Level Steering Board for the European Innovation Partnership' (2012) <<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailPDF&groupID=2844>> accessed 28 August 2015.

<sup>556</sup> European Commission, 'Framework for Commission Expert Groups: Horizontal Rules and Public Register' (Staff Working Document) SEC (2010) 1360 final, 4.

dismantled without going through elaborate formal decision-making procedures, and therefore contribute to creating a dynamic, flexible and adaptive administrative system'.<sup>557</sup> Likewise, comitology committees are 'similar in brevity and limited scope'.<sup>558</sup> Forums and groups that are temporary, ad hoc and easily dissolved may benefit from larger, more permanent mechanisms that are able to effectively provide advice with a mix of permanent and temporary members depending on the subject of the forum.

The approach of the EU towards expert groups provides an example of what should be considered when setting up new forums. The Commission has made a commitment to enhancing coordination between expert groups.<sup>559</sup> When setting up expert groups, services are required to informally consult other services to ensure coordination and avoid duplication. Additionally, 'services are to endeavour to merge different groups having a limited scope that fall within the same policy area into one single group with a wider scope'.<sup>560</sup> Committees should be frequently reviewed. A number of the committees report limited or no activity.<sup>561</sup> It is worth considering whether these inactive committees should be merged with similar committees, improved or dissolved.

Streamlining may also involve expanding mechanisms that work well, such as the EIDHR Forum and the EU-NGO Forum, from the international level to regional or national levels. Both forums are successful in engaging an expanse of CSOs. The EU-NGO Forum, for example, brought together over 200 civil society participants in 2014.<sup>562</sup> The forums provide high profile platforms for discussion, and are important in effectively exchanging ideas and experiences.<sup>563</sup> These forums are held annually, and focus on a particular

<sup>557</sup> Åse Gornitzka and Ulf Sverdrup, 'Who consults? The configuration of expert groups in the European Union' (2008) 31(4) West European Politics 725, 743.

<sup>558</sup> European Commission, 'Frequently Asked Questions' <<http://ec.europa.eu/transparency/regcomitology/index.cfm?do=FAQ.FAQ>> accessed 28 August 2015. The EIDHR Committee, for example, ended in December 2013, see Commission, 'Report from the Commission on the Working of the Committees During 2013' SWD (2014) 279 final, 11 <[http://ec.europa.eu/transparency/regcomitology/docs/annual\\_report\\_2013\\_en.pdf](http://ec.europa.eu/transparency/regcomitology/docs/annual_report_2013_en.pdf)> accessed 28 August 2015. The representation of committees has been criticised, 'far from representing civil society, these committees are like quangos, firmly situated in the public sector', see Carol Harlow, 'Civil society organisations and participatory administration: a challenge to EU administrative law?', in Stijn Smismans (ed), *Civil Society and Legitimate European Governance* (Edward Elgar Publishing 2006) 124.

<sup>559</sup> Commission, 'Framework for Commission Expert Groups: Horizontal Rules and Public Register' (Communication) COM (2010) 7649 final, 4-5 <[http://ec.europa.eu/transparency/regexpert/PDF/C\\_2010\\_EN.pdf](http://ec.europa.eu/transparency/regexpert/PDF/C_2010_EN.pdf)> accessed 1 September 2015.

<sup>560</sup> Ibid.

<sup>561</sup> Commission, 'Report from the Commission on the Working of the Committees During 2013' SWD (2014) 279 final, 4 <[http://ec.europa.eu/transparency/regcomitology/docs/annual\\_report\\_2013\\_en.pdf](http://ec.europa.eu/transparency/regcomitology/docs/annual_report_2013_en.pdf)> accessed 28 August 2015.

<sup>562</sup> European Council, 'EU Annual Report on Human Rights and Democracy in the World in 2014' (2015) 10152/15, 27 <[http://eeas.europa.eu/human\\_rights/docs/2014-hr-annual-report\\_en.pdf](http://eeas.europa.eu/human_rights/docs/2014-hr-annual-report_en.pdf)> accessed 14 August 2015; See also Diplomatic Intelligence, 'Freedom of Expression online and offline: 16<sup>th</sup> EU-NGO Human Rights Forum' (2014) <<http://www.diplomaticintelligence.eu/human-rights/267-freedom-of-expression-online-and-offline-16th-eu-ngo-human-rights-forum>> accessed 28 August 2015.

<sup>563</sup> European Commission, 'EU Human Rights Instruments and the Lisbon Treaty: State of Play and Way Forward' (12<sup>th</sup> Annual EU-NGO Forum for Human Rights, July 2010) 57 <[https://ec.europa.eu/europeaid/sites/devco/files/report-12th-eu-ngo-forum-lisbon-treaty-2010\\_en\\_0.pdf](https://ec.europa.eu/europeaid/sites/devco/files/report-12th-eu-ngo-forum-lisbon-treaty-2010_en_0.pdf)> accessed 28 August 2015; See also World Coalition Against the Death Penalty, 'EU-NGO forum: death penalty is a

topical issue, such as the EIDHR Forum 2014, which concerned ‘Protecting Those Who Protect’, and the 16<sup>th</sup> EU-NGO Forum, which focused on ‘Freedom of Expression online and offline’. The EIDHR’s 2014 Forum had the following objectives: firstly, defining priorities and avenues for concrete EU support to HRDs; secondly, aiming at reviewing field operations, good practices, concrete lessons learned and practical adaptation in HRD support; and thirdly, offering an opportunity for HRDs to gather and exchange information and network.<sup>564</sup>

On a regional or national setting, forums could be established that discuss country-specific issues annually with civil society. EUDs could work in setting up these forums. Country Roadmaps and Human Rights Country Strategies should be central in establishing forums that discuss topical issues. The platforms should be high profile, and invitations open to all CSOs within the country related to the issue. Forums could be complimentary to, or merged with, existing Human Rights Seminars. Efforts should also be made to ensure there is no overlap with the EU Member States’ dialogues with civil society.

Coherence in EU approaches toward civil society is necessary for effective EU-CSO interactions on human rights.<sup>565</sup> Coherence has both vertical and horizontal dimensions.<sup>566</sup> In terms of the vertical element, the actions of the EU and Member States towards civil society should be mutually reinforcing. Horizontal coherence is between the different EU institutions. Engagement between CSOs and EU institutions should be viewed on a continuum from informal lobbying to structured relations, on which no clear line can be drawn.<sup>567</sup> Coherence should not be made a bureaucratic requirement,<sup>568</sup> but all actions need to be in keeping with the EU’s principles and converge towards a well-defined goal. Institutional coherence requires a degree of continuation in engaging with civil society.<sup>569</sup> This is impacted where the Directorate-Generals or Commissioners’ profiles change, and therefore the EU should consider putting in place permanent mechanisms for ensuring steadfast civil society engagement.<sup>570</sup>

#### 4. Strengthening Engagement

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priority’ <<http://www.worldcoalition.org/EU-NGO-forum-death-penalty-is-a-priority.html>> accessed 28 August 2015.

<sup>564</sup> European Commission, ‘EIDHR Forum 2014’ <<http://www.eidhr.eu/events/eidhr-forum-2014>> accessed 01 September 2015.

<sup>565</sup> See FRAME D7.2, 127-130 for an in-depth discussion of this issue.

<sup>566</sup> Nicholas Hachez, ‘Roundtable Discussion and Conclusion’ (Towards More Effective Engagement between the EU and Non-State Actors on Human Rights Workshop, London, 3 July 2015).

<sup>567</sup> Elodie Fazi and Jeremy Smith, ‘Civil dialogue: making it work better’ (2006) 27 <<http://act4europe.horus.be/module/FileLib/Civil%20dialogue,%20making%20it%20work%20better.pdf>> accessed 30 July 2015.

<sup>568</sup> Nicholas Hachez, ‘Roundtable Discussion and Conclusion’ (Towards More Effective Engagement between the EU and Non-State Actors on Human Rights Workshop, London, 3 July 2015).

<sup>569</sup> Dr Narine Ghazaryan, ‘Roundtable Discussion and Conclusion’ (Towards More Effective Engagement between the EU and Non-State Actors on Human Rights Workshop, London, 3 July 2015).

<sup>570</sup> See FRAME D7.2, 128.

The Action Plan on Human Rights and Democracy 2015-2019 should be at the heart of strengthening engagement with CSOs. This includes several actions that will enable stronger CSO-engagement, including facilitating and supporting structured exchanges, strengthening the capacity of CSOs to hold governments accountable, improving the quality of local level consultations, and stepping up engagement with political parties and citizens' movements.<sup>571</sup>

## (1) Consultation Methods

A distinction can be made between mandatory civil society involvement, where there is a legal requirement of involving civil society in, for example, policy making, and where engagement is purely voluntary.<sup>572</sup> Mandatory civil society involvement is visible in the terms of both bilateral and multilateral agreements. As Haugner-Burton states, 'Human Rights Agreements (HRAs) are no longer the only alternative for international regulation of domestic human rights policy. Few realise that the governance menu has recently expanded to include a growing number of formal institutions that embed human rights standards into rules governing market access'.<sup>573</sup>

Free Trade Agreements (FTAs) may include mandatory forms of civil society engagement. There is an in-depth assessment of the effect of trade agreements on human rights in FRAME D9.1.<sup>574</sup> As a result, only a brief overview will be given here of this form of engagement, focusing on engagement with civil society. There is an emphasis in FTAs on consultative measures and civil society dialogue in implementing labour standards.<sup>575</sup> More recent FTAs have sustainable development chapters that provide for civil society participation.<sup>576</sup> These Agreements have been successful in engaging civil society. Through the EU-Chile Association Agreement, for example, labour rights in Chile have been positively influenced through pressure from civil society.<sup>577</sup> The Cotonou Partnership Agreement (CPA) is a further example of

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<sup>571</sup> EU Council, *EU Strategic Framework and Action Plan on Human Rights and Democracy 2015-2019* (European Union 2015) 9.

<sup>572</sup> See FRAME D7.2, 118.

<sup>573</sup> Emilie M. Hafner-Burton, 'Trading Human Rights: How Preferential Trade Agreements Influence Government Repression' (2005) 59(3) International Organisation 593, 594.

<sup>574</sup> See Laura Beke, David D'Hollander, Nicholas Hachez, Beatriz Pérez de las Haras, 'Report on the Integration of Human Rights in EU Development and Trade Policies' (FRAME D9.1 2014).

<sup>575</sup> Evgeny Postnikov and Ida Bastiaens, 'Does Dialogue Work? The Effectiveness of Labor Standards in EU Preferential Trade Agreements' (2014) 21(6) Journal of European Public Policy 923, 925.

<sup>576</sup> Ibid, 925; See also European Commission, 'Sustainable Development' <<http://ec.europa.eu/trade/policy/policy-making/sustainable-development/>> accessed 13 August 2015.

<sup>577</sup> Evgeny Postnikov and Ida Bastiaens, 'Does Dialogue Work? The Effectiveness of Labor Standards in EU Preferential Trade Agreements' (2014) 21(6) Journal of European Public Policy 923, 928 and 935.

mandatory civil society engagement.<sup>578</sup> The majority of the ACP countries (Africa, Caribbean and Pacific) have a dialogue with civil society based on Article 8 of the Cotonou Agreement addressing human rights, democratic principles, the rule of law and good governance.<sup>579</sup> This has been described as a highly structured political dialogue.<sup>580</sup> Benefits of mandatory forms of engagement extend to civil society itself, and prompt it to establish frameworks for dialogue and provide information exchange between organisations.<sup>581</sup> Clearly the EU needs to consider how mandatory civil society involvement in agreements with non-EU countries can be utilised, applied and strengthened.

A distinction can also be drawn between formal and informal engagement. Formal engagement is where dialogue mechanisms are established, whereas informal engagement consists of unofficial mechanisms for communication. Most interviewees in FRAME D7.2, were of the view that both formal and informal mechanisms were needed, and complemented each other.<sup>582</sup> The choice of method depends on the context and the aim of the consultation.<sup>583</sup>

Both forms of dialogue have advantages and disadvantages. On the one hand, formal dialogue strengthens the trust between the EU and CSOs by allowing for a reinforced understanding of CSOs, identification of common interests and facilitating cooperation between CSOs as opposed to competition.<sup>584</sup> Formal dialogue also draws upon greater respect for transparency and participatory democracy – participants are invited, the agenda for the forum is set and usually relevant documents will be available.<sup>585</sup> On the other hand, there is a trade-off between achieving the required transparency and democracy and increased bureaucratic requirements, for example, there is a danger that consultative

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<sup>578</sup> Janice Giffen, 'Creating Space for Civil Society in Policy Dialogue' in Wil Hout (ed), *EU Development Policy and Poverty Reduction Enhancing Effectiveness* (Ashgate 2007) 149.

<sup>579</sup> European External Action Service 'Human Rights Dialogues' (9<sup>th</sup> May 2014) 1 <[http://eeas.europa.eu/factsheets/docs/factsheets\\_europe\\_day\\_2014/factsheet\\_human-rights\\_dialogues\\_en.pdf](http://eeas.europa.eu/factsheets/docs/factsheets_europe_day_2014/factsheet_human-rights_dialogues_en.pdf)> accessed 12 August 2015.

<sup>580</sup> Marco Mascia, *Participatory Democracy for Global Governance: Civil Society Organisations in the European Union* (vol 2, Human Rights Studies 2012) 142.

<sup>581</sup> The courier ACP-EU, 'Civil Society Participation and the Cotonou process in West Africa' (July-August 2003) n°199, 1 <[http://ec.europa.eu/development/body/publications/courier/courier199/en/en\\_024.pdf](http://ec.europa.eu/development/body/publications/courier/courier199/en/en_024.pdf)> accessed 11 August 2015. In Kenya, for example, CSOs organised workshops and meetings about the Cotonou Agreement, see Janice Giffen, 'Creating Space for Civil Society in Policy Dialogue' in Wil Hout (ed), *EU Development Policy and Poverty Reduction Enhancing Effectiveness* (Ashgate 2007) 155.

<sup>582</sup> FRAME D7.2, 119.

<sup>583</sup> Ibid.

<sup>584</sup> Elodie Fazi and Jeremy Smith, 'Civil dialogue: making it work better' (2006) 49 <<http://act4europe.horus.be/module/FileLib/Civil%20dialogue,%20making%20it%20work%20better.pdf>> accessed 31 July 2015.

<sup>585</sup> EU Civil Society Contact Group, 'Survey, How to improve relations between NGOs and the Council of the European Union?' (EU Civil Society Contact Group Recommendations, 2009) 9 <[http://act4europe.horus.be/module/FileLib/090225\\_CSCGstudy\\_AccesstoCouncil\\_full.pdf](http://act4europe.horus.be/module/FileLib/090225_CSCGstudy_AccesstoCouncil_full.pdf)> accessed 13 August 2015.

measures could be reduced to ‘tick box legitimacy’ allowing no scope for CSOs to contribute meaningful opinions or suggestions.<sup>586</sup>

As a result, some of the interviewees in FRAME D7.2 indicated a preference for informal mechanisms.<sup>587</sup> On the one hand, some suggest that CSO influence can be stronger through ‘more direct, bilateral and less formalised channels’.<sup>588</sup> These allow for elaboration of CSO opinions, and build strong relationships with EU officials. On the other hand, ‘Brussels’ is renowned for being an ‘insider’s town’ where people meet in a ‘cocktail circuit’, meaning that the majority will not have access to informal dialogue mechanisms.<sup>589</sup> As a result of this, informal contacts do not guarantee participation of all stakeholders.<sup>590</sup>

There needs to be an appropriate balance between formal and informal interactions, which consists of less emphasis on informal mechanisms of dialogue. Corresponding with CSO platforms will be easier than communicating with individual CSOs. Informal points of contact with a relevant EU body or member could be established. This would also need to take into account CSOs that are not located in Brussels, and informal dialogue here could take place by online correspondence. The EU should proactively take measures to restrict the proliferation of informal dialogue and ensure it remains transparent when it does occur, where possible engaging a wide number of members.

