



# **Policymakers' Experiences Regarding Coherence in the European Union Human Rights Context**

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## **Policymakers' Experiences Regarding Coherence in the European Union Human Rights Context**

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## Executive Summary

This report is submitted in connection with Work Package 8 of the FP7 FRAME (Fostering Human Rights Among European Policies) project. The report falls within Cluster Two, tasked to look at the actors in the European Union's Multi-Level, Multi-Actor Human Rights Engagement. Work Package 8, 'Coherence Among EU Institutions and Member States', examines the principles, competences, actions and interactions of EU institutions and the Member States that characterise human rights policies and that lead to coherence or incoherence in the EU and Member States' promotion of human rights. The potential for 'horizontal' coherence and incoherence was examined in the Work Package's first report, Deliverable 8.1, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies'. The Work Package's second report, Deliverable 8.2, 'EU and Member State competences in human rights', examined 'vertical' coherence and incoherence, produced by the interaction between the EU and its institutions and the Member States.

In this report, we try to put a face on the results of previous reports in Work Package 8 and to get a sense of how coherence or incoherence appears in practice in the activities and discourse of policymakers in EU institutions, the Member States and in their vertical and horizontal interaction. The report is based almost entirely on interviews with policymakers, which includes primarily EU officials, but is interpreted broadly to include also Member States and non-state actors. Given the emphasis on actors for this Cluster and the Work Package, the report maintains the focus on them, in this case both as the basis for the choice of interview subjects and in terms of the research question, with an emphasis on different actors as potential 'agents of coherence'. The questions that have been posed during the interviews are based on the findings from previous reports in Work Package 8. They begin with the understanding of coherence developed in Deliverable 8.1, which sees incoherence arising from three potential sources: structural, policy (in terms of competing concepts and visions or policy regimes) and interests. Policymakers have been asked specifically about their own experiences of coherence/incoherence in the context of EU human rights policy.

The main body of the report (section II) looks at EU institutions as potential 'agents of coherence' or avenues for incoherence. Through the views of policymakers working in the context of the principal EU institutions, it provides an account of the role of the institutions in promoting or undermining coherence in EU human rights policy, including examples of best practices of coherence, as well as what are considered to be the main sources of incoherence in the views of the policymakers involved. Section III is devoted to Member State policymakers with responsibility for EU policies, and is limited to the analysis of the views of representatives from two Member States interviewed for the present study. Finally section IV is devoted to a thematic case study on 'Coherence in EU Business and Human Rights Policy', which examines how coherence or incoherence appears in practice in the activities and discourse of EU institutions, the Member States and other actors on the subject of business and human rights.

Overall, the report has found that different types of incoherence emerge in the work of all EU institutions and bodies. Each EU institution has a role as an 'agent of coherence' in EU human rights policy, while at the same time at risk of facing different types of incoherence in its work. The same is true for Member

States and more generally for policymakers involved in the development of EU human rights policy. All EU institutions show good practices and potential avenues to aid coherence. However, while all EU institutions play a role in the coherence of EU human rights policy, some are institutionally better placed to act as 'agents of coherence' in EU human rights policy. In this regard, the report has highlighted best practices as well as limitations and sources of incoherence. Each institution was also found to report potential limitations and shortcomings in the context of the coherence of its human rights work, some of which were found to be more irresolvable than others. Further, different EU institutions show very different levels and sources of incoherence, whether structural, policy or interest-based.

On the whole structural incoherence dominates the accounts of interviewees, which in turn may give rise to other sources of incoherence, including policy or interest-based incoherence. The complexities of the institutional set up of EU human rights policymaking clearly emerges and provides a perhaps worrying picture of competing processes, structures and mandates overwhelming the policymakers themselves. On one hand, there appear to be too many processes taking place at the same time, with some overlap. On the other hand, the resources to follow all such processes as well as carrying out the necessary human rights related work were regularly reported to be limited and insufficient. Further, interviewees often reported to be working in a context of 'information overload' in which keeping on top of all relevant knowledge was a challenge in itself. At the same time communication barriers within and between institutions made it impossible to attain full knowledge of all competing processes.

The issue of policy incoherence, in terms of competing concepts and visions or policy regimes, received some attention from the interview subjects. The most prominent example reported by many interviewees was the fundamental rights/human rights divide, which resulted from the internal/external aspect of incoherence in EU human rights policy. This theme was also related to the role of international human rights instruments and standards, on one hand receiving insufficient attention from EU policymakers and institutional actors, on the other providing a useful avenue to avoid the internal/external disconnect in EU human rights policy. The issue of interest-based incoherence, which by definition requires more in depth thematic studies, received less attention from interviewees. The case study on business and human rights (section IV) presents a useful example of the type of research necessary to fully investigate issues of interest-based incoherence, which remains a problem for numerous other areas of human rights and other institutions. The case study investigates the role of a wide multiplicity of actors in relation to one cross-cutting theme, including how they relate to the different policy frameworks, and how they relate to each other in relation to a specific theme and push forward the debate, issues and ultimately human rights policy.

Overall a varied picture of challenges and recommendations emerges from the accounts of the different actors involved, who offer a range of practical solutions to overcome the sources of incoherence which often underlie their work. A number of concrete recommendations - emerging from the views of the interviewees and informed by our own analysis - have been put forward on each institution and are listed in the final section of this report (section V).

## List of abbreviations

ACP	African, Caribbean and Pacific group of States
AFET	European Parliament Foreign Affairs Committee
CEPEJ	European Commission for the Efficiency of Justice of the Council of Europe
CFR	Charter of Fundamental Rights
CFSB	Common Foreign and Security Policy
CFTA	Continental Free Trade Area
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CSP	Country Strategy Paper
COHOM	Human Rights Working Group of the Council of the European Union
COREPER	Committee of Permanent Representatives
CSDP	Common Security and Defence Policy
CSO	Civil Society Organisations
CSR	Corporate Social Responsibility
DCI	Development Cooperation Instrument
DG	Directorate General
DG DEVCO	European Commission's Directorate General for Development and Cooperation
DG EMPL	Directorate General for Employment, Social Affairs and Inclusion
DG FISMA	Directorate General for Financial Stability, Financial Services and Capital Markets Union
DG GROW	Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
DG HOME	Directorate General on Migration and Home Affairs
DG JUST	Directorate General for Justice and Consumers
DG NEAR	Directorate General for Neighbourhood and Enlargement Negotiations
DG TRADE	Directorate General for Trade

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DROI	European Parliament Subcommittee on Human Rights
EC	European Commission
ECCJ	European Coalition for Corporate Justice
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESCR	Economic, Social and Cultural Rights
EDF	European Development Fund
EEAS	European External Action Service
EHRC	Equality and Human Rights Commission
EIDHR	European Instrument for Human Rights and Democracy
ENI	European Neighbourhood Instrument
ENP	European Neighbourhood Policy
EP	European Parliament
EU	European Union
FRA	European Union Agency for Fundamental Rights
FREMP	Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons of the Council of the European Union
FTA	Free Trade Agreement
GSP	Generalised Scheme of Preferences
HRBA	Human Rights Based Approach
IA	Impact Assessment
IGO	Intergovernmental Organization
ILO	International Labour Organization
ISO	International Organization for Standardization
INTA	European Parliament International Trade Committee

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JHA	Justice and Home Affairs
JRO	Joint Return Operation
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
LIBE	European Parliament Committee on Civil Liberties, Justice and Home Affairs
MAF	Multiannual Framework of the European Union Agency for Fundamental Rights
MEP	Member of the Parliament
MS	Member State
MSF	Multistakeholder Forum
NAP	National Action Plan
NGO	Non-governmental Organisation
NHRI	National Human Rights Institution
OECD	Organisation for Economic Co-operation and Development
OHCHR	United Nations Office of the High Commissioner for Human Rights
OP ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
OSCE	Organization for Security and Co-operation in Europe
PI	Partnership Instrument
RBA	Rights Based Approach
SIA	Sustainability Impact Assessment
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNDP	United Nations Development Programme
UNGP	United Nations Guiding Principles on Business and Human Rights
VW	Volkswagen

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## I. Methodology and Approach

### A. Introduction

This report is submitted in connection with Work Package 8 of the FP7 FRAME (Fostering Human Rights Among European Policies) project. The report falls within Cluster Two, tasked to look at the actors in the European Union's Multi-Level, Multi-Actor Human Rights Engagement. In this report, we try to put a face on the results of previous reports in Work Package 8 and to get a sense of how coherence or incoherence appears in practice in the activities and discourse of policymakers in EU institutions, the Member States and in their vertical and horizontal interaction. The report is based entirely on interviews with policymakers, which includes primarily EU officials, but is interpreted broadly to include also Member States and non-state actors. Interview material has been supplemented by EU documents, case law and secondary academic sources. Given the emphasis on actors for this Cluster and the Work Package, the report maintains the focus on them, in this case both as the basis for the choice of interview subjects and in terms of the research question, with an emphasis on different actors as potential 'agents of coherence'.