There are also different types of dialogue, predominantly event-based or internet-based. The type of dialogue depends on the context. Event-based dialogue has a limited audience, and generally only a limited number of people have space to contribute. Internet-based dialogue is more flexible in scope, participation and capacity to handle and react to questions.<sup>591</sup> The EU should consider greater use of mixed dialogue, whereby internet platforms can be used in parallel with events. This is a method which is particularly effective in cross-border dialogue.<sup>592</sup> The EU Civil Society Platform against trafficking in human beings meets annually, involving over 100 CSOs.<sup>593</sup> This Platform acts in parallel to the EU Civil Society e-

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<sup>586</sup> Holly Jarman, ‘Collaboration and Consultation: Functional Representation in EU Stakeholder Dialogues’ (2011) 33 (4) Journal of European Integration 385, 392.

<sup>587</sup> FRAME D7.2, 119.

<sup>588</sup> Elodie Fazi and Jeremy Smith, ‘Civil dialogue: making it work better’ (2006) 49 <<http://act4europe.horus.be/module/FileLib/Civil%20dialogue,%20making%20it%20work%20better.pdf>> accessed 31 July 2015.

<sup>589</sup> Christian Lahusen, ‘Joining the Cocktail Circuit: Social Movement Organizations at the European Union’ (2004) 9(1) Mobilization: An International Law Journal 55, 57.

<sup>590</sup> Dawid Friedrich, ‘Participatory Democracy in the European Union? European Governance and the Inclusion of Civil Society Organisations in Migration and Environmental Policies’ (2006) Council for European Studies 10 <<http://councilforeuropeanstudies.org/files/Papers/Friedrich.pdf>> accessed 13 August 2015.

<sup>591</sup> European Economic and Social Committee, ‘Draft guidelines for citizens and civil society participation in EU transport policies and projects’ (European Union 2015) 20-21 <<http://www.eesc.europa.eu/resources/docs/qe-01-15-437-en-n.pdf>> accessed 19 August 2015.

<sup>592</sup> Ibid, 21.

<sup>593</sup> European Commission, ‘Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings’ (Staff Working Document) (COM) (2014) 635 final, 13 <[https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/commission\\_staff\\_working\\_document\\_-\\_mid-term\\_report\\_on\\_the\\_implementation\\_of\\_the\\_eu\\_strategy\\_towards\\_the\\_eradication\\_of\\_trafficking\\_in\\_human\\_beings.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/commission_staff_working_document_-_mid-term_report_on_the_implementation_of_the_eu_strategy_towards_the_eradication_of_trafficking_in_human_beings.pdf)> accessed 18 August 2015.

Platform against trafficking in human beings which complements the event-based platform, enabling continuity of the discussions beyond the Brussels meetings.<sup>594</sup>

## (2) Improving Interactions

Effective EU-CSO engagement depends on strong interactions.<sup>595</sup> The EU needs to tackle the perception that dialogue is only decorative.<sup>596</sup> Dialogue should be two-way, open and engaging.<sup>597</sup> Strong interactions are characterised by a number of features that will enhance the capacity of dialogues to fulfil their respective functions. To give a strong foundation to dialogue mechanisms, the EU must take context-specific approaches to each dialogue mechanism or forum. In the country context, this will involve assessing the enabling environment for CSOs, which is characterised by a democratic state system and favourable legal and regulatory frameworks.<sup>598</sup> There should also be flexibility in using languages in dialogue.<sup>599</sup>

Time is vital in improving interactions between the EU and CSOs. Giving adequate time is necessary at all stages of consultation. The time required for each dialogue should be decided on a case-by-case basis. The EU should ensure sufficient time is given to setting up dialogues as this will widen the variety of participants.<sup>600</sup> For example, the annual EU-NGO Forum which involves hundreds of participants will need

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<sup>594</sup> Ibid.

<sup>595</sup> See Ingie Hovland, 'Successful Communication: A Toolkit for Researchers and Civil Society Organisations' (Research and Policy in Development Programme, Overseas Development Institutions, Toolkit 2005) <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/192.pdf>> accessed 1 September 2015.

<sup>596</sup> European Economic and Social Committee, 'Civil dialogue and participatory democracy in the practice of the European Union institutions' (European Union 2015) 80 <<http://www.eesc.europa.eu/resources/docs/qe-02-15-397-en-n.pdf>> accessed 19 August 2015.

<sup>597</sup> European Economic and Social Committee, 'Draft guidelines for citizens and civil society participation in EU transport policies and projects' (European Union 2015) 7 <<http://www.eesc.europa.eu/resources/docs/qe-01-15-437-en-n.pdf>> accessed 19 August 2015.

<sup>598</sup> European Commission, 'The Roots of Democracy and Sustainable Development: Europe's Engagement with Civil Society in External Relations' (Communication) COM (2012) 492 final, 5. The new Action Plan has the potential to enhance the EU's approach to restrictive environments, including by monitoring and assessing environments and taking steps to counter threats to civil society space, see EU Council, *EU Strategic Framework and Action Plan on Human Rights and Democracy 2015-2019* (European Union 2015) 10.

<sup>599</sup> European Economic and Social Committee, 'Draft guidelines for citizens and civil society participation in EU transport policies and projects' (European Union 2015) 21 <<http://www.eesc.europa.eu/resources/docs/qe-01-15-437-en-n.pdf>> accessed 19 August 2015.

<sup>600</sup> Elodie Fazi and Jeremy Smith, 'Civil dialogue: making it work better' (2006) 41 <<http://act4europe.horus.be/module/FileLib/Civil%20dialogue,%20making%20it%20work%20better.pdf>> accessed 31 July 2015.

more time to establish than a small country-based dialogue.<sup>601</sup> During the meetings, allowing enough time for participant contributions will enhance the quality and output of consultations.<sup>602</sup> Time after meetings should be given to allow CSOs, particularly CSO platforms, to consult their members and construct internal opinions.<sup>603</sup>

The date of dialogues is a further factor that must be considered. Consultations over holiday periods are too frequent and prevent democratic consultation.<sup>604</sup> Consultations should also take place prior to a proposal being drafted, not during.<sup>605</sup> Additionally, dialogues need to occur at regular intervals, such as two or three times a year, in order to establish CSO connections and foster more effective and meaningful participation.<sup>606</sup>

Information relevant to dialogues should be transparent and available, with accessible agendas that are sent well in advance of meetings.<sup>607</sup> The content on the agenda should be relevant and where possible sufficiently engaging. Meetings that merely discuss information that can be found elsewhere may not be effectively engaging civil society.<sup>608</sup> Questions offered to participants should be technical, and the EU should aim to facilitate a proper dialogue as opposed to what is described as ‘university style lecturing’.<sup>609</sup> Furthermore, there should be clarity for participants to know when and how to give input.<sup>610</sup>

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<sup>601</sup> European Economic and Social Committee, ‘Draft guidelines for citizens and civil society participation in EU transport policies and projects’ (European Union 2015) 15 <<http://www.eesc.europa.eu/resources/docs/qe-01-15-437-en-n.pdf>> accessed 19 August 2015.

<sup>602</sup> Elodie Fazi and Jeremy Smith, ‘Civil dialogue: making it work better’ (2006) 41 <<http://act4europe.horus.be/module/FileLib/Civil%20dialogue,%20making%20it%20work%20better.pdf>> accessed 31 July 2015.

<sup>603</sup> Socialplatform, ‘How to Establish an Effective Dialogue between the EU and Civil Society Organisations’ (2010) 2 <[http://www.socialplatform.org/wp-content/uploads/2013/07/20100201\\_SocialPlatform\\_EffectiveCivilDialogue.pdf](http://www.socialplatform.org/wp-content/uploads/2013/07/20100201_SocialPlatform_EffectiveCivilDialogue.pdf)> accessed 6 August 2015.

<sup>604</sup> Elodie Fazi and Jeremy Smith, ‘Civil dialogue: making it work better’ (2006) 41 <<http://act4europe.horus.be/module/FileLib/Civil%20dialogue,%20making%20it%20work%20better.pdf>> accessed 31 July 2015.

<sup>605</sup> Ibid, 48.

<sup>606</sup> European Economic and Social Committee, ‘Civil dialogue and participatory democracy in the practice of the European Union institutions’ (European Union 2015) 81-82 <<http://www.eesc.europa.eu/resources/docs/qe-02-15-397-en-n.pdf>> accessed 19 August 2015.

<sup>607</sup> Ibid, 83-84; Only 40% of respondents in a CONCORD survey received information in time prior to dialogues taking place, see CONCORD, ‘Mutual Engagement Between EU Delegations and Civil Society Organisations: Lessons from the field’ (2015) 29 <[http://www.concordeurope.org/publications/item/download/385\\_0f51bc348b8678d58c4729a97aaaba7c](http://www.concordeurope.org/publications/item/download/385_0f51bc348b8678d58c4729a97aaaba7c)> accessed 31 July 2015.

<sup>608</sup> See FRAME D7.2, 135.

<sup>609</sup> European Economic and Social Committee, ‘Civil dialogue and participatory democracy in the practice of the European Union institutions’ (European Union 2015) 83-84 <<http://www.eesc.europa.eu/resources/docs/qe-02-15-397-en-n.pdf>> accessed 19 August 2015.

<sup>610</sup> Socialplatform, ‘How to Establish an Effective Dialogue between the EU and Civil Society Organisations’ (2010) 2 <[http://www.socialplatform.org/wp-content/uploads/2013/07/20100201\\_SocialPlatform\\_EffectiveCivilDialogue.pdf](http://www.socialplatform.org/wp-content/uploads/2013/07/20100201_SocialPlatform_EffectiveCivilDialogue.pdf)> accessed 6 August 2015.

Formal Civil Society Seminars held prior to Human Rights Dialogues may offer an example of effective interactions between the EU and CSO participants.<sup>611</sup> The seminars have a multiplicity of participants, including human rights activists, NGO members and representatives from academia. They provide space to discuss areas of concern and make recommendations to be considered at the official dialogue.<sup>612</sup> Interest in the seminars is increasing, and there is a corresponding desire to undertake preparatory and follow-up activities in maximising CSO input.<sup>613</sup> The participants of an African Union-EU Human Rights Dialogue ‘acknowledged the added value of maintaining the AU-EU civil society seminar on human rights as an essential element of the AU-EU human rights dialogue. They underlined the need to maintain a high level of involvement of the civil society organisations in following-up the results of the dialogue’.<sup>614</sup> The Civil Society Seminars contain a mix of plenary speeches, panel discussions and workshop sessions, which allow for effective participation of the participants in providing a variety of space for input.<sup>615</sup> This mix of forms of engagement could be applied to other civil society forums.

### (3) Feedback

Feedback shows CSOs that their participation is valued, and ultimately ensures the sustainability of CSO engagement.<sup>616</sup> As a result, there needs to be a defined process that shows how CSO inputs feed into policy, which could involve facilitating debates alongside policy making or following a consultation process.<sup>617</sup> There are a variety of tools by which feedback could be provided. Feedback could be improved

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<sup>611</sup> For more information about Human Rights Dialogues and discourse with civil society over these, see FRAME D7.2, 114 and 115.

<sup>612</sup> Vera Abynova, ‘The EU-Central Asia Human Rights Dialogues: Making a Difference?’, (April 2011) 16 EUCAM 2 <[http://aei.pitt.edu/58491/1/EUCAM\\_PB\\_16.pdf](http://aei.pitt.edu/58491/1/EUCAM_PB_16.pdf)> accessed 24 August 2015.

<sup>613</sup> European Commission, ‘Implementing Decision on the Annual Action Programme 2015 for the European Instrument for Democracy and Human Rights (EIDHR) to be financed from the general budget of the European Union’ (Implementing Decision) COM (2015) 2025 final, Annex 8, 2.

<sup>614</sup> Addis Ababa, ‘6<sup>th</sup> AU-EU Human Rights Dialogue’ (20 October 2010) 1 <<https://www.consilium.europa.eu/uedocs/cmsUpload/FinalCommunique-20-10-2010.pdf>> accessed 26 August 2015; see also Marco Mascia, *Participatory Democracy for Global Governance: Civil Society Organisations in the European Union* (vol 2, Human Rights Studies 2012) 162.

<sup>615</sup> Vera Abynova, ‘The EU-Central Asia Human Rights Dialogues: Making a Difference?’, (April 2011) 16 EUCAM 2 <[http://aei.pitt.edu/58491/1/EUCAM\\_PB\\_16.pdf](http://aei.pitt.edu/58491/1/EUCAM_PB_16.pdf)> accessed 24 August 2015.

<sup>616</sup> Beate Kohler-Koch, ‘The Three worlds of European civil society-What role for civil society for what kind of Europe?’ (2009) 28 Policy and Society 47, 50. There is an issue with insufficient feedback being linked to a sense of lack of influence, see Coffey International Development and Deloitte, ‘Evaluation of DG TRADE’s Civil Society Dialogue: Final Report’ (European Union 2014) 13-14 <[http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc\\_152927.pdf](http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152927.pdf)> accessed 3 August 2015.

<sup>617</sup> Coffey International Development and Deloitte, ‘Evaluation of DG TRADE’s Civil Dialogue: Final Report’ (European Union 2014) 10 <[http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc\\_152927.pdf](http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152927.pdf)> accessed 31 July 2015.

by publicising results of dialogues, and following up via mail, an EUD website, Twitter or Facebook, or organising a follow-up meeting.<sup>618</sup>

The Feedback processes on the Health Policy Strategy have been referred to as an example of best practice in this area. The Commission took into account responses to a consultation process and formulated a report in summary of the views and the EU's responses.<sup>619</sup> This could be applied in most, if not all, dialogue mechanisms. Spending time to gather responses and evaluate inputs ensures the EU effectively considers all CSO suggestions. Codes of good practice for CSO consultations could be drawn up and applied more widely. An example of this is the 'Code of Good Practice for Consultation of Stakeholders' under the DG for Health and Consumers, which recognises the value of effective consultation and constructive, timely feedback to stakeholders.<sup>620</sup> Such a code would not only deal with some of the interaction issues identified above, but also make the necessary connection between stakeholder input and the final result.<sup>621</sup>

The EU needs to put the necessary human and financial resources in place to ensure proper facilitation and follow-up of dialogue processes.<sup>622</sup> There also needs to be monitoring of whether the dialogues are achieving their goals and ultimately having effect.<sup>623</sup> In line with this, there could be an annual report that is made of feedback from the EU, discussion with CSOs, an online questionnaire or structured dialogue with the participants.<sup>624</sup>

#### (4) Funding

Finally, in this part, the importance of effective funding must be stressed. EU funding plays an essential role in strengthening civil society both within and outside the EU. Generally, obtaining funding is carried out through a call for proposals, which is a public invitation for propositions that are within the framework

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<sup>618</sup> CONCORD, 'Mutual Engagement between EU Delegations and Civil Society Organisations: Lessons from the field' (2015) 38  
[http://www.concordeurope.org/publications/item/download/385\\_0f51bc348b8678d58c4729a97aaaba7c](http://www.concordeurope.org/publications/item/download/385_0f51bc348b8678d58c4729a97aaaba7c)  
accessed 3 August 2015.

<sup>619</sup> DG Health and Consumers, 'Summary Report of the Responses to Health in Europe: A Strategic Approach Discussion Document for a Heath Strategy' (European Commission) 3  
[http://ec.europa.eu/health/archive/ph\\_overview/strategy/docs/consultation\\_frep\\_en.pdf](http://ec.europa.eu/health/archive/ph_overview/strategy/docs/consultation_frep_en.pdf) accessed 31 July 2015.

<sup>620</sup> DG Health and Consumers, 'Code of Good Practice for Consultation of Stakeholders' (European Commission) 8,13  
[http://ec.europa.eu/dgs/health\\_food-safety/dgs\\_consultations/docs/code\\_good\\_practices\\_consultation\\_en.pdf](http://ec.europa.eu/dgs/health_food-safety/dgs_consultations/docs/code_good_practices_consultation_en.pdf)  
accessed 31 July 2015.

<sup>621</sup> Ibid.

<sup>622</sup> Jean Bossuyt, 'Involving Non State Actors and Local Governments in ACP-EU Dialogue' (December 2000) 13 Policy Management Brief, 5 <http://ecdpm.org/wp-content/uploads/2013/10/PMB-13-Involving-Non-State-Actors-Local-Governments-ACP-EU-Dialogue-2000.pdf> accessed 11 August 2015.

<sup>623</sup> Ibid.

<sup>624</sup> Coffey International Development and Deloitte, 'Evaluation of DG TRADE's Civil Dialogue: Final Report' (European Union 2014) 11 [http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc\\_152927.pdf](http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152927.pdf) accessed 31 July 2015.

of a specific EU programme.<sup>625</sup> In prospective accession countries, the Commission envisages utilising a mix of funding instruments in order to respond to the different types of CSOs, their needs and the country contexts in a flexible, transparent, cost-effective and results-focused manner.<sup>626</sup> These include by direct awards, pooled funding, follow-up grants and simplified calls for proposals. The Commission also envisages moving to a more flexible approach that fosters partnership and coalition building.<sup>627</sup> This approach to the neighbourhood should be applied in the larger funding mechanisms, such as the EIDHR, to foster a consistent and valuable partnership with civil society.

Obtaining and managing EU funding is not easy. A CONCORD survey identifies that respondents find that the process is complex, the funding evaluators are not locally experienced, and there remains a need for the EU to accommodate for the less well-resourced community groups.<sup>628</sup> It is also recognised that selection procedures are becoming increasingly competitive, creating and fuelling tensions between CSOs with similar aims rather than encouraging cooperation between them.<sup>629</sup> Such an atmosphere is not desirable for effective EU-CSO engagement on human rights. Even though participation in the call for proposals is a major learning and capacity-building process for a CSO, the smaller CSOs face significant obstacles in obtaining funding. These include the requirements of bank guarantees, obligations to apply for large amounts of money and complex processes.<sup>630</sup> Additionally, smaller CSOs find that their proposals are rejected, but cannot afford to pay for an expert to write their proposal.<sup>631</sup> Moreover, the process of applying is time consuming, usually there is a language barrier where proposals must be submitted in French or English, and the template for application requires specific understanding of the project management cycle.<sup>632</sup>

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<sup>625</sup> For more information, see <<https://ec.europa.eu/europeaid/node/1071>> accessed 4 August 2015.

<sup>626</sup> DG Enlargement, 'Guidelines for EU support to civil society in enlargement countries, 2014-2020' (2013) 3 <[http://ec.europa.eu/enlargement/pdf/civil\\_society/doc\\_guidelines\\_cs\\_support.pdf](http://ec.europa.eu/enlargement/pdf/civil_society/doc_guidelines_cs_support.pdf)> accessed 25 August 2015.

<sup>627</sup> Ibid.

<sup>628</sup> CONCORD, 'Mutual Engagement between EU Delegations and Civil Society Organisations: Lessons from the field' (2015) 32

<[http://www.concordeurope.org/publications/item/download/385\\_0f51bc348b8678d58c4729a97aaaba7c](http://www.concordeurope.org/publications/item/download/385_0f51bc348b8678d58c4729a97aaaba7c)> accessed 3 August 2015. The EU needs to make funding available to grassroots organisations, see Glevys Rondon, 'Panel 2: Civil Society Organisations and Human Rights Defenders' (Towards More Effective Engagement between the EU and Non-State Actors on Human Rights Workshop, London, 3 July 2015).

<sup>629</sup> The Foreign Policy Centre, 'Trouble in the neighbourhood? The Future of the EU's Eastern Partnership' (2015) 8 <<http://fpc.org.uk/fsblob/1681.pdf>> accessed 5 August 2015.

<sup>630</sup> Rosa Sánchez-Salgado, 'Giving a European Dimension to Civil Society Organisations' (December 2007) 3(3) Journal of Civil Society 253, 261.

<sup>631</sup> CONCORD, 'Mutual Engagement between EU Delegations and Civil Society Organisations: Lessons from the field' (2015) 33

<[http://www.concordeurope.org/publications/item/download/385\\_0f51bc348b8678d58c4729a97aaaba7c](http://www.concordeurope.org/publications/item/download/385_0f51bc348b8678d58c4729a97aaaba7c)> accessed 3 August 2015.

<sup>632</sup> DG for External Policies, 'Improving the EU's Support for the Civil Society in its Neighbourhood: Rethinking Procedures, Ensuring that Practices Evolve' (European Parliament 2012) 24 <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET\\_ET\(2012\)433693\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET_ET(2012)433693_EN.pdf)> accessed 4 August 2015.

As a result, the EU needs to invest in capacity-building of CSOs as many CSOs (particularly local, grassroots CSOs) lack the skills needed to participate in EU funding.<sup>633</sup> The process of applying limits space for constructive dialogue between potential applicants and the EU, indeed, proposals are assessed per se, regardless of the applicant's situation.<sup>634</sup> The EU should assess proposals in consideration of the applicant's situation. Currently the cooperation with CSOs is predominantly project-based and action-orientated, so grants do not allow for capacity-building, for example, through purchasing equipment, or covering CSO running costs.<sup>635</sup> The EU needs to consider allowing for funding that covers these expenses.

An EU initiative in Belarus, The Clearing House, provides an example of how capacity-building could occur. This has incorporated training sessions for local NGOs on funding applications, alongside individual consultations for smaller NGOs. This has also facilitated four project implementers meetings in Brussels. Additionally, at the time of writing, since 2011, 87 CSOs and grassroots initiatives have received support on funding instruments and applications.<sup>636</sup> Such an initiative should be applied elsewhere, as it has both successfully engaged with grassroots CSOs and enabled funding applications from a number of CSOs that otherwise would not have the necessary knowledge or skills to engage.

Alongside this, EUDs are in an opportune position to provide capacity support. In Sierra Leone, the EUD provided training on submitting successful proposals to the Commission for the Non State Actors and Local Authorities in the Development 2013 call for proposals. This was beneficial in that prospective applicants were allowed to submit draft proposals for evaluation before final submission.<sup>637</sup> Providing feedback on draft proposals would be especially supportive of grassroots organisations, and this practice should be more widespread. A further example can be drawn from the EUD in Congo-Brazzaville that organised a four-day workshop on grant management covering the entire funding project cycle.<sup>638</sup> The EU could consider making such workshops compulsory annually or biannually by EUDs. The EU could also consider engaging advanced urban CSOs or CSO platforms to train grassroots CSOs in the funding

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<sup>633</sup> In Cambodia, for example, the low capacity of local NGOs meant that INGOs had the strongest policy voice. INGOs in Cambodia emphasised the protection of forests rather than its utilisation which led to a lack of consideration to ensure access for local, poor people, see Enrique Mendizabal, David Osborne and John Young, 'Policy Engagement: How Civil Society Can be More Effective' 21, 37-40 (Research and Policy in Development, Overseas Development Institute, 2006) <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/200.pdf>> accessed 01 September 2015.

<sup>634</sup> DG for External Policies, 'Improving the EU's Support for the Civil Society in its Neighbourhood: Rethinking Procedures, Ensuring that Practices Evolve' (European Parliament 2012) 25 <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET\\_ET\(2012\)433693\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET_ET(2012)433693_EN.pdf)> accessed 4 August 2015.

<sup>635</sup> Ibid, 17.

<sup>636</sup> DG DEVCO, 'EU Cooperation for a Successful Eastern Partnership: Supporting Reforms, Promoting Change ' 3 <<http://ec.europa.eu/europeaid/sites/devco/files/eap-flyer-results.pdf>> accessed 20 August 2015.

<sup>637</sup> CONCORD, 'Mutual Engagement between EU Delegations and Civil Society Organisations: Lessons from the field' (2015) 34 <[http://www.concordeurope.org/publications/item/download/385\\_0f51bc348b8678d58c4729a97aaaba7c](http://www.concordeurope.org/publications/item/download/385_0f51bc348b8678d58c4729a97aaaba7c)> accessed 3 August 2015.

<sup>638</sup> Ibid.

process.<sup>639</sup> This would not only contribute to enhancing the capacity of rural CSOs but would also promote cooperation between CSOs over competition.

The minimum contract size of the main EU funding instruments also discourages CSOs from benefiting from funding.<sup>640</sup> The EU needs to build a bridge between the larger funds and CSOs that are not international organisations. As a result, the EU should consider possibilities for enlarging the scope of sub-granting, whereby a grant beneficiary chooses further beneficiaries (usually smaller CSOs) when making a funding proposal. Sub-granting would allow for broader CSO support and multiply the number of smaller grants that are available.<sup>641</sup> Sub-granting may also deal with funding competition as larger CSOs are under an obligation to cooperate with smaller CSOs.<sup>642</sup> Currently, the EUD in Kenya utilises sub-granting schemes as a means of reaching grassroots organisations.<sup>643</sup> The EU has also strongly encouraged sub-granting in the Eastern Neighbourhood.<sup>644</sup> As smaller grants become more widely utilised, improved mechanisms are needed to tackle cases of fraud or misappropriation of funds for example, by targeted anti-corruption measures and training for local CSOs.<sup>645</sup>

The timeline for the call for proposals also needs to be improved. The EU should share information about funding opportunities and give sufficient time for CSOs to design proposals.<sup>646</sup> Information technology can be utilised to disseminate information about funding to a wide audience, taking into account assessing

<sup>639</sup> DG for External Policies, 'Improving the EU's Support for the Civil Society in its Neighbourhood: Rethinking Procedures, Ensuring that Practices Evolve' (European Parliament 2012) 25 <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET\\_ET\(2012\)433693\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET_ET(2012)433693_EN.pdf)> accessed 4 August 2015.

<sup>640</sup> The Foreign Policy Centre, 'Trouble in the neighbourhood? The Future of the EU's Eastern Partnership' (2015) 8 <<http://fpc.org.uk/fsblob/1681.pdf>> accessed 5 August 2015.

<sup>641</sup> DG for External Policies, 'Improving the EU's Support for the Civil Society in its Neighbourhood: Rethinking Procedures, Ensuring that Practices Evolve' (European Parliament 2012) 7, 24 <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET\\_ET\(2012\)433693\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET_ET(2012)433693_EN.pdf)> accessed 4 August 2015.

<sup>642</sup> The Foreign Policy Centre, 'Trouble in the neighbourhood? The Future of the EU's Eastern Partnership' (2015) 8 <<http://fpc.org.uk/fsblob/1681.pdf>> accessed 5 August 2015.

<sup>643</sup> CONCORD, 'Mutual Engagement between EU Delegations and Civil Society Organisations: Lessons from the field' (2015) 36 <[http://www.concordeurope.org/publications/item/download/385\\_0f51bc348b8678d58c4729a97aaaba7c](http://www.concordeurope.org/publications/item/download/385_0f51bc348b8678d58c4729a97aaaba7c)> accessed 3 August 2015.

<sup>644</sup> Adam Hug, 'Trouble in the Neighbourhood? The future of the EU's Eastern Partnership' (2015) European Foreign Policy Centre 8 <<http://fpc.org.uk/fsblob/1681.pdf>> accessed 20 August 2015.

<sup>645</sup> DG for External Policies, 'Improving the EU's Support for the Civil Society in its Neighbourhood: Rethinking Procedures, Ensuring that Practices Evolve' (European Parliament 2012) 25 <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET\\_ET\(2012\)433693\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET_ET(2012)433693_EN.pdf)> accessed 4 August 2015.

<sup>646</sup> CONCORD, 'Mutual Engagement between EU Delegations and Civil Society Organisations: Lessons from the field' (2015) 33 <[http://www.concordeurope.org/publications/item/download/385\\_0f51bc348b8678d58c4729a97aaaba7c](http://www.concordeurope.org/publications/item/download/385_0f51bc348b8678d58c4729a97aaaba7c)> accessed 3 August 2015; see also Marilyn Croser, 'Panel 2: Civil Society Organisations and Human Rights Defenders' (Towards More Effective Engagement between the EU and Non-State Actors on Human Rights Workshop, London, 3 July 2015).

the appropriate means of transmitting that information to grassroots organisations without reliable internet access.<sup>647</sup> The EU needs to improve transparency in granting funding by ensuring commitment to the relevant guidelines.<sup>648</sup> Qualitative feedback should be given on proposals, a practice adopted by the EUD in Mozambique that should be applied elsewhere.<sup>649</sup>

When the EU accepts proposals, care must be taken to ensure that beneficiaries are not GONGOs (NGOs set up by the state).<sup>650</sup> Funding GONGOs should be avoided especially in the context of restrictive CSO environments, whereby funding governmental organisations prevent promotion of democracy and human rights. Some GONGOs have been created especially to succeed in applications for funding, which may give them an advantage over competitors in the funding process.<sup>651</sup> To avoid funding GONGOs, the EU could set up a working group, or commission a report that explores classification of CSOs and establishes a certification scheme that will identify GONGOs.<sup>652</sup> A less resource intensive method of avoiding GONGOs could also be by greater investigation into prospective beneficiaries, which could be a task delegated to the relevant EUD.

Two instruments of particular importance in tackling difficulties with obtaining funding from larger mechanisms are the Civil Society Facility and the European Endowment for Democracy. The former, the Civil Society Facility, is exclusive to CSOs.<sup>653</sup> In 2011, this consisted of three components: 1) assisting in capacity building for Non-State Actors (NSAs), 2) funding regional and country projects by NSAs and 3) aiming to increase NSA involvement in policy dialogues and the implementation of bilateral programmes between the EU and neighbouring countries.<sup>654</sup> The success of this facility depends on the extent to which it is user-friendly, quick and flexible.<sup>655</sup> To address this, the Commission has been paying more attention to involving grassroots, local CSOs and support in the longer term, which allows greater scope for capacity

<sup>647</sup> CONCORD, 'Mutual Engagement between EU Delegations and Civil Society Organisations: Lessons from the field' (2015) 36  
[http://www.concordeurope.org/publications/item/download/385\\_0f51bc348b8678d58c4729a97aaaba7c](http://www.concordeurope.org/publications/item/download/385_0f51bc348b8678d58c4729a97aaaba7c)  
 accessed 3 August 2015.

<sup>648</sup> Ibid, 34-35.

<sup>649</sup> Ibid, 33.

<sup>650</sup> DG for External Policies, 'Improving the EU's Support for the Civil Society in its Neighbourhood: Rethinking Procedures, Ensuring that Practices Evolve' (European Parliament 2012) 25  
[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET\\_ET\(2012\)433693\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET_ET(2012)433693_EN.pdf) accessed 4 August 2015.

<sup>651</sup> Ibid, 29.

<sup>652</sup> Institut de Relations Internationales et Stratégiques, 'Improving the EU's Support for the Civil Society in its Neighbourhood: Rethinking Procedures, Ensuring that Practices Evolve' iii [http://pasos.org/wp-content/uploads/2012/08/study\\_iris.pdf](http://pasos.org/wp-content/uploads/2012/08/study_iris.pdf) accessed 5 August 2015.

<sup>653</sup> The Civil Society was established to support civil society engaged in the accession process to the EU, for more information about the Civil Society Facility see FRAME D7.2, 109.

<sup>654</sup> European Commission, 'Action Fiche for Neighbourhood Civil Society Facility 2011' (2011) 3  
[http://ec.europa.eu/europeaid/documents/aap/2011/af\\_aap-spe\\_2011\\_enpi.pdf](http://ec.europa.eu/europeaid/documents/aap/2011/af_aap-spe_2011_enpi.pdf) accessed 26 August 2015.

<sup>655</sup> DG for External Policies, 'Improving the EU's Support for the Civil Society in its Neighbourhood: Rethinking Procedures, Ensuring that Practices Evolve' (2012) 31  
[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET\\_ET\(2012\)433693\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET_ET(2012)433693_EN.pdf) accessed 4 August 2015.

building of CSOs.<sup>656</sup> The Civil Society Facility has also put into place sub-granting schemes managed by regional thematic networks and international organisations. Further activities that support the capacities of local and community-based CSOs include providing regional technical assistance to CSOs and the EUDs at country level, for example having a helpdesk, information days and translating guidelines into local languages when a new call for proposals is published.<sup>657</sup>

The European Endowment for Democracy (EED) also has the potential to lead to effective engagement with civil society. This is a private foundation supporting democracy and human rights.<sup>658</sup> The funding mechanism has the aim of providing funding to those in civil society who would otherwise be unable to access funding.<sup>659</sup> By 19 May 2015, the EED had funded 148 initiatives totalling over EUR 4.5 million in the Southern Neighbourhood and EUR 4.4 million in the Eastern Neighbourhood.<sup>660</sup> The Commission has renewed its support to the EED, financing the mechanism through 2015-2018.<sup>661</sup> The European Parliament acknowledges the EED as providing ‘fast, flexible, bottom-up and demand-driven funding’, which is done in a ‘financially efficient manner that complements other EU means’ due to the ‘low administrative burden and simple procedures’.<sup>662</sup> To facilitate strengthening of the mechanism’s aims, the EED itself should be strengthened. This could occur in supporting the transition of beneficiaries to larger funding instruments such as the EIDHR, or actively engaging in countries with a shrinking space for civil society.<sup>663</sup>

## 5. Case Study on engagement with the social partners

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<sup>656</sup> European Commission, ‘adopting a Civil Society Facility and Media Programme for the years 2014-2015 under the Instrument for Pre-accession Assistance (IPA II)’ (Implementing Decision) COM (2014) 9571 final, 3-4 <[http://ec.europa.eu/enlargement/pdf/financial\\_assistance/ipa/2015/multi-country/ipa\\_ii\\_2014-031-605\\_2015-037-653\\_civil\\_society\\_facility\\_and\\_media\\_programme\\_2014-2015.pdf](http://ec.europa.eu/enlargement/pdf/financial_assistance/ipa/2015/multi-country/ipa_ii_2014-031-605_2015-037-653_civil_society_facility_and_media_programme_2014-2015.pdf)> accessed 25 August 2015.