The main body of the report looks at EU institutions as potential 'agents of coherence' or avenues for incoherence. Through the views of policymakers working in the context of the principal EU institutions, it provides an account of the role of the institutions in promoting or undermining coherence in EU human rights policy, including examples of best practices of coherence, as well as what are considered to be the main sources of incoherence in the views of the policymakers involved. A separate smaller section is devoted to Member State policymakers with responsibility for EU policies, and is limited to the analysis of the views of representatives from a couple of Member States interviewed for the present study. Finally the last section is devoted to a thematic case study on 'Coherence in EU Business and Human Rights Policy', which examines how coherence or incoherence appears in practice in the activities and discourse of EU institutions, the Member States and other actors on the subject of business and human rights.

The questions that have been posed during the interviews are based on the results of previous deliverables in Work Package 8. They begin with the understanding of coherence developed in Deliverable 8.1, which sees incoherence arising from three potential sources: structural, policy (in terms of competing concepts and visions or policy regimes) and interests. Policymakers have been asked specifically about their own experiences of coherence/incoherence in the context of EU human rights policy. The report also sets out to test if some of the findings of previous reports in the work package are found in the experience of the interview subjects.

Policymakers' opinions present a particular viewpoint, especially when they are asked to discuss their own work or that of the institutions they work in. Further, the current study is by no means representative of the views of policymakers broadly, but only of a select few. Yet when 'looking at things from the inside' an interesting picture and important findings on the issue of coherence and incoherence in EU human rights policy emerge. On one hand perfect coherence may be impossible to achieve, and the question of

competences poses serious limitations to any discussion of coherence in an EU context, while interest-based incoherence is also seen by some policymakers as being part and parcel of the EU as an institution, made up of competing stakeholders, interests and ultimately diverse Member States. On the other, interesting areas of best practice in human rights policy coherence emerge, including through the work of different actors or institutions as 'agents of coherence'. On the whole structural incoherence dominates the accounts of interviewees, which in turn may give rise to other sources of incoherence, including policy or interest-based incoherence. Whether arising from Member States or the institutions themselves, structural incoherence may be perceived as being more or less entrenched in different contexts. Overall a varied picture of challenges and recommendations emerges from the accounts of the different actors involved, who offer a range of practical solutions to overcome the structural tensions which often underlie their work. Recommendations put forward by interviewees in this context range from changes in working methods or information management, to shifts in institutional working culture, mandates and policy documents.

## B. Definition of coherence

This study builds on the findings of our previous reports - in particular Deliverable 8.1 on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies and Deliverable 8.2 on EU and Member State competences in human rights - and starts from the definition of coherence in EU human rights policy developed in that context. The first report in particular developed a definition of policy coherence, arguing that, in EU policy, coherence in human rights policy entails:

policymaking that seeks to achieve common, identifiable goals that are devised and implemented in an environment of collaboration, coordination and cooperative planning among and within the EU Institutions, among the EU Institutions and Member States, as well as among EU Member States. This policymaking considers the internal (within EU borders) and external (with third countries or other partners) aspects of human rights policies, together with the vertical (policies handed to Member States by the EU) and horizontal relationships (policies among EU Institutions or among Member States). Additionally, human rights policymaking ensures the respect for the universality and indivisibility of human rights in each policy dimension.<sup>1</sup>

That same report found that incoherence is introduced into policymaking when (1) structures are ill-designed leading to a lack of coordination in policy design or policy implementation; (2) frameworks have competing visions or overlapping responsibilities; and (3) interests diverge or conflict regarding policy goals. More specifically, structural incoherence is related to the way in which an institution or body is designed, hierarchy of decision-making, power sharing or, in the case of the EU, competence, mandate

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<sup>1</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 18.

and responsibilities. The EU has special challenges given its nature. It has the features of a state, but is not a state. It is intergovernmental while still being supranational. Therefore, when the institutional framework and structure is poorly designed or the powers of the actors are poorly defined, structural incoherence will arise. While the EU is committed to human rights in its treaties and fundamental rights are enumerated in the Charter of Fundamental Rights of the EU, the EU's fundamental and human rights policies are enumerated in framework instruments and action plans. These documents communicate the vision of the EU in this policy area and guide its implementation. Sometimes, frameworks and instruments introduce competing visions or objectives, making it difficult to distinguish the direction of the organisation as a whole. Finally, as a powerful actor in global markets and international fora, the EU is subject to external influence and interest pressure groups. Within its ranks, there are also diverging interests and schools of political and economic thought that seek to influence and shape policymaking. When opposing interests are identified in policymaking, it can also introduce additional incoherence.<sup>2</sup>

The first report in this Work Package, Deliverable 8.1 looked at issues of horizontal coherence between different institutions. The second report, Deliverable 8.2 looked at the issue of vertical coherence between EU institutions and Member States, and found that while there is hope for a more coherent approach to human rights protection by the EU and its Member States, conflicts between the interests of the various actors and the only nascent interpretation by the CJEU of the principles that are supposed to govern these interactions mean that a more coordinated approach to promoting human rights within and without the EU is a long way off. It concluded that the greatest resource for future progress may be found in the conceptual coherence of the idea of human rights itself, with the obligations for implementation it imposes on both the EU and its institutions and on the Member States, with their separate commitments to international human rights conventions.<sup>3</sup>

Both areas of coherence/incoherence, -horizontal and vertical - are investigated in the present study through the views of EU policymakers and Member States. The findings of previous reports concerning the main sources of incoherence in EU human rights policy and possible solutions to overcome them have been tested throughout the present study, in the interviews themselves as well as in their analysis.

## C. Methodology

The current report is based almost entirely on interviews conducted with policymakers and their views on the questions that were posed. To provide a full picture of the issues being discussed as well as an analysis of the views of interviewees, interview data has been supplemented by desk research and an analysis of

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<sup>2</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 19.

<sup>3</sup> Tamara Lewis, Adina Portaru (Raducanu), Ricki Schoen, Karen Murphy, TJ McIntyre, and Graham Finlay, 'EU and Member State competences in human rights', *FRAME Deliverable 8.2*, 31 October 2015, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/23-Deliverable-8.2.pdf>>, ii.

EU primary sources and materials as well as secondary sources, including academic literature. Interviews for the main body of the report were conducted between March and June 2016, while the case study 'Coherence in EU Business and Human Rights Policy' (see section IV) is based on interviews conducted previously as part of the FRAME research project. The methodology for that case study is specifically described at outset of the case study (see section IV.A).

The majority of interviews were carried out in person. When this was not possible interviews were arranged over the telephone or via video conferencing. A table of all interviews conducted is contained in Annex 2. To facilitate open and frank discussions, all interviewees, with the exception of the European Ombudsman, were guaranteed anonymity. Therefore their names and roles beyond their institutional affiliation have not been disclosed. The contributions and views of the interviewees reported in the current study have also been anonymised, and information and answers that could disclose their identities have been omitted from the current research study.