<sup>657</sup> European Commission, ‘adopting a Civil Society Facility and Media Programme for the years 2014-2015 under the Instrument for Pre-accession Assistance (IPA II)’ (Implementing Decision) COM (2014) 9571 final, 4 <[http://ec.europa.eu/enlargement/pdf/financial\\_assistance/ipa/2015/multi-country/ipa\\_ii\\_2014-031-605\\_2015-037-653\\_civil\\_society\\_facility\\_and\\_media\\_programme\\_2014-2015.pdf](http://ec.europa.eu/enlargement/pdf/financial_assistance/ipa/2015/multi-country/ipa_ii_2014-031-605_2015-037-653_civil_society_facility_and_media_programme_2014-2015.pdf)> accessed 25 August 2015.

<sup>658</sup> See FRAME D7.2, 110 for the overview of the EED’s functions.

<sup>659</sup> DG for External Policies, ‘Improving the EU’s Support for the Civil Society in its Neighbourhood: Rethinking Procedures, Ensuring that Practices Evolve’ (European Parliament 2012) 31 <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET\\_ET\(2012\)433693\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/433693/EXPO-AFET_ET(2012)433693_EN.pdf)> accessed 4 August 2015.

<sup>660</sup> European Parliament, ‘Report on the EU’s new approach to human rights and democracy – evaluating the activities of the European Endowment for Democracy (EED) since its establishment’ (2 June 2015) 2014/2231 (INI) 6.

<sup>661</sup> European Commission, ‘European Commission renews support to the European Endowment for Democracy’ (2015) <[http://ec.europa.eu/enlargement/news\\_corner/news/2015/07/20150701\\_en.htm](http://ec.europa.eu/enlargement/news_corner/news/2015/07/20150701_en.htm)> accessed 5 August 2015.

<sup>662</sup> European Parliament, ‘Report on the EU’s new approach to human rights and democracy – evaluating the activities of the European Endowment for Democracy (EED) since its establishment’ (2 June 2015) 2014/2231 (INI) 6.

<sup>663</sup> Ibid, 8.

Social dialogue between the EU level representatives of management and labour, the European social partners, is the most formalised method of deep civil society engagement in the EU system of governance. Internationally, its origins lie with the tripartite method of dialogue upon which the ILO was founded in 1919. In the European sphere, it can be traced back to the European Coal and Steel Community Treaty of 1951, which recognised a role for ‘producers’ and ‘workers’ on a Consultative Committee with the task of pursuing social goals and raising living standards.<sup>664</sup> By the mid-1980s, European social dialogue, the so-called ‘Val Duchesse’ process,<sup>665</sup> emerged as the centrepiece of the social dimension of the internal market. The President of the Commission, Jacques Delors, believed that negotiation and consensus between the two sides of industry would help to ensure a balance between market liberalisation and the protection of fundamental social rights.<sup>666</sup> Ultimately, if the two sides considered it ‘desirable’, it was envisaged that dialogue between management and labour would lead to ‘relations based on agreement’.<sup>667</sup> An idea was born of going beyond consultation to a new level of deep civil society engagement including a stake for the social partners in the EU’s decision making process in the area of social policy. The Commission would have a facilitative role to play but what was unique was the development of a systematic but flexible process of autonomous dialogue between social actors. It is a process that has evolved separately from other forms of civil society dialogue, outside of the labour market sphere, but there are synergies that can be explored.

Social dialogue is an inherently flexible concept that has its own norms, customs and practices in each society in which it flourishes.<sup>668</sup> It is defined by the ILO as ‘including all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers on issues of common interest relating to economic and social policy’.<sup>669</sup> According to the ILO, for social dialogue to be effective, the parties must be strong, independent and broadly representative organisations of management and labour. The parties must be recognised as equal partners by each other and engage in good faith. One further ingredient is necessary, there must be appropriate institutional support.<sup>670</sup>

In the EU, the Commission has provided the necessary institutional support. It has facilitated dynamic social dialogue involving both bipartite and tripartite engagement. Bipartite social dialogue is autonomous dialogue between representatives of employer and trade union organisations at European level. It operates at cross-industry, sectoral and company levels. Cross-industry dialogue brings together management and labour at an EU level Social Dialogue Committee to engage on labour market and wider

<sup>664</sup> Jeff Kenner, *EU Employment Law* (Hart Publishing 2003) 61. The relevant provisions are found in the preamble of the ECSC, fourth recital and Art 18 ECSC.

<sup>665</sup> So-called because the inaugural meeting of the European level social partners was convened by the President of the Commission, Jacques Delors, at the ‘Val Duchesse’ castle in Brussels in January 1985.

<sup>666</sup> Jeff Kenner, *EU Employment Law* (Hart Publishing 2003) 105-107.

<sup>667</sup> Art 118b EEC introduced by the Single European Act, 1987, now replaced by Arts 154-155 TFEU.

<sup>668</sup> European Commission, ‘VADEMECUM – A Practical Guide for European Social Partner Organisations and their National Affiliates’ (May 2014) 4 <<http://ec.europa.eu/socialdialogue>> accessed 5 February 2016.

<sup>669</sup> International Labour Organisation, ‘Social Dialogue: Finding a common voice’ 1 <<http://www.ilo.org/public/english/dialogue/download/brochure.pdf>> accessed 5 February 2016.

<sup>670</sup> Ibid.

socio-economic issues.<sup>671</sup> Sectoral dialogue is undertaken in sector-specific social dialogue committees as fora for consultation on how to improve working conditions and industrial relations in the social partners' respective sectors.<sup>672</sup> Company level dialogue is promoted through European Works Councils with the aim of providing employees with information and consultation on transnational matters.<sup>673</sup>

Tripartite social dialogue is a form of engagement involving employers' and workers' representatives and the EU institutions. The contribution of the biannual Tripartite Social Summit for Growth and Employment is recognised in Article 152 of the Treaty on the Functioning of the European Union (TFEU). It brings together the President of the European Council, the Council Presidency and the two subsequent presidencies, the Commission and the social partners' highest level representatives. Tripartite dialogue is also conducted in a more informal fashion on macroeconomics, employment, social protection, education and training.<sup>674</sup> In the light of the negative impact of the financial crises on economic and social rights, there is a strong case for deepening the Macroeconomic Dialogue which, at present, is merely an 'exchange of views' at ministerial level between the Council, Commission, the European Central Bank and the social partners.<sup>675</sup>

For the purposes of this case study, our focus is on autonomous bipartite social dialogue because, as a method, is it capable of being transformative in converting civil society dialogue into the framework of an agreement to implement human rights norms at both EU and national levels.

Bipartite social dialogue has been formalised by Articles 152-155 TFEU.<sup>676</sup> Collectively these articles provide European social dialogue with a framework and basic principles for its functioning.<sup>677</sup> The social partners are granted 'a fundamental role in shaping legislation in the social field'.<sup>678</sup> Social dialogue is understood as not an end in itself but a means to an end. As Brian Bercusson aptly put it, the social partners are engaged in a process of 'bargaining in the shadow of the law'.<sup>679</sup> It is important to note also that the explicit reference point for these Treaty provisions is fundamental social rights, specifically rights

<sup>671</sup> European Commission, 'VADEMECUM – A Practical Guide for European Social Partner Organisations and their National Affiliates' (May 2014) 5 <<http://ec.europa.eu/socialdialogue>> accessed 5 February 2016.

<sup>672</sup> European Commission, 'Staff Working Document on the functioning and potential of European sectoral social dialogue', (SEC) (2010) 964 final 6.

<sup>673</sup> European Commission, 'VADEMECUM – A Practical Guide for European Social Partner Organisations and their National Affiliates' (May 2014) 5 <<http://ec.europa.eu/socialdialogue>> accessed 5 February 2016. European Works Councils are based on Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 122, 15.5.2009, 28-44.

<sup>674</sup> European Commission, 'A new start for social dialogue' (2015) 6 <<http://ec.europa.eu/socialdialogue>> accessed 5 February 2016.

<sup>675</sup> Ibid, 10.

<sup>676</sup> Articles 154-155 TFEU contain a modification of provisions first introduced in Articles 3 and 4 of the Agreement on Social Policy annexed to the Treaty on European Union signed at Maastricht on 7 February 1992.

<sup>677</sup> European Commission, 'VADEMECUM – A Practical Guide for European Social Partner Organisations and their National Affiliates' (May 2014) 4 <<http://ec.europa.eu/socialdialogue>> accessed 5 February 2016.

<sup>678</sup> European Commission, 'A new start for social dialogue' (2015) 6 <<http://ec.europa.eu/socialdialogue>> accessed 5 February 2016.

<sup>679</sup> Brian Bercusson, *European Labour Law* (2<sup>nd</sup> edn, Cambridge University Press 2009) 522.

contained in the European Social Charter of 1961 and the Community Social Charter of the Fundamental Social Rights of Workers of 1989 (the Community Social Charter).<sup>680</sup>

The role of the EU is to ‘recognise and promote’ the role of the social partners at EU level, taking into account the diversity of national systems.<sup>681</sup> Dialogue is facilitated by the EU ‘between the social partners, respecting their autonomy’.<sup>682</sup> It is the Commission that has the institutional task of promoting the consultation of ‘management and labour’ and taking ‘any relevant measure’ to facilitate their dialogue by ‘ensuring balanced support’ for the parties.<sup>683</sup> Therefore, the Commission has a dynamic role as both champion and moderator of the social partners.

It is entirely up to the social partners to decide whether to embark on dialogue.<sup>684</sup> It is open to them to engage in autonomous dialogue without a Commission proposal. Autonomous agreements have been concluded at cross-industry level on telework, stress at work, harassment and violence at work, and inclusive labour markets.<sup>685</sup> For example, the Framework Agreement on Harassment and Violence at Work (2007)<sup>686</sup> contains a commitment to a zero-tolerance approach to moral and sexual harassment and physical violence in the workplace. Affiliated organisations should establish procedures to deal with possible cases. Ultimately, under such autonomous arrangements, affiliated organisations of the signatory parties are bound to implement each agreement in accordance with the national procedures and practices specific to management and labour and the Member States.<sup>687</sup> It can be argued that this is a form of hard law although the extent to which it is normative will depend on the national law of each Member State. It is equally possible for the social partners to adopt what the Commission describes as ‘process-oriented texts’ such as frameworks for action with cyclical reporting on benchmarks, joint opinions, guidelines and codes of conduct.<sup>688</sup>

Alternatively, the social partners can choose to trigger the formal process of negotiation in response to a Commission proposal. If so, the TFEU provides for a mandatory two-phase process of consultation that can lead to negotiations and, ultimately, to agreements capable of being converted into binding Union legislative acts (see diagram below). In the first phase, the Commission has an *ex ante* obligation to consult the social partners ‘on the possible direction of Union action’ before submitting proposals in the social policy field.<sup>689</sup> Once the first phase is complete, the Commission decides whether Union action is

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<sup>680</sup> Article 151 TFEU.

<sup>681</sup> Article 152 TFEU.

<sup>682</sup> Article 152 TFEU.

<sup>683</sup> Article 154(1) TFEU.

<sup>684</sup> Article 154(1) TFEU.

<sup>685</sup> In 2002, 2004, 2007 and 2010 respectively. Commission, ‘A new start for social dialogue’ (2015) 8 <<http://ec.europa.eu/socialdialogue>> accessed 5 February 2016.

<sup>686</sup> The framework agreement is available at <[http://www.ueapme.com/docs/joint\\_position/2007\\_Framework\\_Agreement\\_Harassment\\_and\\_Violence\\_at\\_Work.pdf](http://www.ueapme.com/docs/joint_position/2007_Framework_Agreement_Harassment_and_Violence_at_Work.pdf)> accessed 10 February 2016.

<sup>687</sup> Article 155(2) TFEU.

<sup>688</sup> European Commission, ‘A new start for social dialogue’ (2015) 9 <<http://ec.europa.eu/socialdialogue>> accessed 5 February 2016.

<sup>689</sup> Article 154(2) TFEU.

'advisable' and, if so, it has an obligation to embark on a second phase of consultation with the social partners on its content.<sup>690</sup> The social partners, in turn, are required to forward an opinion or recommendation to the Commission. It is at this point that the social partners have the choice to go further in the exercise of their autonomy by, if they 'so desire', converting dialogue into 'contractual relations, including agreements'.<sup>691</sup> The duration of any negotiations should not exceed nine months unless the social partners and the Commission agree to an extension.<sup>692</sup>

Once this period of negotiation on the Commission proposal has begun the Union legislative process is frozen.<sup>693</sup> The Commission no longer has control over the proposal. Where the parties fail to reach an agreement the proposal is defrosted, the Commission regains control of the right of legislative initiative and, if it so wishes, the proposal can be relaunched and may be adopted under the standard legislative procedures for social policy measures.<sup>694</sup> If, however, an agreement is signed by the social partners, two options are available to them. The social partners can either issue an opinion or recommendation which may request the Commission to propose that the Council of the EU issues a decision to implement the agreement, or they can decide to implement it in accordance with their own procedures and practices and those of the Member States.<sup>695</sup> If the social partners wish to pursue the former option the European Parliament is merely informed. The Council retains the ultimate discretion to implement the agreement normally as an annex to a directive. The Commission, however, regards the text of the social partners' agreement as sacrosanct.<sup>696</sup> The Council has accepted that it cannot amend the agreement,<sup>697</sup> not least because such amendments would undermine the balance of power between the social partners and also, by challenging their autonomy, destroy confidence in the system.<sup>698</sup> The latter option, of national implementation, by contrast, does not create a specific obligation on the Member States to implement the agreement of the social partners or to amend national legislation.<sup>699</sup>

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<sup>690</sup> Article 154(3) TFEU.

<sup>691</sup> Article 155(1) TFEU.

<sup>692</sup> Article 154(4) TFEU.

<sup>693</sup> Elaine Whiteford, 'W(h)ither Social policy', in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Oxford University Press 1995) 111-145 at 111.

<sup>694</sup> The relevant legal bases and applicable legislative procedures are contained in Article 153 TFEU.

<sup>695</sup> Article 155(2) TFEU.

<sup>696</sup> Commission Communication concerning the application of the Social Policy Agreement, COM (1993) (600) final, para. 41.

<sup>697</sup> Opinion of 31 March 1994 published in Council Document 6116/94.

<sup>698</sup> Jeff Kenner, *EU Employment Law* (Hart Publishing 2003) 253.

<sup>699</sup> Declaration on Article 4(2) of the Agreement on Social Policy (1992). This agreement was annexed to the Treaty on European Union signed at Maastricht on 7 February 1992. The provisions in Article 4(2) of the Agreement on Social Policy are not contained in Article 155(2) TFEU.