Different research partners were responsible for conducting interviews for different sections of the report. In particular University College Dublin was responsible for sections I; II.B; II.D; II.H; III.B; and V, as well as conducting interviews with policymakers at the Court of Justice of the European Union, Council of the European Union, European External Action Service, and Ireland Ministry of Justice. European Training and Research Centre for Human Rights and Democracy was responsible for sections II.A; II.C; II.F; and III.A as well as conducting interviews with policymakers at the European Commission, the European Parliament, the Fundamental Rights Agency and the Austrian Ministries. The European Inter-University Centre for Human Rights and Democratisation was responsible for the interview and section of the European Ombudsperson (see section II.G). Finally, the University of Nottingham was responsible for all interviews conducted in the context of the case study 'Coherence in EU Business and Human Rights Policy' (see section IV). Each section explains how many interviews were conducted for each institutional actor, whose views the section is based upon, and clear reference is made to the anonymised sources.

The interviews conducted were semi-structured, combining a common set of discussion points for all partners in the form of a questionnaire (with the exception of the case study in section IV) with the opportunity for each interviewer to explore particular themes or responses further. Interviewers were also free to adapt the questionnaire to the interviewees and their role as they thought best. The model questionnaire is attached in Annex 1. Some interviewees were sent the questionnaire in advance and/or other background information on the FRAME research project and in particular about Work Package 8.

Starting with an introduction to the policy area, mandate and responsibilities of interviewees, as well as their relations with other actors, and human rights-related work, the model questionnaire set out to test their experience of coherence and/or incoherence in the context of EU human rights policymaking. In particular the questionnaire contained a number of discussion points on the policymakers' experiences and views of the three main sources of incoherence identified in Deliverable 8.1, namely structural, policy (in terms of competing concepts and visions or policy regimes) and interests, as well as specific issues and findings which emerged in the previous research on these topics, conducted in the context of Deliverables 8.1 and 8.2. The questionnaire also set out to identify examples of coherence and best practices in overcoming instances of incoherence. Finally the questionnaire offered the possibility of testing out

previous recommendations and findings from previous reports, depending on the institutional position and thematic expertise of the interviewee.

Each section of the report on each of the EU institutional bodies contains the findings from the interviews conducted with policymakers in that context, including policymakers from other institutions who discussed issues of coherence within those bodies or relevant inter-institutional issues. These findings are supplemented by the analysis and observations of the authors, taking into account the broader context of the topic of human rights policy coherence and different institutional actors. The same goes for sections about policymakers in Member States. Anonymous quotations have been used extensively throughout the report to provide a greater insight into and illustration of the opinions of the policymakers and the way they described their work.

A number of potential limitations have been identified in the methodology of the report and are important to mention here. First, arranging interviews with interviewees was found to be a challenge by all partners, given the busy schedule of EU policymakers. Further some potential interviewees, especially in less senior roles, appeared concerned about the confidentiality of the interviews, or their anonymity being undermined by their views, and expressed a preference to not take part in the study for these reasons. This may have limited the choice of interviewees. In general such a choice was guided by the area of work of the interviewee, or pre-existing contacts, however often the interviewees chosen were those directly involved in fundamental rights/human rights related work, which may also have resulted in at times overlooking where the coherence gaps lie. Talking to policymakers most involved in human rights work, or those already aware of the problems related to sources of incoherence in EU human rights policy, may only provide a partial picture.

In terms of representativeness, given the limited number of interviews conducted, the current study makes no claim to be representative of the views of the different institutions or EU policymakers more generally, which would be impossible by definition in this context. As such it represents a snapshot of some of the views, of a select number of policymakers from some of the main institutions and few Member States, on the issue of coherence/incoherence in EU human rights policy. Nonetheless it offers an interesting and important 'inside picture', which not only confirms many of the findings of Deliverables 8.1 and 8.2, but also provides many new insights on the issue from the perspective of policymakers themselves. The case study (section IV) may be more comprehensive in its reach although on a single thematic issue, i.e. business and human rights.

Further questions must be asked about the methodological approach of asking policymakers themselves about their own perspectives on incoherence within their work, which it could be argued may at times result from their own work. In fact, in general it could be said that interviewees were more open to criticising sources of incoherence resulting from the work of other institutions, while they may be more defensive about their own work and institutions. Perhaps unsurprisingly, former members of staff appeared to be most open about the problems and sources of incoherence present in an institution. Perhaps for the same reason interviewees often chose to focus on best practices of coherence and the role of their institutions as 'agents of coherence'. These findings were nonetheless very useful as examples and best practices provide useful avenues for further fostering coherence. At the same time, the structure



of report itself and the division of labour amongst partners in conducting the interviews may contribute to incoherence between institutions being at times overlooked, while incoherence within different institutions emerges as the main picture provided by interviewees.

In the context of the busy schedules of EU policymakers the model questionnaire was found to be too long by all researchers conducting the interviews, which posed a challenge in terms of addressing all relevant issues in the limited time available. In addition the breadth of the topic of coherence and its different strands makes conducting structured interviews, and addressing all relevant topics, at times challenging. On the whole there seemed to be a tendency for interviewees to focus on structural incoherence. While this was the first type of incoherence they were asked about, as policymakers within the institutions they probably also felt it to be helpful to provide the 'insiders' perspective' of their work and how it is structured including in terms of working methods. The tendency to focus on structural incoherence perhaps also derived from the more general reluctance to talk about distinct policy areas for reasons of anonymity, especially in smaller structures such as legal service of the Council, as well as from the political sensitivity of specific issues. As anonymity was guaranteed to interviewees, at times interesting information, which could have revealed the identity of the interviewee had to be omitted from the report.

Finally such research is limited by definition by what interviewees choose to put forward or answer, within the context of the semi-structured interviews. As such the picture that emerges is by definition limited by all of the above constraints. Yet the research findings provides an important inside picture of EU policymakers' views, challenges and suggestions for improving coherence in EU human rights policy. It also provides a number of interesting findings and recommendations as described below.

#### **D. Common themes raised by interview subjects**

EU policymakers, whether within the institutions, Member States or non-state actors, by definition present a huge variety of viewpoints, issues and concerns relating to the coherence of their own institutions' or others' human rights policy. Nonetheless some common themes emerge from the interviews conducted for this study, based on the model questionnaire and more broadly on the definitions of coherence and incoherence which have been framed in the context of FRAME Work Package 8. Broader conclusions with regard to the role of EU institutions as 'agents of coherence' as well as their interactions with Member States and non-state actors are contained in section V.

One interesting finding emerging from the interviews with policymakers conducted for this study which should be mentioned at the outset is the common reaction and perception that perfect coherence is not only impossible but perhaps not even desirable. Given the multiplicity of actors, interests and human rights standards at stake, there was widespread consensus that coherence at least in some areas of policymaking constituted a utopia. This was considered to be particularly true with regard to interest-based incoherence. As noted in our own definition of interest-based incoherence, the EU is by definition subject to external influence and interest pressure groups, while within its ranks diverging interests and

schools of political and economic thought seek to influence and shape policymaking. As such some degree of interest-based incoherence is likely to remain a defining feature of EU human rights policymaking. Nonetheless, ensuring that the balance is struck in favour of fundamental rights and human rights interests, within the limits of legality and the protection of fundamental/human rights, remains an essential challenge for EU policymakers. The balancing of competing interests, as in the case of balancing competing rights, must take place within the contours of European and international human rights standards. Further, the inevitability of incoherence must never be used as an excuse for violating human rights. As such, the conceptual coherence of the idea of human rights itself, with the obligations for implementation it imposes on both the EU and its institutions and on the Member States, with their separate commitments to international human rights conventions, provides a key resource towards overcoming such interest-based incoherence. Many examples of this may be found in the report, starting from the work of the CJEU itself, and its key role in terms of balancing a number of interests with fundamental rights standards (see section II.H)

Related to this is the frequently emerging theme that some level of incoherence in EU policy may even be desirable or 'productive'. Of course this depends very much on the context, degree and type of incoherence at stake. However some interviewees have argued that at times balancing political interests with human rights promotion/protection, may be important in terms of effectiveness and foster a healthy debate within EU structures themselves. One such example was found to be the tension between the geographic and thematic units within the EEAS headquarters, in particular the human rights units, in which some degree of confrontation between the political knowledge of the local context in a third country situation and human rights expertise was found to be healthy and lead to greater effectiveness, also in terms of human rights policy, in the work of the EEAS. However other areas may be found in which different structures may protect different areas of work and expertise and come face to face in a healthy confrontation. Of course this will very much depend on whether the tensions emerging are irreconcilable, and whether the end result is greater protection/promotion of human rights in the long run. Similarly avenues of structural incoherence, in which different actors or structures may in turn be protecting different interests or policy frameworks, may push forward debate even as part of democratic processes, especially in certain institutions such as the Parliament or the Council. And the same is of course true of policy incoherence between Member States. It is clear that all EU policymakers will never be fully on same page, but they should be advancing EU human rights policy within the limits of relevant political and effectiveness considerations.

Despite this the question of coherence in EU human rights policy was considered essential by most interviewees and was generally reported to be gaining traction in recent years. Policymakers within some EU institutions were more concerned about the notion and aware of the issues at stake than others, and the same of course would be true for Member States. The main understanding policymakers have of the notion of coherence in EU human rights policy appears to be along the internal/external dimension, and in particular the incoherence between EU external policy and protection of human rights within the EU, which goes hand in hand with the human rights/fundamental rights policy framework incoherence. This appeared to be an important area of concern for many interviewees, across different institutional settings, but was especially the case for those working in EU external action. In fact the work of external relations

officials is most likely to be undermined by the internal-external dimension of incoherence in human rights policymaking, when the EU's soft power to act externally is harmed by accounts of its failure to uphold internally the human rights standards which it 'preaches' externally. However, overall interviewees engaged with all types of coherence/incoherence once the different sources of incoherence identified in Deliverable 8.1 were presented by the interviewers.

In this context, the challenges of conducting research on such a broad topic, in which coherence in EU human rights policy can mean a myriad of different things for different policymakers, made keeping the thread of the research more challenging. Overall, although all the different sources of incoherence in EU human rights policy put forward in our research were considered important and deserving careful attention, and the breakdown into the different categories was considered useful, the usefulness of our own definition was at times questioned due to its complexity. In particular one interviewee argued that a less 'procedural' and more concise and pragmatic definition would be useful in this respect.<sup>4</sup>

## 1. Structural incoherence

Structural incoherence was the area of incoherence which received by far the most attention from interviewees. Possible reasons for this have been addressed in part in the previous section on methodology. Given the main focus of the present study on policymakers within EU institutions, this is partly to be expected as a way of sharing their insights deriving from their institutional position and daily work. However this may also be partly attributable to the complexities and incoherence within and among EU institutions and may be indicative of a broader finding of significant structural incoherence underlying the institutions across the board. This finding was already documented in previous deliverables. Yet looking at the situation through the eyes of the interviewees, the complexities of the institutional set up clearly emerges and provides a perhaps worrying picture of competing processes structures and mandates overwhelming the policymakers themselves. Although not always formulated in these words, the perception that emerges from speaking to policymakers about structural incoherence is that 'the EU is so big, a lot of the time they don't know what the other hand is doing'.<sup>5</sup>

The complexity of processes and structures described in detail by interviewees in the different institutions gives clear picture of how structural coherence in EU human rights policy may be difficult in these settings. On one hand there appear to be too many processes taking place at the same time, with some overlap. On the other hand the resources to follow all such processes as well as carrying out the necessary human rights related work were regularly reported to be limited and insufficient. Further, interviewees often reported to be working in a context of 'information overload' in which keeping on top of all relevant knowledge was a challenge in itself. At the same time communication barriers within and between institutions made it impossible to attain full knowledge of all competing processes. The importance of sharing information and changing the working culture were regularly reported in this context by

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<sup>4</sup> Interviewee C6.

<sup>5</sup> Interviewee B1.

interviewees within the different EU institutions. A range of concrete approaches to overcome such structural incoherence were put forward by interviewees, ranging from training, to inter-institutional groups and meetings (e.g. across DGs or working parties). The risk of further increasing processes and workloads in the process of tackling such structural incoherence is a question which should also be posed. In this context the theme clearly emerged from a number of interviews conducted that coherence in EU human rights policy is a complex and time-consuming issue, which requires time and in depth knowledge of numerous competing processes and standards within and outside the EU.

The issue of competences was regularly raised by interviewees in the context of discussing structural incoherence, and was often seen as an insurmountable barrier, although many practical solutions linked to working methods were also put forward. Other interviewees emphasised that competence was at times an excuse behind which different actors hide. And Member States of course had a key role to play in this context. Further, lack of leadership on the issue of coherence in human rights policy or on specific human rights themes, such as the case of business and human rights, was also reported as an element of structural incoherence across the board.

Both horizontal and vertical incoherence were discussed by interviewees in the context of structural incoherence. While many of the problems outlined above related to intra-and inter-institutional sources of incoherence in EU human rights policy, some sources of policy incoherence were found to mirror structural incoherence at the national level. Examples of lack of coordination domestically, for instance between different ministries, indicate that some of the structural incoherence in EU human rights policy are grounded in structural incoherence within Member States, making a comprehensive study of sources of incoherence even more challenging.

One of the most interesting set of findings emerging from the views of policymakers interviewed for this study related to how the different sources of incoherence identified in 8.1 interact with each other, and often cause or influence each other directly. The most prominent example of this which emerged from the majority of areas of investigation related to the ways in which structural incoherence gave rise to policy or interest-based incoherence. Many examples emerge in the report - both within institutions (e.g. between DGs, working parties or branches of government) and between institutions - in which structural incoherence is also reflective of interest-based or policy incoherence.

## **2. Policy framework incoherence**

The issue of policy incoherence, in terms of competing concepts and visions or policy regimes, received some attention from the interview subjects, although far less than the issue of structural incoherence. The most prominent example reported by many interviewees was the fundamental rights/human rights divide, which resulted from the internal/external aspect of incoherence in EU human rights policy. This theme was also related to the role of international human rights instruments and standards, on one hand receiving insufficient attention from EU policymakers and institutional actors, on the other providing a useful avenue to avoid the internal/external disconnect in EU human rights policy. Policy coherence in

relation to normative instruments acquired a particular meaning in the context of the work of the CJEU, also in the interaction between the Charter and other international and regional human rights instruments. In this and other contexts the notion of coherence in EU human rights policy and that of legality and fundamental rights compliance overlap more than in others. In particular, the key role of fundamental rights compliance within the human rights coherence discourse emerges clearly from the work of the CJEU and the legal service of the Council.

The notion of policy coherence in the context of policy pronouncements, framework documents and action plans, was discussed in particular in relation to the Action Plan on Human Rights and Democracy, which was highlighted by many actors as a best practice in fostering policy coherence in EU human rights policy and guiding the action of the relevant actors involved. Similarly other policy pronouncements were highlighted as best practices of coherence such as the redefinition of CSR at the EU level in the context of the case study on business and human rights, which was reported to increase coherence in that context. Similarly the absence of relevant policy pronouncements or action plans may also constitute a source of incoherence in EU human rights policy, such as the failure by the Commission to produce a new communication outlining CSR policy post-2014, or lack of a clear internal fundamental rights policy cycle lamented in context of the Council and FREMP in particular.