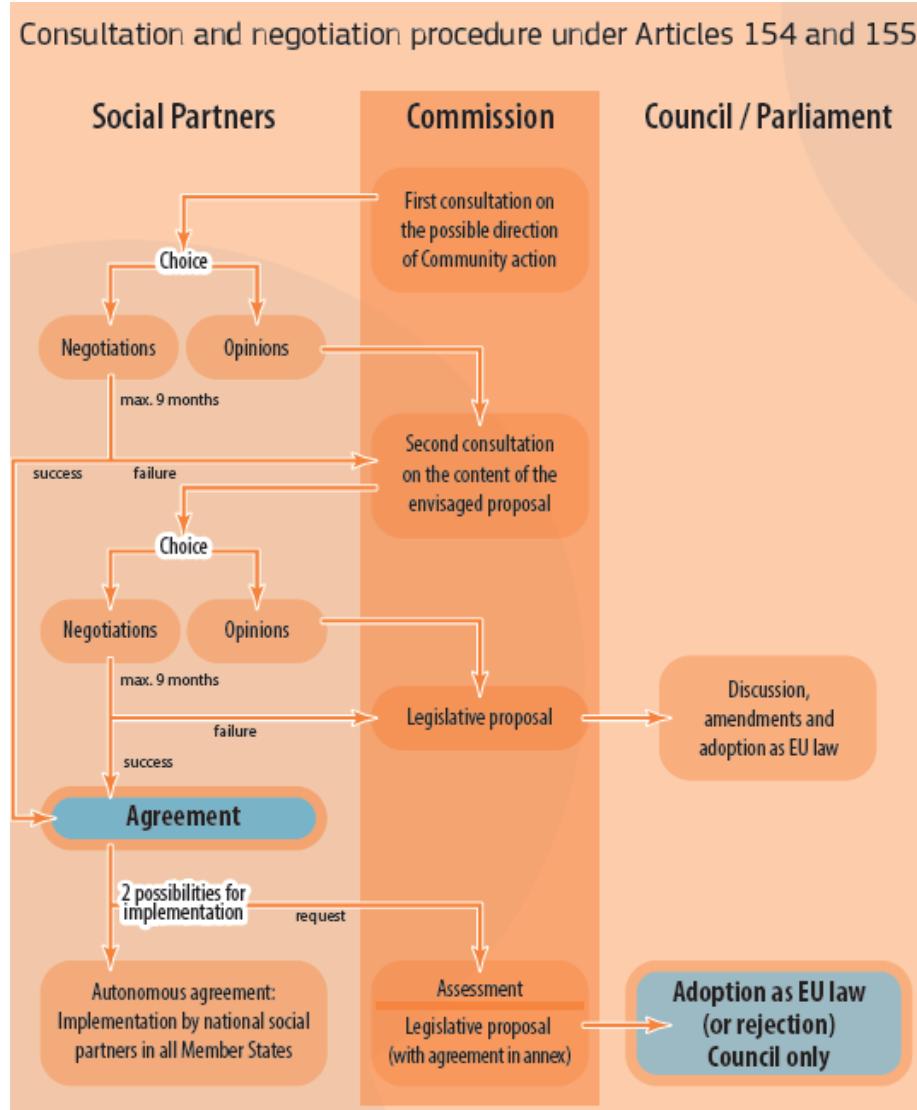


Figure 1: Commission 'A new start for social dialogue' (2015) 7 <<http://ec.europa.eu/socialdialogue>>

Fundamental issues have been raised about the democratic legitimacy and exclusivity of a process that restricts the role of the European Parliament and empowers private actors to make public policy without any direct form of accountability.<sup>700</sup> The Commission has the challenging task of 'ensuring balanced support for the parties'.<sup>701</sup> It must decide who should participate on behalf of whom?<sup>702</sup> According to the CJEU, in order to comply with the Union principle of representative democracy, the Commission and the

<sup>700</sup> Daniela Obradovic, 'Accountability of Interest Groups in the European Lawmaking Process', in Paul Craig and Carol Harlow (eds), *Lawmaking in the European Union* (Kluwer 1998) 354-385 at 355-356.

<sup>701</sup> Article 154(1) TFEU.

<sup>702</sup> Lammy Betten, 'The Democratic Deficit of Participatory Democracy in Community Social Policy' (1998) 23 European Law Review 20, 30.

Council must verify that the parties are ‘sufficiently representative’ before implementing an agreement at EU level.<sup>703</sup>

The Commission has established criteria for organisations to be recognised as partners in European social dialogue. Representative interest organisations must:<sup>704</sup>

- be cross industry or relate to specific sectors or categories and be organised at European level;
- consist of organisations, which are themselves an integral and recognised part of Member State social partner structures and with the capacity to negotiate agreements, and which are representative of several Member States;
- have adequate structures to ensure their effective participation in the consultation process.

The Commission bases its decisions on the representativeness of organisations to be recognised as European social partners on evidence produced by Eurofound, an EU agency responsible for carrying out research on living and working conditions. Eurofound has carried out 38 representativeness studies since 2006.<sup>705</sup> In practice, the Commission has consistently recognised three cross-industry organisations as representative of the economy as a whole. These are:

- BUSINESSEUROPE<sup>706</sup>
- European Centre of Employers and Enterprises providing Public Services (CEEP)
- European Trade Union Confederation (ETUC)

Other organisations are recognised as representing certain categories of workers or undertakings or specific organisations including, *inter alia*, the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME) and the associations of chambers of commerce, Eurochambres.<sup>707</sup>

The sectoral social partners are comprised of 80 organisations from specific economic sectors.<sup>708</sup> Sectoral social dialogue, first established in 1998, is regarded by the Commission as an important governance tool with considerable potential for promoting ‘social cohesion and resilience’.<sup>709</sup> The Commission has created 43 sectoral social dialogue committees comprising 66 social partner organisations covering over 145

<sup>703</sup> Case T-135/96 UEAPME v Council (1998) ECR II-2335, paras. 89-90. The relevant provision is now contained in Article 10(1) TEU, which states that: ‘The functioning of the Union shall be founded on representative democracy’.

<sup>704</sup> Commission, ‘A new start for social dialogue’ (2015) 5 <<http://ec.europa.eu/socialdialogue>> accessed 5 February 2016.

<sup>705</sup> Eurofound, European Observatory of Working Life Representativeness Studies (2016) <<http://www.eurofound.europa.eu/observatories/european-observatory-of-working-life-eurwork/representativeness-studies>> accessed 5 February 2016.

<sup>706</sup> Formerly known as the Union of Industrial and Employers’ Confederations of Europe (UNICE).

<sup>707</sup> Also recognised are Eurocadres, representing trade union professionals and managers, and the European Confederation of Executives and Managerial Staff (CEC).

<sup>708</sup> European Commission, ‘A new start for social dialogue’ (2015) 4 <<http://ec.europa.eu/socialdialogue>> accessed 5 February 2016.

<sup>709</sup> European Commission, ‘Staff Working Document on the functioning and potential of European sectoral social dialogue’, (SEC) (2010) 964 final 5.

million workers. More than 500 texts have been adopted including agreements to be implemented in the Member States either by EU directives or national procedures.<sup>710</sup> For example, social partners in such diverse sectors as hospitals, maritime transport, civil aviation and railways have adopted agreements on working conditions, working time and occupational health and safety, which have been implemented through Council directives using the procedure in Articles 154-155 TFEU.<sup>711</sup> Also, the committees are an increasing part of the process of consultation in responding to issues such as management of change, employment transition, youth unemployment and equal opportunities within the framework of the EU2020 strategy.<sup>712</sup> The strength of sectoral social dialogue lies with the involvement of expert partners closely linked to their sectors and people on the ground.<sup>713</sup> It can be argued that because they are at the ‘coalface’, the sectoral partners have greater democratic legitimacy and are more representative than the larger, more remote, cross-industry partners. Engagement at the micro-level can produce more fruitful results and be part of what the Commission has described as ‘a Union of democratic change’.<sup>714</sup>

To date, four cross-industry framework agreements have been negotiated by the social partners and recommended for implementation at EU level. These agreements have each been presented by the Commission to the Council in the form of a draft directive wrapped around the agreement. In all cases the Council has adopted a directive with the agreement, in the form negotiated by the social partners, as an annex for transposition into national law by all Member States.<sup>715</sup> The conversion of these agreements into the substantive content of EU legislative norms demonstrates the transformative potential of this special type of civil society engagement. The agreements provide for rights to protected parental leave for childcare, time-off for urgent family reasons, and for those in part-time and fixed-term employment relationships.

For the purpose of this case study, the cross-industry agreements between the European social partners on parental leave provide a useful test case. The first agreement, of December 1995, was put into effect

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<sup>710</sup> European Commission, ‘Staff Working Document on the functioning and potential of European sectoral social dialogue’, (SEC) (2010) 964 final 5.

<sup>711</sup> Ibid, 6.

<sup>712</sup> Ibid.

<sup>713</sup> Joint position of the European Federation of Education Employers (EFE) and the European Trade Union Committee for Education (ETUCE): The contribution of sectoral social dialogue to the strengthening of social dialogue (21 January 2015) <[http://www.educationemployers.eu/uploads/files/joint\\_position\\_efee\\_etuce\\_sectoral\\_social\\_dialogue\\_21\\_01\\_2015.pdf](http://www.educationemployers.eu/uploads/files/joint_position_efee_etuce_sectoral_social_dialogue_21_01_2015.pdf)> accessed 10 February 2016.

<sup>714</sup> Ibid.

<sup>715</sup> Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145, 19 June 1996, 4–9; Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L 68, 18 March 2010, 13–20; Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 14, 20 January 1998, 9–14; Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10 July 1999, 43–48.

by Directive 96/34/EC.<sup>716</sup> It is a good example of how the method of social partner consultation and agreement can be used to overcome an impasse between the EU institutions and may help to further the promotion and protection of human rights in the EU.<sup>717</sup> The Commission had first put forward a legislative proposal on parental leave in 1983 but it was not progressed because of a lack of agreement in the Council.<sup>718</sup> However, the idea was kept alive in the Community Social Charter of 1989, which called for measures to be developed ‘enabling men and women to reconcile their occupational family obligations’ as a means towards equal treatment of the sexes.<sup>719</sup> The Commission had consulted the social partners on the issue in February 1995 leading to the agreement between them several months later and, following a formal proposal from the Commission, its rapid adoption in full as an annex to a Council directive.

The social partners’ agreement of 1995 grants an individual non-transferable right to all workers to at least three months of parental leave until their child reaches a given age of up to eight years, to be determined at national level. It also gives workers time off on grounds of *force majeure* for urgent family reasons. Employees who avail themselves of parental leave or urgent family leave are able to maintain their acquired employment rights during leave and are also protected against dismissal. The social partners subsequently revisited the Directive in 2009, at the Commission’s request, and signed off a new agreement which, *inter alia*, increased the minimum period of parental leave entitlement from three to four months for each employee, with at least one month being transferable between parents. Following the same process, the 2009 agreement was implemented by Directive 2010/18/EU,<sup>720</sup> which repealed and replaced the 1996 Directive. For the first time the organisation representing European small and medium-sized businesses, UEAPME, was a signatory of a cross-industry agreement along with the main cross-industry partners, BUSINESSEUROPE, CEEP and ETUC. The involvement of UEAPME was significant because it had been excluded from the original framework agreement and won its place at the negotiating table by bringing a legal challenge to the first Parental Leave Directive on the grounds of lack of representativeness of the social partners.<sup>721</sup>

On the one hand, the social partners’ agreement on parental leave, as revised, is disappointing because it contains no right for employees to paid parental leave. In practice, there is evidence from international

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<sup>716</sup> Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145, 19.6.1996, 4–9.

<sup>717</sup> Jeff Kenner, *EU Employment Law* (Hart Publishing 2003) 267–275.

<sup>718</sup> Proposal for a Council Directive on Parental Leave and Leave for Family Reasons, COM(83) 686 final, OJ C 333, 9.12.1983, 6–8.

<sup>719</sup> Community Charter of Fundamental Social Rights of Workers (1989) Point 16, Social Europe 1/90 <<http://www.eesc.europa.eu/resources/docs/community-charter--en.pdf>> accessed 10 February 2016.

<sup>720</sup> Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L 68, 18.3.2010, 13–20.

<sup>721</sup> Case T-135/96 Union Européenne de l’artisanat et des petites et moyennes entreprises (UEAPME) v Council of the European Union (1998) ECR II-2335. UEAPME was unsuccessful in seeking the annulment of the Directive but the challenge exposed shortcomings in the Commission’s process of selecting a balance of representatives of the social partners: Jeff Kenner, *EU Employment Law* (Hart Publishing 2003) 259–263.

studies that, where paid parental leave is available, the take up of leave is significantly higher.<sup>722</sup> On the other hand, the social partners were working within the constraints of their Treaty mandate, which can be interpreted as excluding measures concerning ‘pay’ from social policy directives.<sup>723</sup> It is inevitable that the outcome of ‘European collective bargaining’ will be the lowest common denominator of what can be agreed by parties that represent the two sides of industry. Nevertheless, the social partners regarded the issue of reconciling work and family life as sufficiently important to recommend implementation of measures at EU level. Moreover, the agreements allow for more favourable provisions to be introduced by Member States or, subject to national law and practice, by national social partners. Data published by the European Parliament in 2015 shows that 23 out of 28 Member States require parental leave to be paid and the average compensation rate across the Member States when parental leave is taken is at 50% of previous incomes.<sup>724</sup> All Member States, with the exception of Cyprus, provide for longer parental leave than the minimum four months in the directive with an average of 86.9 weeks across the EU.<sup>725</sup> The evidence points, therefore, to a significant upwards harmonisation of rights to parental leave.

Most importantly, in the wider human rights context, the European social partners’ willingness to negotiate and conclude the first framework agreement in 1995 was a seminal achievement in recognising the right to protected parental leave at a transnational level, acting as a catalyst for its broader recognition as an international human right. In 2000, the right was included in an ILO Recommendation,<sup>726</sup> although the ILO has not yet adopted a Convention on parental leave. This ground breaking agreement ensured that, firstly, when the Charter of Fundamental Rights of the EU was adopted in 2000, parental leave was recognised as a fundamental right in the context of the reconciliation of family and professional life and, more broadly, the legal, economic and social protection of the family.<sup>727</sup> Specifically, Article 33(2) of the Charter provides that ‘everyone ... shall have the right to protection from dismissal for a reason connected with ... the right to ... parental leave following the birth or adoption of a child’. The explanation on Article

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<sup>722</sup> Peter Moss, ‘10<sup>th</sup> International Review of Leave Policies and Related Research 2014’ (International Network on Leave Policies and Research, 2014) 17 <[http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual\\_reviews/2014\\_annual\\_review\\_korr.pdf](http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual_reviews/2014_annual_review_korr.pdf)> accessed 10 February 2016.

<sup>723</sup> Article 153(5) TFEU.

<sup>724</sup> European Parliament Directorate-General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, ‘Maternity, paternity and parental leave: Data related to duration and compensation rates in the European Union: Study for the FEMM Committee’ (2015) 66 <[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509999/IPOL\\_STU\(2015\)509999\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509999/IPOL_STU(2015)509999_EN.pdf)> accessed 10 February 2016. Parental leave is unpaid in Cyprus, Greece, Ireland, Malta, the Netherlands, Spain, and the United Kingdom.

<sup>725</sup> Ibid. The average is somewhat distorted by the availability of two years’ parental leave in the public sector in Greece.

<sup>726</sup> Maternity Protection Recommendation, 2000 (No 191) para 10(3) <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:R191](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R191)> accessed 10 February 2016.

<sup>727</sup> Article 33 CFREU. The right of the family to social, legal and economic protection is sourced from Article 16 of the European Social Charter of 1961 <<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035>> accessed 10 February 2016.

33(2),<sup>728</sup> to which ‘due regard’ must be given when interpreting the Charter,<sup>729</sup> refers specifically to the 1996 Directive as the source of this right. Secondly, the importance of the rights contained within the social partners’ agreement has been recognised by the Court of Justice of the EU (CJEU). In *Meerts*,<sup>730</sup> the CJEU observed that the provision of the Framework Agreement which maintains rights acquired by workers before they take parental leave, including some rights arising from changes in law or collective agreements during leave,<sup>731</sup> should be interpreted widely as meaning that workers are intended to be in the same situation when they return from leave as that in which they were before that leave.<sup>732</sup> The CJEU took account of the objective of making it easier to reconcile family and professional life and concluded that the clause ‘must be interpreted as articulating a particularly important principle of [Union] social law which cannot therefore be interpreted restrictively’.<sup>733</sup>

In November 2015, the Commission launched a fresh consultation of EU social partner organisations on how to further improve work-life balance and reduce obstacles to women’s participation in the labour market.<sup>734</sup> The fact that a further consultation was necessary highlighted the problem that attempts to negotiate further agreements in this area for implementation at EU level have been unsuccessful. Indeed, the Commission has withdrawn its 2008 proposal to strengthen rights in the Maternity Leave Directive,<sup>735</sup> and has instead consulted the social partners to establish whether there is willingness on their part to ‘adapt the current EU legal and policy framework to allow for parents with children or those with dependent relatives to better balance caring and professional responsibilities, encourage a more equitable use of work-life balance policies between men and women, and to strengthen gender equality in the labour market’.<sup>736</sup> The social partners are therefore being encouraged to autonomously negotiate an agreement in this area and implement it because it is highly unlikely that there will be political agreement in the Council on the issue.