### 3. Interest-based incoherence

The issue of interest-based incoherence received very little attention and time from interviewees. As discussed already in the previous section (see section I.C) the thematic issues raised by interviewees were found to be few and far between. While issues related to the research design may have had an influence on this, including the sensitivity of the topics and concerns about anonymity, there is no question that a full investigation into different instances of interest based incoherence would require an in depth analysis of each potential theme and interest driving such incoherence. Interest-based incoherence by definition requires more in depth thematic studies than was possible through the interviews conducted for this report. And the same is true of country specific studies, in which particular issues and priorities specific to each state are taken into account. Given the resource constraints of conducting such in depth studies on a broad scale, the interviews with Member State policymakers and the relevant sections in the report had to be limited to their views on their roles in EU institutions and of course amount to a very partial picture.

The case study presented in section IV on business and human rights presents a useful example of the type of research necessary to fully investigate issues of interest-based incoherence. Here the role of a wide multiplicity of actors investigated in relation to one cross cutting theme, including how they relate to the different policy frameworks, and how they relate to each other in relation to a specific theme and push forward the debate, issues and ultimately human rights policy. Further, a much broader picture emerges here by taking into account a broader range of actors, including civil society and businesses and their competing interests.

Nonetheless a few general themes related to issue-based incoherence emerge from the views of the interviewees and are worth mentioning here. First, the disconnect between different institutional actors, such as the different aims of DGs, constitute a very clear example of interest-based incoherence, where the structures are merely reflecting the interests of the actors involved. A number of examples of this are present in the report, most prominently in the case study on business and human rights, in which the established organisational structure of the Commission was found to trigger divergent interests and policy goals among different DGs, which in turn gave rise to interest incoherence, which was particularly evident in the protection of labour rights in the context of internal and external policy actions (see section IV). Whether the structures are actively influencing the interests or vice versa, many examples can be found in which interest-based incoherence goes hand in hand with the institutional set up of the EU, and does not lead to greater coherence as a result. This makes instances of interest-based incoherence also harder to identify when the research target is focusing on human rights issues specifically, and other interests and sources of incoherence may go unnoticed. Second, the tension between upholding human rights standards and political realism especially in relation to third country work constitutes an example of two apparently competing interests, which may ultimately not always be at odds, and where keeping the door open for dialogue may also be in the best interest of human rights. For instance, this was reported in the context of third country strategies, where at times human rights issues may be pushed too far, or too frequently, with the result of being counterproductive (see section II.D). At times human rights policy coherence may be tied to its effectiveness. Similarly, different political interests may lead to incoherence in relation to other types of relations such as sanctions measures, yet the interest of effectiveness in terms of influencing or changing state behaviour may not always go hand in hand with a principled human rights approach.

#### 4. 'Agents of coherence'

The notion of 'agents of coherence' is vague by definition and a huge variety of views was expressed by interviewees about which actors are best placed in their opinion to promote the coherence in the human rights policy areas with which they are concerned. These vary from institutional bodies - such as the CJEU or the FRA - to working groups, DGs, specific mechanism (e.g. impact assessments or human rights dialogues), meetings, structures or individual policymakers themselves. Similarly with respect to best practices, the report highlights a number areas of best practice from the macro-level, in which specific EU institutions may be seen as agents of coherence, to the micro-level, in which a particular topic, document or meeting is reported to have supported human rights policy coherence in some way. Again the choice of which aspect is presented is very much guided by the ideas put forward by interviewees. The role of Member States is crucial in this respect and requires further investigation, especially in relation to their different stances on the issue of coherence, including an investigation into the position of the more reluctant Member States.

## II. EU Actors – Potential Agents of Coherence

### A. European Commission<sup>6</sup>

At the European Commission (EC) four members, who deal with issues of human rights coherence were interviewed for this section. The interviewees are affiliated to the following Commission services: the Directorate General for Neighbourhood and Enlargement Negotiations (DG NEAR), the Directorate General for Trade (DG TRADE), the Directorate General for Development Cooperation (DG DEVCO) and the Impact Assessment Unit at the Secretary General. Relevant findings of interviews with members of the EEAS are also included in this section.

#### 1. Structural in-coherence

The interviews show that human rights are implemented at the EU as a cross-sectional matter, which indicates the relevance that it dedicates to human rights. Interviewed members of the EC generally perceive this as a pertinent way of implementing human rights into the EC. Self-evidently, the work of each EU human rights actor is limited by the field of his or her competencies and this entails obstacles in the coordination of tasks and the cooperation of actors. Many different actors, dealing with human rights issues in different fields and policy areas are involved.

The splintered thematic responsibilities among EU institutions (e.g. the EEAS is responsible for the external area only, the FRA is responsible for the internal area only) and between EU institutions and Member States while at the same time sharing the responsibility for human rights issues, are perceived by interviewed commission members as the main structural obstacle towards achieving greater human rights coherence.

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<sup>6</sup> This section was written by Wolfgang Benedek, Isabella Meier and Maddalena Vivona.

### a) *The use of impact assessments*

The European Commission prepared guidelines for the IA in 2009<sup>7</sup> which have been currently updated and revised.<sup>8</sup> General information on the EC's impact assessment is available on the European Commission webpage<sup>9</sup> and in a number of deliverables, produced in the course of FRAME.<sup>10</sup>

Interviewees generally discussed the role of human rights impact assessments in achieving human rights coherence and particularly commented on the practical use of ex-ante human rights impact assessments (IA).

They overall perceive IAs as a relevant instrument to strengthen rights coherence as they allow to assess the human rights impacts of specific policies. While ex-ante impact assessments focus on the potential economic, social and environmental impacts of alternative policy options, human rights are integrated within this framework. The *EU Action Plan on Human Rights and Democracy* of 2012<sup>11</sup> foresees the incorporation of human rights in all impact assessments.

According to the interviewees involved in IAs, they follow a standardised procedure: the Secretariat General Impact Assessment Unit receives from the different Commission Services draft IAs to carry out an initial guideline-based check. A negative opinion of the Unit is usually accompanied by comments of the Unit on how to improve the legislation or by recommendations on how to provide better evidence for the IA. The IA is then revised and scrutinised again. A positive opinion to the IA leads to the launch of an inter-service consultation on the policy proposal. Thereby, all DGs and the cabinets receive the proposal to comment on, thereby ensuring its coherence. The interviewee perceives this as *horizontal coherence at the working level*.<sup>12</sup>

Interviewees mentioned some critical points related to the IAs, which reduce the relevance of this instrument in promoting human rights coherence. When it comes to strengthening human rights

<sup>7</sup> European Commission, 'Impact Assessment Guidelines', SEC(2009) 92 of 15 January 2009, available at <[http://ec.europa.eu/smart-regulation/impact/commission\\_guidelines/docs/iag\\_2009\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf)> accessed 17 June 2016.

<sup>8</sup> European Commission, Better Regulation, Impact Assessment, Key Documents, available at <[http://ec.europa.eu/smart-regulation/impact/key\\_docs/key\\_docs\\_en.htm](http://ec.europa.eu/smart-regulation/impact/key_docs/key_docs_en.htm)> accessed 17 June 2016.

<sup>9</sup> European Commission, 'Better Regulation Guidelines', COM (2015) 215 final, SWD(2015) 110 final, Strasbourg of 19.5.2015, available at <[http://ec.europa.eu/smart-regulation/impact/index\\_en.htm](http://ec.europa.eu/smart-regulation/impact/index_en.htm)> accessed 16 June 2016.

<sup>10</sup> Many deliverables, prepared in the course of the FRAME project deal with the impact assessments in detail. Klaus Starl, Veronika Apostolovski, Isabella Meier, Markus Möstl, Maddalena Vivona and Alexandra Kulmer, in collaboration with Hans-Otto Sano and Erik André Andersen, 'Baseline Study on Human Rights Indicators in the context of the European Union', 31 December 2014, *FRAME Deliverable 13.1*, available at < <http://www.fp7-frame.eu/wp-content/materiale/reports/12-Deliverable-13.1.pdf>>.

<sup>11</sup> Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' 11855/12 of 25 June 2012.