It is not a coincidence that, with the exception of the revised Framework Agreement on Parental Leave, in 2009, there have been no new cross-industry social partner agreements since 1999.<sup>737</sup> When it was

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<sup>728</sup> Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, 17.

<sup>729</sup> Article 6(1) TEU.

<sup>730</sup> Case C-116/08 *Meerts v Proost NV* (2009) ECR I-10063.

<sup>731</sup> At the time of the case the relevant provision was in Clause 2.6 of the 1995 Framework Agreement. It is now contained in Clause 5.2 of the Revised Framework Agreement of 2009.

<sup>732</sup> Case C-116/08 *Meerts v Proost NV* (2009) ECR I-10063, para 39.

<sup>733</sup> Case C-116/08 *Meerts v Proost NV* (2009) ECR I-10063, para 42.

<sup>734</sup> Commission, ‘Work-Life Balance: Commission launches consultation of EU social partner organisations’ (11 November 2015) <<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=2380>> accessed 10 February 2016.

<sup>735</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 348, 28.11.1992, 1.

<sup>736</sup> Commission, ‘Work-Life Balance: Commission launches consultation of EU social partner organisations’ (11 November 2015) <<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=2380>> accessed 10 February 2016.

<sup>737</sup> Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, 43–48.

launched, the social dialogue was regarded as a centrepiece of the ‘European Social Model’ (ESM). The ESM is a fluid concept based on a consensus which, according to the Commission White Paper on Social Policy (1995), is underpinned by certain ‘values’, including ‘democracy and individual rights, free collective bargaining, the market economy, equality of opportunity for all and social welfare and solidarity’, which are ‘held together by the conviction that economic and social progress must go in hand. Competitiveness and solidarity have both been taken into account in building a successful Europe for the future’.<sup>738</sup> The ESM places the social dimension at the core of the European integration project.<sup>739</sup> Over recent years, however, the consensus over the ESM has become increasingly fragile and, consequently, it has moved from the core to the periphery of EU integration. Catherine Barnard argues that the ESM ‘is facing some sort of existential crisis’.<sup>740</sup> Firstly, there is a crisis of legitimacy, as the economic is increasingly prioritised over the social by the EU institutions.<sup>741</sup> Secondly, employment protection and upholding of fundamental social rights is no longer at the fore. Before the economic crisis there was a semblance of balance between security at work and flexibility in the labour market, so-called ‘flexicurity’,<sup>742</sup> but after the crisis ‘positive narratives for labour law were unceremoniously dumped’ as stringent ‘labour market reforms’ were required as a condition for bail-outs.<sup>743</sup> Thirdly, the crises of legitimacy and purpose are combined with a crisis of regulation.<sup>744</sup> Legislating has become more difficult in an increasingly heterogeneous EU and competing narratives, such as removing obstacles to free movement, envisage less legislation.<sup>745</sup> It follows that, as Barnard observes, employers’ associations, such as BUSINESSEUROPE, ‘no longer have the incentive to engage in European-level collective bargaining, with a view to reaching a collective agreement that can be extended to all workers’.<sup>746</sup>

This case study has demonstrated that EU engagement with the social partners, and more particularly autonomous social dialogue, has proved to be a dynamic and effective tool for cross-industry and grassroots involvement in EU decision making processes. In some cases, as with the agreements on parental leave, social dialogue has made an important contribution to the advancement of fundamental social rights. It is important to emphasise that all of this has been achieved by a civil society consensus rather than top down imposition by political actors at EU or national level. Also, the social partners are

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<sup>738</sup> COM(94) 333, para 3.

<sup>739</sup> Catherine Barnard, ‘EU Employment Law and the European Social Model: The Past, the Present and the Future’ (2014) 67(1) *Current Legal Problems* 199, 201.

<sup>740</sup> *Ibid.*, 202.

<sup>741</sup> *Ibid.*, 202-208. In the judicial sphere, for example, Barnard highlights the Court of Justice’s rulings in *Viking* and *Laval* in which ‘the economic interests of migrant companies were seen to prevail over the social interests of (some groups of) workers’, 205: Case C-438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* (2007) ECR I-10779 and Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* (2007) ECR I-11767.

<sup>742</sup> Jeff Kenner, ‘New Frontiers in EU Labour Law: From Flexicurity to Flex-security’, in Samantha Currie and Michael Dougan (eds), *Fifty Years of the Treaty of Rome: Looking Back and Looking Forward* (Hart Publishing 2009) 279.

<sup>743</sup> Catherine Barnard, ‘EU Employment Law and the European Social Model: The Past, the Present and the Future’ (2014) 67(1) *Current Legal Problems* 199, 212.

<sup>744</sup> *Ibid.*, 213-215.

<sup>745</sup> *Ibid.*, 214.

<sup>746</sup> *Ibid.*

increasingly involved in promoting both tripartite and autonomous bipartite social dialogue in the wider European neighbourhood and among accession states as an essential component of building trust and social cohesion.<sup>747</sup> Looking forward, in responding to the ‘existential crisis’ in the ESM identified by Barnard, the social partners could be given an enhanced role in rebuilding European social solidarity as part of a rebalancing between economic and social interests in the Union.<sup>748</sup>

However, one problem remains - the issue of democracy and representativeness of the social partners. On the one hand, it can be argued that, even if the Commission has chosen the most representative of social partners for consultation, the cross-industry social partners still do not represent a majority of employers and workers in the EU, or indeed the self-employed.<sup>749</sup> This raises questions about the compatibility of social dialogue with the principle of ‘equality of citizens’.<sup>750</sup> It is also questionable whether the European social partners should, at least potentially, have greater influence over social policy than the European Parliament, which is regarded as the direct representative of citizens at the Union level.<sup>751</sup> On the other hand, the increasing prominence of sectoral social dialogue has widened citizen involvement at a more micro level. Moreover, social dialogue is wholly consistent with Article 11 TEU, under which the EU institutions have a duty, ‘by appropriate means’, to ‘give citizens and representative associations the opportunity to make known and publicly exchange their views’ including through ‘regular dialogue’.

To conclude, social dialogue is highly specialised to the field of employment rights and the labour market sectors in which it operates, but there is no reason why some of its methods cannot be translated to other areas of civil society engagement. In areas such as environmental rights or consumer rights there is the basis for interaction between, for example, producers, consumers and governments, not only in a tripartite or multiparty fashion, but also via autonomous dialogue with governmental actors encouraging and facilitating the process. In California, for example, environmental dialogue is becoming increasingly sophisticated.<sup>752</sup> The social partners tend to operate in their own ‘bubble’. There is a need for more interaction between the social partners and other civil society actors. It is recommended that the Commission draws from best practice in social dialogue and identifies ways in which its methods may be applied in other areas of law and policy, both internal and external, to deepen civil society engagement on human rights. Mutual autonomous learning between the social partners and other civil society actors, perhaps through a regular forum, could be an effective means to achieve this goal.

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<sup>747</sup> For example, see ETUC Press Release, ‘ETUC and European employers promote social dialogue in Macedonia (FYROM), Montenegro and Serbia’ (2 February 2015) <<https://www.etuc.org/press/etuc-and-european-employers-promote-social-dialogue-macedonia-fyrom-montenegro-and-serbia#.VryUNPKLShsaccessed>> 10 February 2016.

<sup>748</sup> Catherine Barnard, ‘EU Employment Law and the European Social Model: The Past, the Present and the Future (2014) 67(1) Current Legal Problems 199. Barnard, at 224-229, suggests a European Social Compact to match the Fiscal Compact.

<sup>749</sup> Lammy Betten, ‘The Democratic Deficit of Participatory Democracy in Community Social Policy’ (1998) 23 European Law Review 20, 32.

<sup>750</sup> Article 9 TEU.

<sup>751</sup> Article 10(2) TEU.

<sup>752</sup> For example, the California Environmental Dialogue (CED) is ‘an on-going, open dialogue among California business, environmental, and government leaders about critical current environmental policy issues and long-term environmental strategies’ <<http://cedlink.org/>> accessed 10 February 2016.

## D. Strengthening Engagement with HRDs on Human Rights

### 1. General Context

As stated by former UN Commissioner for Human Rights, Mary Robinson, HRDs are the ‘vital bridge between the theory and practice of human rights protection’.<sup>753</sup> Through this role, HRDs frequently become targets of human rights violations themselves, which is why protection mechanisms have to be developed.<sup>754</sup> Support for HRDs constitutes an integral part of the EU’s external policy on human rights. The EU has notably sought to protect HRDs through the UN, as examined in a previous FRAME Report 5.1.<sup>755</sup> In addition, the EU has also developed its own mechanisms and measures to support and protect HRDs, such as the EU Guidelines for HRDs<sup>756</sup> adopted in 2004 by the European Council and seeking to streamline EU actions in this field, the EU Strategic Framework and the Action Plan on Human Rights and Democracy (2015-2019),<sup>757</sup> and the European Instrument on Democracy and Human Rights. In 2014, on the occasion of the tenth anniversary of the EU Guidelines for HRDs, the Council of the EU committed to ‘intensify its political and material support to human rights defenders’, ‘improve its support to vulnerable and marginalised human rights defenders’ and ‘intensify outreach to those operating in remote and rural areas’.<sup>758</sup>

FRAME Report 7.2 analysed the EU’s engagement with HRDs on human rights and considered this engagement as being ‘broadly positive and beneficial for both parties, especially with regard to their receipt of funding under instruments such as the European Instrument for Democracy and Human Rights’.<sup>759</sup> However, the authors of this report also revealed a set of problematic issues that needed to be addressed in order for the EU to strengthen its engagement with HRDs. The four issues presented hereafter will be further scrutinised in the following sections of this chapter.

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<sup>753</sup> Mary Robinson, ‘Linking the National and the International: a Challenge for Human Rights Defenders’, speech delivered at the Dublin Platform for Human Rights Defenders, Dublin, 17 January 2002, cited in Kevin Boyle (ed), *A Voice for Human Rights. Mary Robinson* (Philadelphia, University of Pennsylvania Press 2006) 108.

<sup>754</sup> Alice M. Nah, Karen Bennett, Danna Ingleton and James Savage, ‘A Research Agenda for the Protection of Human Rights Defenders’ (2013) 5(3) *Journal of Human Rights Practice* 401.

<sup>755</sup> Grażyna Baranowska, Anna-Luise Chané, David D’Hollander, Agata Hauser, Jakub Jaraczewski, Zdzisław Kędzia, Mariusz Lewicki, Anna Połczyńska, ‘Report on the analysis and critical assessment of EU engagement in UN bodies’ (FRAME D5.1 2014).

<sup>756</sup> EU Council, ‘EU Guidelines on Human Rights Defenders’ (General Affairs Council 8 December 2008) para 1 <<http://www.consilium.europa.eu/uedocs/cmsUpload/GuidelinesDefenders.pdf>> accessed 11 March 2016.

<sup>757</sup> EU Council, *EU Strategic Framework and Action Plan on Human Rights and Democracy 2015-2019* (European Union 2015) 10.

<sup>758</sup> European Union Delegation to the United Nations, ‘EU Council Conclusions on 10th Anniversary of EU Guidelines on Human Rights Defenders’ (23 June 2014) <[http://eu-un.europa.eu/articles/en/article\\_15216\\_en.htm](http://eu-un.europa.eu/articles/en/article_15216_en.htm)> accessed 14 March 2016.

<sup>759</sup> FRAME D7.2, iii.

Firstly, FRAME Report 7.2 demonstrated that the EU is not making as much use of HRDs in the field as it could do. Given that HRDs are close to the issues on the ground, it is necessary to improve communication between these HRDs in the field and the EU.

Secondly, the lack of uniform access to the EU in third countries has been pointed out in Report 7.2. In order to improve engagement, uniform access has to be provided to HRD liaison officers in the EU's third country missions.

Thirdly, the way EU funding is structured and distributed has been criticised by many HRDs interviewed in the preparatory work for Report 7.2. These complaints in particular are centred upon the conditions placed on certain grant applications, which reportedly excluded smaller NGOs and HRDs and the administrative burden of applying for the grants. A balance has to be found between the EU's need for due diligence in managing its funding and the HRDs' need to focus on their beneficial work, rather than jumping through administrative hoops for the EU.

Finally, we recommend that the EU should organise more fora along the lines of the example of the EU-NGO Forum and the EIDHR Forum in order to strengthen its engagement with HRDs and CSOs. Such fora should also be expanded to the national, regional and local levels.

## 2. Improving the Communication between HRDs in the Field and the EU

Pursuant to the EU Guidelines for HRDs, the EU should look to improve the protection of HRDs by 'maintaining [...] suitable contacts with human rights defenders, including by receiving them in Missions and visiting their areas of work' and 'consideration could be given to appointing specific liaison officers, where necessary on a burden sharing basis, for this purpose'.<sup>760</sup> These measures have been reiterated in the revised EU Strategic Framework and Action Plan on Human Rights and Democracy 2015-2019 adopted on 20 July 2015, which notably recommends 'increasing burden sharing and co-ordination between EU Delegations and Member State Embassies on HRD protection activities'.<sup>761</sup>

These recommendations have been translated into practice through the creation of Focal Points for Democracy and Human Rights-related matters in EU diplomatic missions.<sup>762</sup> Most of the EUDs have one or two such focal points, whose contact details are posted on the EUD's websites. Moreover, people have been nominated in these EUDs as 'dedicated liaison officers' acting as the first point of contact for HRDs on the ground to access the EU.<sup>763</sup> The publication of the contact details of human rights focal points and

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<sup>760</sup> EU Council, 'EU Guidelines on Human Rights Defenders' (General Affairs Council 8 December 2008) para. 10 <<http://www.consilium.europa.eu/uedocs/cmsUpload/GuidelinesDefenders.pdf>> accessed 11 March 2016.

<sup>761</sup> EU Council, *EU Strategic Framework and Action Plan on Human Rights and Democracy 2015-2019* (European Union 2015) 10.

<sup>762</sup> <<http://www.eidhr.eu/focal-points>> accessed 11 March 2016.

<sup>763</sup> European External Action Service, 'The EU's policy on Human Rights Defenders' <[http://eeas.europa.eu/human\\_rights/defenders/index\\_en.htm](http://eeas.europa.eu/human_rights/defenders/index_en.htm)> accessed 11 March 2016.

HRD Liaison Officers on the websites of the EEAS and the EUDs constituted one of the actions mentioned in the Action Plan on Human Rights and Democracy of 2012 to be completed by December 2012 by the EEAS, the Member States and the European Commission.<sup>764</sup>

However, HRDs reported difficulty identifying contacts in third countries in some cases as delegation details were not kept up to date. The previous FRAME Report 7.2 pointed out that as of January 2015, not all EUDs had published the contact details of the HRD liaison officers their websites. The interviews conducted for that report also revealed criticism of the fact that ‘the persons responsible are frequently changing, leaving gaps until a new person is appointed and are not always sufficiently responsive to the needs expressed by HRDs’.<sup>765</sup>

On the website that is meant to display the contact details of all the 100 focal points<sup>766</sup> established by the EU, ‘operational contacts’ are provided for all focal points, but 22 of them have no ‘political contact’ indicated.<sup>767</sup> Given that this matter is of crucial importance for the protection of the HRDs, the EEAS, the Member States and the European Commission should ensure that all relevant contact details are published on the website and to regularly verify that all details are still up-to-date.

A 2013 study requested by the European Parliament’s Subcommittee on Human Rights in order to assess the implementation of the European Union Guidelines on HRDs with case-studies on the situation of HRDs in Kyrgyzstan, Thailand and Tunisia, revealed that HRDs in the study considered the engagement of the focal points with HRDs remained a work in progress.

The appointment of HRD liaison officers in EUDs is a welcome and important commitment toward supporting HRDs. However, the time allowed for actually ‘liaising with HRDs’ in this newly appointed position appears to be undefined, and many HRDs did not know how to engage with their EU Liaison.

It is not clear how decisions are made about dedicating ‘HRD liaison work’ in each country, or what the job descriptions entail. Slotted HRD responsibilities in with a number of other responsibilities the diplomat has in their role in the delegation may leave ‘HRD liaison work’ minimised.<sup>768</sup>

Moreover, the study insisted on the importance of sharing the responsibilities for engaging and working with HRDs between EU Member State Missions (MSMs) and the EUD political sections.

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<sup>764</sup> EU Council, *EU Strategic Framework and Action Plan on Human Rights and Democracy* (European Union 2012) 15.

<sup>765</sup> FRAME D7.2, 143.

<sup>766</sup> 22 focal points exist in the ‘Asia, Central Asia and Pacific Islands’ region, 12 in the ‘Eastern European partners and Russia’ region, 20 in ‘Latin America, Central America and Caribbean’, 12 in ‘Middle East and Northern Africa’ and 34 in Sub-Saharan Africa. This information is available at <<http://www.eidhr.eu/focal-points>> accessed 11 March 2016.

<sup>767</sup> <<http://www.eidhr.eu/focal-points>> accessed 11 March 2016.

<sup>768</sup> Karen Bennett, ‘Assessing the implementation of the European Union Guidelines on HRDs. The cases of Kyrgyzstan, Thailand and Tunisia’, Study requested by the European Parliament’s Subcommittee on Human Rights (June 2013) <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410221/EXPO-DROI\\_ET\(2013\)410221\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410221/EXPO-DROI_ET(2013)410221_EN.pdf)> accessed 12 March 2016, 67.

So far, ‘many MSMs rely on the EUD to lead their HRD interventions, and for some, to provide their mission with information on HRDs. To be effective the HRD liaison officer position needs sufficient structure and support from colleagues and across MSMs’.<sup>769</sup>

This analysis demonstrates that the liaison work of the HRD liaison offices has to be clearly defined in a set of responsibilities guaranteeing the efficiency of the system and make sure that sufficient time and energy is allocated to ‘liaising’ with HRDs in the field.<sup>770</sup> Moreover, a clear structure involving the support from colleagues in Member States Missions, through an effective system of exchange of information and communication, may improve the EU’s engagement with HRDs.

In addition, the practice of filter groups should be further developed.<sup>771</sup> The EU has, for example, established a filter group in Guatemala as an ‘informal mechanism’ to address the most critical cases of threats against HRDs.<sup>772</sup> As described in a report by Amnesty International,<sup>773</sup> this filter group was initially composed by Deputy Heads of Mission from the UK and The Netherlands embassies, as well as the General Consul of Finland, and expanded in January 2008 to include representatives of the Delegation of the European Commission and the Swedish Embassy. The filter group has been set up to receive, investigate and forward cases concerning allegations of violations against HRDs to the regular Deputy Heads of Missions, who in turn refer the cases to the Heads of Missions. In addition to its mission of monitoring the situation of HRDs, such a group may also provide HRDs with an established point of contact and consequently facilitate communication between HRDs and EU missions. Hence, this instrument may serve as a relevant communication channel to be recommended to other EU missions.

In order to strengthen its engagement with HRDs, the EU should adopt a pro-active approach in seeking to enter into contact with these HRDs, through the use of local media or directly through mobile phones, social media or the internet. However, in certain regions or remote areas, such channels may be hindered by the lack of technological means. Furthermore, these instruments can be subject to surveillance and

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<sup>769</sup> Ibid.

<sup>770</sup> Karen Bennett, ‘European Union Guidelines on Human Rights Defenders: a review of policy and practice towards effective implementation (2015) 19(7) The International Journal of Human Rights 908, 913.

<sup>771</sup> Joint letter by Amnesty International, Christian Solidarity Worldwide, Front Line Defenders, Human Rights Without Frontiers, International Rehabilitation Council for Torture Victims, The Observatory for the Protection of Human Rights Defenders, Peace Brigades International, Protection International, Reporters sans frontières to Mr Olof Skoog, Chair of the Political and Security Committee, Ms Riina Kionka, Head of Division, Human Rights - Policy Guidelines, EEAS, Mr Rolf Timans, Head of Division, Human Rights - Policy Instruments, EEAS, Mr Wojciech Wysocki, Division, Human Rights - Policy Instruments, EEAS, Mr Charles-Michel Geurts, Deputy Head of Division, Human Rights - Policy Instruments, EEAS and Ms Małgorzata Górska, Division, Human Rights - Policy Instruments, EEAS (25 November 2011).

<sup>772</sup> Parliamentary Questions at the European Parliament, Answer given by High Representative/Vice-President Mogherini on behalf of the Commission (1 June 2015) <<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-004771&language=EN>> accessed 12 March 2016.

<sup>773</sup> Amnesty International, ‘The European Union - Rising to the Challenge of Protecting Human Rights Defenders’ (June 2008) <<https://www.amnesty.org/fr/documents/document/?indexNumber=EUR01%2F009%2F2008&language=en>> accessed 12 March 2016.

consequently lead to censorship and endanger the HRDs' safety. A recent study conducted into the use of digital technologies by HRDs confirmed that

[t]he central role that information and communications play in HRDs' work is often the object of control and harassment by adversaries. This includes direct surveillance and intelligence gathering for the purposes of monitoring HRDs' actions, contacts and networks; using information gathered as evidence against HRDs and their organizations; more manipulative forms of information misuse such as entrapment or the circulation of misinformation; and direct interventions in access to and circulation of information by HRDs such as blocking and censoring web-based content.<sup>774</sup>

Hence, a thorough analysis of the particularities in each of these areas has to be undertaken in order to ensure safe and effective communication with the HRDs in these areas. There is no 'one-size-fits-all' approach and the actors are encouraged to make iterative use of tools such as 'activity mapping, actor mapping, analysis of security incidents and use of the "risk formula" in order to produce an analysis of their environment upon which to base security and emergency plans'.<sup>775</sup> The EU has to assess the risks and protect the HRDs' identities and privacy.<sup>776</sup> The data retrieved should be collected and disseminated to other EUDs to document experiences and improve the protection of HRDs.<sup>777</sup>

### 3. Consistency and Uniform Access to the EU in Third Countries

As noted in FRAME Report 7.2, the engagement between EUDs and HRDs in third countries is worryingly inconsistent and cases have been reported in which the points of contact in EUDs in third countries were not always accessible to the HRDs in these countries. The Report also noted a high degree of variability between different countries, with certain delegations being much more easily accessible than others.<sup>778</sup>

In addition, there are third countries that do not have EUDs and only limited EU Member State Missions, such as Bahrain and Iran.<sup>779</sup> In those countries, the EU should collaborate with other actors, such as the EU Member State missions or the UN to protect HRDs.

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<sup>774</sup> Stephanie Hankey and Daniel Ó Clunaigh, 'Rethinking Risk and Security of Human Rights Defenders in the Digital Age (2013) 5(3) Journal of Human Rights Practice 535, 536.

<sup>775</sup> Ibid, 533.

<sup>776</sup> Alice M. Nah, Karen Bennett, Danna Ingleton and James Savage, 'A Research Agenda for the Protection of Human Rights Defenders' (2013) 5(3) Journal of Human Rights Practice 401, 415.

<sup>777</sup> For further information, see FRAME D3.2, part III.

<sup>778</sup> FRAME D7.2, 165.

<sup>779</sup> Karen Bennett, 'Assessing the implementation of the European Union Guidelines on HRDs. The cases of Kyrgyzstan, Thailand and Tunisia', Study requested by the European Parliament's Subcommittee on Human Rights (June 2013) <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410221/EXPO-DROI\\_ET\(2013\)410221\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410221/EXPO-DROI_ET(2013)410221_EN.pdf)> accessed 12 March 2016, 71.

Even in States where the EU has a delegation, it has been noted that the EU's engagement with HRDs in remote areas outside the major cities remains problematic.<sup>780</sup> In order to strengthen this engagement, the EU should adopt a pro-active approach in seeking to enter into contact with these HRDs, as described above.

On 9 December 2015, the EU Commissioner for International Cooperation and Development, Neven Mimica, announced the launch of the EU Human Rights Defenders Mechanism, which is managed by a consortium of 12 independent international NGOs and funded by the EIDHR.<sup>781</sup> This new mechanism, named ProtectDefenders.eu, offers a highly relevant example of a collaborative effort, joining the forces of CSOs active in human rights to the ones of the EU in seeking to protect HRDs.

ProtectDefenders.eu is notably committed to reaching HRDs in remote areas and places in which it is particularly dangerous to work in the field of human rights protection.<sup>782</sup> Through its website, this mechanism offers an online tool for HRDs at risk in order to ask for emergency support and temporary relocation. The emergency support mechanism provides a permanent helpline at number +353 1 21 00 489 where 24/7 support can be given to HRDs facing immediate risk, with the possibility to speak to someone in Arabic, English, French, Russian or Spanish. Furthermore, a secure contact form is available on the website with secure one-way encryption similar to the system provided by banks. HRDs may contact ProtectDefenders.eu 'via encrypted email using GPG or PGP using the public keys of the relevant staff'. These tools aim to reach every corner of the world, including the most difficult and remote locations.<sup>783</sup>

These recent developments, directly involving the capacities of 12 NGOs active in the field of human rights, constitute major progress towards better protection of HRDs, notably in remote areas.

In addition, we recommend that a collaborative research agenda involving academics, practitioners and HRDs be developed to identify the environments and practices of HRDs in the field.<sup>784</sup> Such broad analysis should allow the identification of strategies to protect HRDs, which could be studied and systematised as 'best practices'. Based on this valuable source of information, the EU could strengthen the capacities of HRDs working in remote areas offering them tailored support and strengthening the engagement of the EU in the protection of HRDs.<sup>785</sup>

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<sup>780</sup> FRAME D7.2, 160.

<sup>781</sup> Front Line Defenders, Reporters Without Borders (RSF), World Organisation Against Torture (OMCT), International Federation for Human Rights (FIDH), Economic, Social and Cultural Rights Network (ESCR-Net), International Gay and Lesbian Association (ILGA), Urgent Action Fund for Women Human Rights Defenders (UAF), Protection International, Peace Brigades International (PBI), Euro-Mediterranean Foundation of Support to Human Rights Defenders (EMHRF), Forum Asia and East and Horn of Africa Human Rights Defenders Project (EHAHRDP).

<sup>782</sup> <<https://www.protectdefenders.eu/>> accessed 13 March 2016.

<sup>783</sup> <<https://www.protectdefenders.eu/emergency-support.html>> accessed 13 March 2016.

<sup>784</sup> Alice M. Nah, Karen Bennett, Danna Ingleton and James Savage, 'A Research Agenda for the Protection of Human Rights Defenders' (2013) 5(3) Journal of Human Rights Practice 401, 416.

<sup>785</sup> FRAME D7.2, 162.

#### 4. Delivery of Funding

EU funding plays a vital role in strengthening HRDs protection. However, both the administrative burden required to apply for and manage EU funding and the limited scope of funding opportunities have been identified in FRAME Report 7.2 as obstacles for HRDs to access EU funding.<sup>786</sup>

Support to HRDs in situations where they are at risk is one of the core objectives of the Regulation 235/2014 establishing a financing instrument for democracy and human rights worldwide. Pursuant to its Article 3(4), the EU shall give information and guidance to assist HRDs in the funding application process.<sup>787</sup> As to the administrative burden of the procedures, the preamble of Regulation 235/2014 states that

In such countries or situations, and in order to address urgent protection needs of human rights defenders and democracy activists, the Union should be able to respond in a flexible and timely manner, through the use of faster and more flexible administrative procedures and by means of a range of funding mechanisms. This should particularly be the case when the choice of procedural arrangements could impact directly on the effectiveness of the measures or could subject beneficiaries to serious intimidation, retaliation or other types of risks.<sup>788</sup>

This EU urgent financial or material support to HRDs operates mainly through the EIDHR.<sup>789</sup> Its financial envelope for the period 2014-2020 corresponds to € 1,332,752,000.<sup>790</sup> This assistance may be allocated through different means: first, global calls for proposals may be issued in relation to all objectives of the EIDHR. The recently established EU HRDs mechanism ProtectDefenders.eu is an example of one such project.<sup>791</sup> The eligibility criteria are specified in the calls themselves. The same is true for the second category of programs, namely country calls for proposals which are specific to one country and cover local projects. Third, direct support may be granted to HRDs through an *ad hoc* program of small grants,<sup>792</sup> which constitutes the most flexible program. This support is only available for HRDs at risk and consists of direct small grants of up to € 10,000. Requests to obtain these grants may be addressed to the delegation or to the EIDHR team and shall provide information on the name of the HRD, the background of the case,

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<sup>786</sup> Ibid, 166.

<sup>787</sup> European Parliament and Council Regulation (EU) 235/2014 of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide [2014] OJ L 77/85, art 3(4).

<sup>788</sup> European Parliament and Council Regulation (EU) 235/2014 of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide [2014] OJ L 77/85

<sup>789</sup> <<http://www.eidhr.eu/side-panels/human-rights-defenders/small-grants>> accessed 13 March 2016.

<sup>790</sup> Europe Aid, European Instrument for Democracy and Human Rights (EDIHR), ‘How We Finance Aid’, <[http://ec.europa.eu/europeaid/how/finance/eidhr\\_en.htm](http://ec.europa.eu/europeaid/how/finance/eidhr_en.htm)> accessed 13 March 2016.

<sup>791</sup> <<http://www.eidhr.eu/events/new-eidhr-call-for-proposal-establishing-a-european-union-human-rights-defenders-mechanism>> accessed 13 March 2016.

<sup>792</sup> <<http://www.eidhr.eu/funding>> accessed 13 March 2016.

the amount of grant requested and its purpose. This small grant program allows the EIDHR to be more flexible and to react in a more timely manner than through its general financial program. Yet, this program is not always well-known by practitioners including by the diplomats themselves.<sup>793</sup> In order to remediate this failure, sessions should be organised within EU missions in order to present the mechanism and its procedures.

Furthermore, the recently established mechanism ProtectDefenders.eu has developed an emergency grants programme in order to ensure access to urgent security measures to protect HRDs, their families and their work. This support is based on the emergency grants programmes of several partners of the mechanism, which also include non-EU funding. Applications for such grants are evaluated on a case-by-case basis against a series of criteria, including the risks HRDs face related to the human rights work they undertake and the need for urgent support. Such grants do not exceed €10,000. The list of types of activities eligible for this support includes physical security; digital security; communications; capacity building in security; secure transportation; legal support; medical support (including psycho-social support and rehabilitation); humanitarian assistance (including family support); urgent relocation and urgent monitoring, reporting and advocacy.<sup>794</sup>

Finally, ProtectDefenders.eu also allocates temporary relocation grants for HRDs at risk.<sup>795</sup> These grants allow HRDs to temporarily relocate within their country or abroad in case of urgent threat. During the relocation period, they may rest, benefit from training, pursue their human rights work from a secure location and prepare their safe return. It should be highlighted that in case of emergency, a decision as to the application by HRDs at risk can be provided within five days.

This myriad of mechanisms, coupled with the complexity and diversity of procedures and eligibility criteria may lead to confusion and diminish the awareness of HRDs of their existence. An efficient communication by the EU and by CSOs active in the field may increase the visibility of these tools. Moreover, the EUDs should actively support HRDs in the application procedures via training sessions and assistance in the drafting process. Preparing applications that are robust and well-constructed constitutes a challenge for HRDs, particularly for smaller organisations. It is crucial for HRDs to formulate their applications in a credible and understandable manner, but the administrative burdens linked to these applications may hinder this process. The creation of flexible mechanisms constitutes a positive development in this regard. More generally, the EU should strive to simplify these procedures as much as possible. Finally, the different EUDs should coordinate among themselves in this field and exchange information as to best practices and capacity building. These best practices should be summarised and published on the websites of these delegations so that the information is easily accessible to HRDs.

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<sup>793</sup> Karen Bennett, 'European Union Guidelines on Human Rights Defenders: a review of policy and practice towards effective implementation (2015) 19(7) *The International Journal of Human Rights* 908, 919.

<sup>794</sup> <<https://www.protectdefenders.eu/emergency-support.html>> accessed 13 March 2016.

<sup>795</sup> <<https://www.protectdefenders.eu/temporary-relocation-grants.html>> accessed 13 March 2016.

## 5. Organisation of Fora to Strengthen the Engagement

FRAME Report 7.2 revealed that the institutional engagement with HRDs across the EU institutions was advanced and that the people interviewed by the authors of the Report ‘were particularly pleased with the EU-NGO Forum, which is seen by participants attending it as being very beneficial’.<sup>796</sup> Similarly, the authors of Report 7.2 noted that the EIDHR Forum has been successful in engaging with HRDs. The current study examines the benefits of establishing similar local or regional events.