<sup>12</sup> Interviewee A3.



coherence through the use of IAs, the problem is that human rights in practice play a marginal role.<sup>13</sup> According to an interviewed member of the IA Unit, only 10% of all IAs touch upon human rights and in 5% of these cases an opinion on human rights is issued. The IA Unit is actively trying to bring human rights issues on board.<sup>14</sup>

The interviewed member of the IA unit was of the opinion that a closer cooperation between the IA Unit and the EEAS would help ensure the integration of human rights issues into the IA. However, as the EEAS is not a part of the EC, the interviewee perceived a number of challenges in setting up this close cooperation.<sup>15</sup>

Another critical issue located at the structural level of using IAs is connected to the different levels of knowledge and expertise between the DGs. Some DGs have an IA support unit, others do not. The Commission has created an IA steering group, made up of representatives of all DGs involved. In the steering group meetings, all new tools and practices for the IAs (e.g. on territorial Impact Assessments or behavioural Impact Assessments) are presented. The interviewee perceived these meetings as a good opportunity to spread practices and ideas on a conceptual level. But the participants at the group meetings are not necessarily the ones to carry out the IAs in the DGs. Thus, steering group participants will have to transfer the knowledge gained to their colleagues; otherwise the meetings will have no influence.<sup>16</sup>

The precondition for an Impact Assessment is that the policy options have an impact, which can be measured in the screening phase. In practice, not all political initiatives will have an impact that can be screened or made foreseeable in the way needed. The IA Unit is currently working on consolidating the back to back process of evaluation in order to speed up this process up and make it easier to be carried out. This way the Unit also pursues the objective that the impact assessments become more accepted among the DGs.<sup>17</sup>

Another critical point addressed by the interviewed member of the IA Unit is that IAs are difficult to read and to understand. The Commission demands Impact Assessments, which are understandable also for those who are not familiar with the policy at hand:

There is a challenge among some DGs of explaining what they are doing and why they are doing it. Thus, IAs are difficult to read. Communication is really a challenge. Particularly, if there are very complex issues. Taking a step back, out of the ivory tower and asking oneself: what is it that we are planning to do and then communicating this to others – this is sometimes a challenge. [...]

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<sup>13</sup> More information on the integration of human rights issues into impact assessments and on the critics in this regard is available in Nicolás Brando, Nicolas Hachez, Brecht Lein, Axel Marx, 'Assessing the impact of EU trade and development policies on human rights', 30 June 2015, *FRAME Deliverable 9.2*, available at <<http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-9.2-Submitted-30-June-2015.pdf>>.

<sup>14</sup> Interviewee A3.

<sup>15</sup> Interviewee A3.

<sup>16</sup> Interviewee A3.

<sup>17</sup> Interviewee A3 and Interviewee C6.

Some DGs are also very absorbed with institutional processes and their relations with the Council. It is very much a pedagogical effort and a communication effort, which is needed in terms of the impact assessments.<sup>18</sup>

The quality of IAs in the EU's external policies is limited by the (perceived or real) political sensitivity of the issues as well as by communication barriers. The interviewed member of the IA Unit discussed the difficulties in explaining ideas and rationales behind policies in external action and in relation to the better regulation package in particular.<sup>19</sup>

The Sustainable Impact Assessment is an instrument to be used specifically for the conduct of sound, evidence-based and transparent trade negotiations.<sup>20</sup> Differently from the ex-ante impact assessment, the SIA works with the involvement of external experts. The SIA comes at a later stage of policymaking and is based on the findings of the ex-ante IA.<sup>21</sup> Interviewed members of DG TRADE commented on their practical use. A positive aspect of the SIA discussed is that it involves many different actors (also from outside the EC). The SIA is not a one-sided EU evaluation, but different parties discuss negotiations and their impacts. Because of these differences between the ex-ante IA and the SIA, the two are not perceived as overlapping instruments or duplicating work, which is done by other departments:

The in house IA is completely separate from the SIA, which comes at a later stage, when we are asking for the mandate of the member states to negotiate one of the options that have been looked at in the impact assessment. It is not concentrating much on the economic impact, but it is looking at the human rights, environmental and labour impacts. It is more a report on the process, the negotiations, on the information that is needed to enable the negotiators to mitigate some of the impact that we don't want to happen. I would like to add that we are getting more and more into ex-post evaluation, also on our trade agreements. After four years we have to undergo evaluations, in the past there have been only a few, but now we are looking into all our agreements.<sup>22</sup>

DG TRADE and the EEAS produced a Handbook for the SIA, which is open for public consultation.<sup>23</sup> Members of DG TRADE mention in the interview that the SIA works better, if they work with external

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<sup>18</sup> Interviewee A3.

<sup>19</sup> Interviewee A3.

<sup>20</sup> European Commission, 'Handbook for Trade Sustainability Impact Assessments', 2<sup>nd</sup> edition, available at <[http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc\\_153400.pdf](http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153400.pdf)> accessed 17 June 2016.

<sup>21</sup> For more information on these instruments see the FRAME deliverables of Work Package 9: Nicolás Brando, Nicolás Hachez, Brecht Lein, Axel Marx, 'Assessing the impact of EU trade and development policies on human rights', 30 June 2015, *FRAME Deliverable 9.2*, available at <<http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-9.2-Submitted-30-June-2015.pdf>>; and Laura Beke, David D'Hollander, Nicolás Hachez, Beatriz Pérez de las Heras, 'Report on the integration of human rights in EU development and trade policies', 30 September 2014, *FRAME Deliverable 9.1*, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/07-Deliverable-9.1.pdf>>.

<sup>22</sup> Interviewee A2.

<sup>23</sup> European Commission, 'Handbook for Trade Sustainability Impact Assessments', 2<sup>nd</sup> edition, available at <[http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc\\_153400.pdf](http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153400.pdf)> accessed 17 June 2016.

consultants coming from the region at stake or with local universities. At the End of July 2015, DG TRADE developed guidelines on how to assess human rights impacts in trade actions.<sup>24</sup>

### *b) Cooperation and coordination*

Interviewees discussed the inter-institutional cooperation and coordination of Commission services in terms of structural incoherence. Thereby, they draw particular attention on the cooperation between the EEAS and the EC in terms of impact assessments and other human rights related instruments and tools.

The interviewed EEAS member pointed out that they busily comment on the tools developed by the EC to strengthen human rights in the EU's external policies. But the involvement of the EEAS in the work of the EC remains on a conceptual level of developing tools and commenting on existing drafts, not on a practical level of implementing tools. The interviewed member of the EEAS sees room for improvement in the cooperation with the EC in external human rights matters. In particular the EEAS should be involved more fully in the practical human rights related work of the EC, e.g. into the application of Impact Assessments and not only as external experts, who counsel on the development of tools and guidelines. The interviewed EEAS member commented on the implementation of the SIA:

It is important that we assess the impact on human rights of proposals. Therefore we worked closely with the Commission in 2011, when they adopted this better regulation package. In the inter-service-consultation and even before, we ensured that this better regulation package also refers to the impact assessments of human rights. And then they developed a tool on the assessment of fundamental rights. Based on the EEAS impact, they broadened it on fundamental and human rights. This is the tool to be used in the Impact assessments. But now, how to implement it: there is also criticism – as we had the case in Vietnam recently – if it is really done and if it is substantially done. We actively approach the Commission in order to give this tool relevant in the commission's practical work.<sup>25</sup>

The EEAS has contacts with the Secretariat General Unit for Impact Assessments and access to a timetable of the scheduled EC Impact Assessments. Thus, the EEAS receives information from the Commission and participates in meetings related to the IAs. However, the EEAS would like to be more systematically involved into the process of impact assessments. When explaining this lack of involvement, the interviewee refers to the formal structure and long tradition of steering groups at the EC, which the EEAS does not have yet. At the moment, the EEAS is neither a member of the steering groups, nor invited to

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<sup>24</sup> European Commission, 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives' (July 2015), available at <[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 19 April 2016.