As noted above, there is a need for streamlining and developing coherent approaches towards engagement with NSAs.<sup>797</sup> This streamlining may imply the expansion of certain mechanisms that work well, such as the EIDHR Forum and the EU-NGO Forum. These annual forums provide relevant platforms for discussion and the exchange of ideas.<sup>798</sup> For instance, the EIDHR Forum organised by the European Commission is dedicated to practice in the field of human rights and more particularly related to the implementation of the EIDHR. The 2014 edition gathered 400 NGOs and focused on HRDs with a threefold objective: first, define priorities and avenues for concrete EU support; second, assessment of the implementation of the EU Guidelines on HRDs; third, allow HRDs to exchange information, views and contacts and to network with the EU institutions.<sup>799</sup>

This forum could be expanded to the national, regional and local level in order to focus on issues of particular interest to the specific country, region or locality concerned. CSOs active in the geographic area concerned should be closely involved in the organisation of the forum. EUDs could seize this opportunity to provide some training to HRDs or offer further guidance on the delivery of funding, risk prevention and security, or the development of new communication channels. Academics could also be invited to share results of their research on HRDs and human rights protection in the particular area concerned.

The recently established EU HRDs mechanism may also provide an interesting avenue to promote the coordination between organisations supporting HRDs, EU institutions and other relevant actors.<sup>800</sup>

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<sup>796</sup> FRAME D7.2, 165. See also above, point III.C.3.

<sup>797</sup> See for instance II.C and III.C.3.

<sup>798</sup> European Commission, ‘EU Human Rights Instruments and the Lisbon Treaty: State of Play and Way Forward’ (12<sup>th</sup> Annual EU-NGO Forum for Human Rights, July 2010) 57 <[https://ec.europa.eu/europeaid/sites/devco/files/report-12th-eu-ngo-forum-lisbon-treaty-2010\\_en\\_0.pdf](https://ec.europa.eu/europeaid/sites/devco/files/report-12th-eu-ngo-forum-lisbon-treaty-2010_en_0.pdf)> accessed 28 August 2015; See also World Coalition Against the Death Penalty, ‘EU-NGO forum: death penalty is a priority’ <<http://www.worldcoalition.org/EU-NGO-forum-death-penalty-is-a-priority.html>> accessed 28 August 2015.

<sup>799</sup> Commission, ‘EIDHR Forum 2014’ <<http://www.eidhr.eu/events/eidhr-forum-2014>> accessed 14 March 2016.

<sup>800</sup> <<https://www.protectdefenders.eu/>> accessed 13 March 2016.

## IV. General Conclusions

This report has presented a number of recommendations as to further steps that the EU could take to streamline and strengthen engagement with NSAs – businesses, IFIs, CSOs and HRDs – in the protection and the promotion of human rights.

The EU as a whole does make efforts to engage with NSAs – as one interviewee put it social dialogue is part of the EU's DNA. In each area we examined over the course of these reports (FRAME D 7.1, FRAME D 7.2 and FRAME D 7.3) we found channels for engagement, forums, public consultations etc. were common. However, that does not mean that engagement is perfect or that it cannot be improved. The EU is already starting from a strong position and adaptations should be possible within the existing frameworks.

### A. Cross-Cutting Issues

This report has examined three cross-cutting issues from a transversal perspective: public consultations, transparency and coherence. Public consultations serve as a key point for engagement with NSAs across the EU in the policy-making process. The EU regime governing public consultations has been recently revised with the adoption of the Better Regulation Package presenting new Guidelines by the European Commission on 19 May 2015. These Guidelines strengthen the European Commission's commitment to carry out high quality, transparent and accessible consultations. The new Guidelines indicate that there will be more openness and responsiveness within the Commission towards public participation in policy-making.

The fact that the public will be able to share views on the entire lifecycle of a given policy constitutes a particularly interesting feature of these new Guidelines. Public consultation needs to be less formulaic, less statistical, less of a 'tick-box' exercise. The practical value of these Guidelines remains to be seen, since the effective implementation of these Guidelines requires a whole shift in the way the Commission has operated thus far. The EU needs to open the door to more substantive engagement with stakeholders and keep the door open. The EU should not just consult for new policies, but engage on older policies as well. It needs to consult at the right time, not at the end, but throughout the policy development process, so that it can have a genuine impact on the policy outcomes. The EU needs to communicate with stakeholders on how feedback impacts on policy development.

Moreover, we recommend that human rights organisations should be systematically consulted at an early stage of the policy-making process. The European Commission should pro-actively reach out to affected communities and human rights defenders in its consultations. The impact on human rights should be systematically assessed for EU draft legislation and the Regulatory Scrutiny Board should include at least one person with human rights expertise.

The second cross-cutting issue examined in this report is transparency. This constitutes the lifeblood of engagement since NSAs have to be aware of EU activities, policy developments and the policy-making process more generally in order to be able to contribute to them. This report has demonstrated how the continuous pressure of the European ombudsman, the MEPs, civil society and the public in general has generated a number of positive developments towards increased openness and transparency of the negotiating process. However, much progress still needs to be made to open this debate to the public at large. For instance, the dissemination of documents to NSAs should be developed in a more systematic and proactive manner, not exclusively relying upon specific requests by these NSAs. More generally, the EU is not communicating its actions and policies to HRDs and CSOs working on the ground well enough. For instance, as far as public consultations are concerned, adequate awareness-raising publicity should be undertaken and communication channels should be capable of targeting HRDs and CSOs active in a given field.

The lack of coherence in EU policy and action is another cross-cutting issue analysed in this report. In some cases the EU can serve as a catalyst for engagement between different NSAs and it should ensure that human rights issues become a central theme in this engagement. The EU should think of its engagement with NSAs on the subject of human rights holistically as much as possible. Development financing has been examined in this report as an example of this type of cross-cutting engagement with NSAs. Given that the EU has an obligation under the EU Charter to comply with human rights law and an obligation under international law not to use other international organisations to violate human rights, the EU should not give money to development finance actors who do not incorporate sufficient human rights safeguards in their project work and their activities more generally. The EU to its credit has actively engaged with the World Bank during its consultations on amending its human rights safeguards. However, if the World Bank fails to adopt adequate safeguards on human rights for its activities as a whole, the EU should distribute its development funding through other channels. In general, the EU should try to leverage inter-relationship between CSOs, IFIs, business and HRDs to promote better human rights outcomes in the context of development funding.

## B. Engagement with IFIs

The consequences of the financial and economic crisis of 2007-2008 and of the euro crisis in 2010 are still perceptible in European States to this day and have impacted the human rights of citizens living in these States. These two crises have increased the IMF's interaction with the EU, notably through the Troika. In this report the Greek financial assistance program negotiated by the Troika with the Greek Government has been scrutinised in order to assess the EU's engagement with the IMF in relation to the promotion and the protection of human rights. It has been noted that both the EU and the euro area should speak with one voice in the Troika in order to strengthen their position and to ensure a more coherent representation. The EU should conduct credible human rights impact assessments as a prerequisite to providing loans.

In this regard, the recent discussions as to the European Social Pillar constitute an interesting development towards a better inclusion of the social dimension in the integration process leading to a deeper and fairer Economic and Monetary Union. Once established, the European Commission could use this reference framework to assess the impact of the measures negotiated between the Troika on the one hand and the Member States on the other hand.

More generally, the EU should engage with IFIs to foster better protection of human rights and increased policy coherence for development. The EU Platform for Blending in External Cooperation could serve to evaluate the positive impact of development finances on human rights protection and to prevent human rights violations of such policies. This platform could also enable a better exchange of information and of best practices.

### C. Engagement with Businesses

As far as the EU's engagement with businesses is concerned, the language of CSR needs to change in the EU, CSR has come to have a toxic meaning particularly among the groups the EU needs to strengthen its engagement with e.g. trade unions and SMEs. Trade unions see CSR as a PR exercise, which is entirely voluntary. SMEs see CSR as being something for large companies and not for SMEs.

There is a need for stronger political leadership and commitment to business and human rights. The absence of Commissioners at the Multistakeholder forum on CSR, given the surrounding context, was noted. This observation sends a message that despite hundreds of companies and other stakeholders attending, the political leadership of the EU is not interested in business and human rights issues. The subject of business and human rights as whole needs to be better integrated and co-ordinated across different policy areas such as trade, development, procurement, financial regulation etc.

Moreover, the EU should do a better job of promoting engagement on CSR issues to trade unions, SMEs and consumer groups. It also needs to actively re-engage consumers groups in the business and human rights dialogue. Finally, the EU should play a more active role in providing advice and information to SMEs on business and human rights issues.

### D. Engagement with CSOs

So far, the EU's engagement with civil society can be described as a patchwork of dialogues. The challenge for the EU is to provide efficient and effective dialogue structures that are not replicated, and are consistent and coherent across the EU institutions.

There is a clear need to diversify the CSOs that the EU engages with to tackle the identified bias towards large, mainly Brussels-based CSOs. We recommend that the EU tackle this bias by increasing the formality

of selection procedures to deal with preferential treatment of certain CSOs. Our research also identified a number of opportunities through which the EU can engage with grassroots CSOs and boost the ownership of local actors. The EU should expand the use of information and communication technology to engage with smaller CSOs through online dialogue and advertise consultations more widely through the internet to target smaller CSOs.

This research also examined the issue of engagement with social partners. Autonomous social dialogue is an effective and dynamic tool for cross-industry and grassroots involvement, yet there are concerns over the representativeness of social partners. Our research recommends that the methods used in social dialogue should also be translated to other areas of civil society engagement, such as environmental rights.

A number of suggestions have been discussed in this report to improve the streamlining of engagement structures, ranging from an enhanced coordination between expert groups to the expansion of mechanisms that work well, such as the EIDHR Forum and the EU-NGO Forum, from the international level to regional or national levels. Coherency in the EU's approaches toward civil society is necessary for effective EU-CSO interactions on human rights. The Action Plan on Human Rights and Democracy 2015-2019 should be at the heart of strengthening engagement with CSOs. This includes several actions that will enable stronger CSO-engagement, including facilitating and supporting structured exchanges, strengthening the capacity of CSOs to hold governments accountable, improving the quality of local level consultations, and stepping up engagement with political parties and citizens' movements.

Finally, the research highlighted the importance of funding for CSOs to increase their capacity to engage effectively with the EU in human rights protection in third countries. The research identified the many problems that CSOs face in obtaining funding, including the complexity of the process, the inexperience of funding evaluators and the competition between CSOs. We recommend that the EU do more to facilitate the ability of smaller CSOs to access funding, for example by engaging in capacity-building or providing for sub-granting. Overall, there are numerous challenges but many opportunities for change.

## E. Engagement with HRDs

In order to strengthen its engagement with HRDs, the communication channels used by the EU to enter into contact with HRDs should be improved and the EU should adopt a pro-active approach toward entering into contact with HRDs. The European Commission should ensure that all relevant contact details are published on the delegations' websites and to regularly verify that all details are still up-to-date. Moreover, the practice of filter groups should be further developed by the EU in its missions in order to provide HRDs with an established point of contact. Finally, a thorough analysis of the particularities of the specific areas in which the HRDs are operating has to be undertaken in order to ensure safe and effective communication with the HRDs. There is no 'one-size-fits-all' approach and the EU should produce an analysis of the environment upon which to base security and emergency plans to support the HRDs in the field.

The recently established EU Human Rights Defender Mechanism, managed by a consortium of 12 independent international NGOs and funded by the EIDHR, constitutes a positive development strengthening the EU's engagement with HRDs and a relevant example of a collaborative effort, joining the forces of CSOs active in human rights to the ones of the EU in seeking to protect HRDs.

In addition to the emergency support put in place by this mechanism and by its commitment to reaching HRDs in remote areas and places in which it is particularly dangerous to work in the field of human rights protection, this EU Mechanism could also support HRDs in obtaining EU funding. The complexity and diversity of procedures and eligibility criteria to obtain such funding require an efficient communication by the EU and by CSOs active in the field in order to increase the visibility of these tools and to support HRDs in the application process.

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## Appendix

Programme of the FRAME workshop in London on 3 July 2015 on *Research and engagement with non-state actors: looking at groupings of non-state actors – businesses, civil society, human rights defenders, and international financial institutions.*

### Workshop Programme

**3 July 2015**

09:00-09:30      **Registration + Tea/Coffee**

09:30-09:40      **Opening Address**

Professor Jeff Kenner, FRAME Project Leader, University of Nottingham

09:40-10:20      **Keynote Speech and Discussion**

John Morrison, Executive Director, Institute for Human Rights and Business

10:20-11:30      **Panel 1: Business and EU Human Rights**

#### ***CSR Sprawl – Maintaining Control and Coherency over a Diverse Policy***

Our reports for the FRAME project have illustrated the diverse range of human rights issues that corporate social responsibility seeks to address from protecting the rights of indigenous people to promoting labour and environmental standards. The subject concerns multiple policy actors within the EU who are engaging with business and civil society. The diversity of this policy area generates a significant risk of incoherence in the EU's CSR policy. This risk has, if anything, been exacerbated by recent re-configurations of the European Commission's Directorates General. The changes have led to some uncertainty over which DG has overall control over this policy area. The panellists will express their views on how to improve the coherence of the EU's CSR policy, how to strengthen engagement so as to more effectively achieve the EU's human rights objectives.

Chair – Professor Mary Footer, University of Nottingham

Mr. Jerome Chaplier, Co-Ordinator, European Coalition of Corporate Justice

Mr. Matthias Thorns, Senior Adviser, International Organisation of Employers

Dr. Michael Addo, Member of the United Nations Working Group on Business and Human Rights, University of Exeter

11:30-11:50      **Break**

11:50-13:00      **Panel 2: Civil Society Organisations and Human Rights Defenders**

**Bursting the Brussels Bubble – Diversifying EU Engagement with CSOs and HRDs**

Our FRAME research conducted thus far has revealed that the EU tends to focus its engagement on large, professionalised CSOs with Brussels-based offices and CSO platforms, such as for example, ECCJ and Business Europe. This process creates a risk that the EU fails to recognise the diversity and heterogeneity of CSOs and the contribution of HRDs. Equally seeing CSOs as a uniform group of actors may result in a system that is exclusionary of certain groups of organisations and a system in which insufficient regard is paid to their resources, potential and capabilities. The participants will discuss their experience of engaging with the EU and the potential implications of this finding and whether the EU would benefit from diversifying the range of CSOs it engages with both within and outside the EU. Panellists will also address ways in which engagement can be diversified possibly by harnessing the networks of smaller CSOs it has created through, for example, the EIDHR and the civil society dialogue network.

Chair – Professor Wolfgang Benedek, University of Graz

Ms. Marilyn Croser, Director, CORE (UK Coalition for Corporate Justice)

Mr. Andrew Anderson, Deputy Director, Front Line Defenders

Ms. Glevys Rondon, Director, Latin American Mining Monitoring Programme

13:00-14:00 **Lunch**

14:00-15:10 **Panel 3: International Financial Institutions and EU Human Rights**

*Overseeing Human Rights Compliance in Financing Arrangements: A Shared Burden?*

Our FRAME research thus far has identified the many positive and negative human rights impacts of IFI financing arrangements. This panel will look at ways of sharing the burden of monitoring human rights compliance between different actors. This may necessitate exchanging good practice between the IFIs, changes to project guidelines or building stronger relationships and communication channels with civil society. The panellists will discuss their experience of how IFIs monitor compliance with human rights and their thoughts on how this could be improved. As the World Bank is currently reviewing its safeguards in this area, the representative from the World Bank will examine how it engages with civil society actors working in the field of human rights and how this can be improved and strengthened.

Chair – Dr. Stuart Wallace, University of Nottingham

Ms. Eleni Kyrou, Senior Social Development Specialist, European Investment Bank

Mr. Guggi Laryea, International Affairs Officer, World Bank

Mr. Luiz Vieira, Coordinator of the Bretton Woods Project

15:10-15:30 **Coffee**

15:30-17:00 **Roundtable Discussion and Conclusion**

Chair – Professor Dominic McGoldrick, University of Nottingham

Professor Robert McCorquodale, British Institute of International and  
Comparative Law and University of Nottingham

Dr. Nariné Ghazaryan, Brunel University

Mr. Nicolas Hachez, University of Leuven

17:00

**Finish**