See also: European Commission, Directorate General for Trade, 'Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives', available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1344>> accessed 16 June 2016.

<sup>25</sup> Interviewee C6.

participate in meetings. The interviewed EEAS member was of the opinion that there should be more participation at the EC's meetings.

I believe that the EC has a formal structure on how to carry out things. The EEAS does not have this. Now we have to find out on how to participate in practice, not only in theory when developing the tools. How can we participate in the group, who carries out the impact assessments?<sup>26</sup>

Another interviewed EEAS-member supports the claim for more EEAS participation and acknowledges that the EEAS is hardly consulted by the EC, when they assess their proposals. However, the interviewee explains the lack of EEAS participation with a lack of awareness and capacity within the EEAS. During the implementation of the "better regulation package", the cooperation between the EEAS and the EC has been established, but it is in its early beginnings.<sup>27</sup>

The interviewed members of DG TRADE perceive the cooperation with and the involvement of the EEAS in the Impact Assessment of trade actions as sufficient and positive.<sup>28</sup> DG TRADE has published a report together with the EEAS on the Generalised Scheme of Preferences (GSP).<sup>29</sup> For DG TRADE, this report is an example of good inter-institutional work to strengthen coherence. DG TRADE mainly dealt with the trade issues, while the EEAS analysed and commented on the human rights issues:

The report concerns an analysis of labour rights and labour rights conventions for each of the beneficiary countries. Internally there was an excellent coordination, while this is a trade tool and programme, the substance of it is of course respect of human rights, which is more something that our colleagues of the EEAS do analyse and comment. This is a new reality, not only for us, but also for third countries governments: when trade people show up to discuss human rights and labour rights, they are surprised. But, as I said, this is a new reality, is coherent, and we try to show up with colleagues from the EEAS or DG EMPL. Third country parties realised quickly that trade is linked to our values and that if they want to continue to enjoy its benefits, they have to respect human rights and the commitment they have. So far so good, I think, it is working well.<sup>30</sup>

Furthermore, interviewed members of DG TRADE appreciate the inter-service cooperation as important tool to receive information, but still acknowledge that its actual functioning depends on the willingness of the people involved.

According to the interviewees, DG TRADE perceives the inter-institutional cooperation as positive in general and when it comes to achieving human rights coherence in particular, but they see room for improvement in terms of EU and Member State cooperation. A better cooperation of the EU institutions

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<sup>26</sup> Interviewee C6.

<sup>27</sup> Interviewee C5.

<sup>28</sup> Interviewee A2.

<sup>29</sup> European Commission, 'Report on the Generalised Scheme of Preferences covering the period 2014-2015', COM(2016) 29 final of 28 January 2016, available at <[http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc\\_154180.pdf](http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc_154180.pdf)> accessed 18 April 2016.

<sup>30</sup> Interviewee A2.

and Member States in terms of achieving human rights coherence would particularly be useful in trade policies, as one interviewee pointed out:

If I were to stick to the realm of coherence, I think that we really need to improve on the transmission chain with the member states. Because I think about the exclusive competence for trade that we have here in Brussels, which is fantastic, but when it comes to issues of human rights and sustainable development, I must say that I don't have half of the tools that the member states have. Sometimes these tools should be put to a better use. To make a different example, I was impressed when we went to Bangladesh, we were absolutely impressed by the sheer amount of initiative that Denmark, Sweden, the UK and Germany were taken.<sup>31</sup>

The implementation of a coordination system, providing information on the actions of the different EU actors in development cooperation and trade policies was recommended by the interviewee. At the same time, the interviewee is well aware that this recommendation is an ambitious one.<sup>32</sup>

### *c) Resources*

Interviewees addressed resources as a structural issue of human rights incoherence. This issue was emphasised in particular by the interviewee from DG NEAR. Lack of staff and resources affect the human rights related work in neighbourhood policies. The lack of resources they make it difficult to ensure that all human rights related objectives and terms of references of the DG's mandate are met. This is an obstacle to achieving human rights coherence. The limited resources of DG NEAR entail the challenge of ensuring the requested support of delegations in the preparation of programs:

It is quite a challenge for us to make sure that all of the objectives of our mandate and the terms of reference are met with the conditions we have. We work more than 100% of our capacity. We have difficulties following up on every single issue or on ensuring systematic and proper support when the requests come from delegations or when there is a need for support in programming. So, we have to be very selective and have to put priorities because otherwise, you cannot do simply everything.<sup>33</sup>

Currently, DG NEAR carries out support of delegates along a very narrow interpretation of the DG's priorities and thematic responsibilities. The resources of DG NEAR are too limited to carry out the requested needs-based support of the delegates in neighbourhood policies.

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<sup>31</sup> Interviewee A2.

<sup>32</sup> Interviewee A2.

<sup>33</sup> Interviewee A4.

## 2. Policy framework incoherence

Interviewed members of the EC discussed various instruments to strengthen coherent policy frameworks. Furthermore, the relations between human rights (as a cross-sectional matter) and other policy areas were addressed by interviewees. Most of the discussions are related to the policy areas of trade and neighbourhood.

### a) Trade policies

DG TRADE puts an emphasis on the interrelation of trade and other policy areas and consults experts to discuss how trade can promote EU policies in other areas, e.g. development cooperation. However, in the concrete trade negotiations, DG TRADE want to keep the trade issues separate from the human rights issues, as one interviewee states:

We have also discussions on how trade can promote other policies, like migration. Regarding human rights, I think that we should maintain the structure that we have and maybe, for the time being, deal with human rights as a separate issue in our negotiations. We might have to tackle human rights more directly in the future, but I think that it is too early to think about that for the moment.<sup>34</sup>

The *inter-institutional and intra-institutional coherence* in trade policies is perceived as basically working well, despite this challenge of matching trade policy goals and human rights issues. Interviewed members of DG TRADE spoke about move in the approach to trade policies in external action, which fosters the promotion of human rights coherence. This is a move away from a binary approach of the EU on partner countries (are human rights standards met or not?) towards a more continuous approach (is progress made?). The EU's aim is now to engage with partner countries, rather than patronizing them. Interviewed members of DG TRADE perceive this approach as positive in terms of strengthening *external-external policy coherence*. At the same time, the interviewees were realistic about not expecting huge changes in some partner countries. Interviewees were aware of the complexity of the reasons underlying human rights problems and they know that these problems cannot be solved solely through (new approaches in) trade programmes.<sup>35</sup>

One interviewee from DG TRADE mentioned negotiations with developed countries on trade agreements as an obstacle for human rights coherence. The thinking and models used in negotiations with developing countries cannot be applied here and proven strategies are not yet available. This was perceived as source of incoherence at policy level.<sup>36</sup>

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<sup>34</sup> Interviewee A4.

<sup>35</sup> Interviewee A2.

<sup>36</sup> Interviewee A2.

## *b) Neighbourhood policies*

An interviewed member of DG NEAR perceives the application of double standards (different standards for different countries; different standards for internal and external human rights affairs) as most important factor of incoherence in neighbourhood policies. The intentions to promote human rights and EU values are strongly outlined in the EU's policy documents, but they do not find their way into reality when it comes to issues like trade, security, and migration.

Furthermore, in the neighbourhood countries, different political dynamics exist. This affects a coherent human rights implementation in neighbourhood policies and programs. Some countries are very engaged in implementing human rights, while other countries are either not engaged at all or only in terms of non-controversial human rights issues, like gender equality. Other countries in turn have interpretations of human rights issues, which are different from the EU's perspective.<sup>37</sup> A common conceptual framework on human rights, rule of law and democracy issues is not only missing, but would also be difficult to implement in this policy area:

EU neighbourhood policy is an extension to the accession policy, it is EU accession applied in other countries. But it is hard to find, what exactly our principle is, what are our references, when it comes to human rights and democracy. What is the language to be used? [...] The dynamic in every single country of the Southern neighbourhood countries is very different. They vary a lot from one country to another when it comes to human rights and the rule of law or the strength of NGOs. This makes it so difficult to try to achieve coherence. The revised neighbourhood policy tries to solve this problem with the principle of differentiation. But – as far as I am concerned – this is the risk on the promotion of human rights and democracy, because each country follows a different dynamic.<sup>38</sup>

The interviewee compares neighbourhood countries with the (former) accession countries. In enlargement the reference framework for an engagement with partner countries is clear; the basis is the *acquis communautaire*. When it comes to neighbourhood policies, this is not the case according to the interviewee. DG NEAR can indeed resort to the *acquis* or the treaties, but there is no incentive for the neighbourhood countries and also no need to legally comply with these instruments. Consequently, finding the proper framework for formulating programs is a challenge related to achieving coherence in neighbourhood policies.<sup>39</sup>

The neighbourhood countries' governments are perceived by the interviewed member of DG NEAR as the most important actors of coherence in this policy area. They are the beneficiaries of EU funding and many of the bilateral programs are directly implemented by them. The interviewee would be in favour of

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<sup>37</sup> More information on Regional Partnerships and Bilateral Cooperation is available in Susanne Fraczek, Beáta Huszka, Claudia Hüttner, Zsolt Körtvélyesi, Balázs Majtényi, Gergely Romsics, 'Report on Mapping, Analysing and Implementing Foreign Policy Instruments in Human Rights Promotion', 31 December 2014, FRAME Deliverable 6.1, <<http://www.fp7-frame.eu/wp-content/materiale/reports/11-Deliverable-6.1.pdf>>.

<sup>38</sup> Interviewee A4.

<sup>39</sup> Interviewee A4.

receiving information on how these governmental bodies understand and perceive the framework and programs of cooperation and whether they take ownership of their content. If constant human rights violations happen in these countries, different and conflicting perceptions exist of how the EU should further cooperate with them. According to the interviewee, DG NEAR prefers condemning the violations, but maintaining relations with the authorities, as this strategy ensures the EU's access to the countries and keeps the possibility of dialogue. On-site human rights actors, such as NGOs, local authorities or governments in the respective countries however push for the EU to totally suspend the relationships. According to the interviewee, it has to be considered that breaking the relations and the dialogue does not necessarily bring an improvement in the human rights situation of those countries, while an open door for dialogue might.<sup>40</sup>

In neighbourhood policies, the most important obstacle towards achieving human rights coherence – besides the lack of resources – is the constant tension between: what should the EU do to be in line with its values and what should the EU do to be realistic in continuing to work with the practical constraints that they have.

### *c) Action Plan on Human Rights and Democracy*

Members of the EC interviewed for this report highly appreciated the way human rights coherence is addressed in the EU Strategic Framework and Action Plan on Human Rights and Democracy,<sup>41</sup> also beyond the chapter that is dedicated to coherence. At the same time interviewees expressed concerns about the need for implementation of the Action Plan in a way that leads to tangible results in the sense of better human rights coherence. In relation to this interviewees criticise that the way the concept of human rights coherence is addressed and defined is too vague in the Action Plan. Interviewees expressed the need for a definition, which would lead to concrete demandable behaviour.<sup>42</sup>

## **3. Interest-based incoherence**

Competing interests and conflicting understandings practically appear in trade policies, as the findings of the interviews show. International Organisations and different DG services have realised that trade can be a tool for their policies too. Incentives in the area of trade can support other EC services in achieving their policy objectives. According to the interviewed members of DG TRADE, the expectations of other EU institutions are a challenge for their daily work, as they are too high. Human rights outcomes of trade policies are benefits, not expected outcomes. Interviewed members of DG TRADE stressed that the Parliament and other organisations strongly demand from DG TRADE to directly address human rights in the trade agreements. DG TRADE refrains from this and argues that human rights are protected by the

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<sup>40</sup> Interviewee A4.

<sup>41</sup> Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' 11855/12 of 25 June 2012.

<sup>42</sup> Interviewees C6, A2, A1.



association agreements anyway and that these agreements can be used to foster human rights. DG TRADE acknowledges the need to tackle human rights more directly. However, they speak against too high expectations and putting pressure on trade policies in this regard. This can be illustrated in the following quote from an interviewed expert at the Commission:

I want to highlight this point, because it is a fundamental thing. In a sense, we are not the policeman of the world; we are simply putting up the service of big international standards, whether they are human rights or not. At the end of the day we are not pushing up the European Agenda, the European values.<sup>43</sup>

Generally, the interviewees point out the challenge of over-estimating the human rights impact of trade policies. At the same time, the readiness of third countries to call into question EU values and the EU's perceptions on human rights is underestimated. The interviewees from DG TRADE believed that it will take time to correct the estimations of other EU actors and EU institutions. They spoke against an understanding of trade policies as a means to serve important but high ambitions of "improving humanity". They rather argued for a differentiation between supporting other policies through trade agreements and achieving other policy goals through trade agreements. They acknowledged that in some cases, trade policies can indirectly support human rights implementation, but still recommended seeing trade policies for what they are, namely trade instruments, rather than human rights instruments.

Achieving coherence between EU institutions and Member States represents a challenge for interviewed members of DG TRADE. The representatives in the Council are party politicians and as such, they mirror the attitudes of their national populations and additionally have political interests to get (re-) elected.

What I heard is still in need of improvement is, what can I call it, downstream or upstream dialogue with member states. I don't think that we are in Brussels at the place where decisions are taken that become then the parameter for the whole Europe: It is not that I'm dreaming of a certain massified approach, but I hear sometimes a certain cacophony in Member states. Now, each of us may have a different idea about where the problem lies, but the fact is that we are still not there. Again, I take the issue of the votes: you take your votes back home as a Parliament, who sits in Council, and so you might have the interest of blaming the European Union, but we don't share that approach. Frankly, it is a bit cheap.<sup>44</sup>

According to interviewed members of DG TRADE, these national and election specific political interests of Council representatives may affect human rights coherence and objectivity in the Council.<sup>45</sup>

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<sup>43</sup> Interviewee A2.

<sup>44</sup> Interviewee A2.

<sup>45</sup> Interviewee A2.

#### 4. Recommendations

The challenges for achieving coherence as identified by the interviewees are mainly due to the limitations of instruments and policies as well as to structural issues, like lack of leadership, lack of resources or the limited scopes of mandates.

Parts of the recommendations developed in the course of Deliverables 8.1 and 8.2 were assessed by interviewed members of the EC. All recommendations related to creating awareness and continuing trainings were highly appreciated by them. Structural measures, like developing mandates with clear references to legal bases and policy areas – such as a Special Representative on Coherence – or giving the FRA a broader mandate and factual independence, were perceived as good in theory, but as unrealistic in practice.

The recommendations posed by you for the Action Plan, we discussed them and I found the recommendation to strengthen the mandate of the FRA very interesting and promotable. But when we pose such recommendations, we also have to be realistic. I am sure that it is going to be a major challenge to strengthen the mandate of the FRA. In theory I would agree with it. It would be perfect if they could themselves monitor a bit more what is happening in the EU or if they come up with their own proposals or even do external work. But in these proposals we make, we need to be realistic, although of course ambitious. And this is very difficult: to take the different competencies and mandates into account and suggest something than really can be achieved. It is really a major issue.<sup>46</sup>

Adopting a definition of coherence to be consistently used by EU institutions in policy development was perceived as theoretically helpful. However, the more complex such a definition is, the less usable it is in practice. The following recommendations were brought up by the interviewees themselves.

##### *a) Strengthening structural coherence*

- Make the impact assessments more comprehensive;
- Intensify the dialogues with stakeholders on the impact of trade policies;
- Raise awareness among the different DG services about the usefulness and the need for impact assessments;
- Constantly update the impact assessment tools – perceive them as living documents;
- More coordination and cooperation of different EU institutions when it comes to impact assessments;
- Increasing the capacities of DGs to address human rights issues: either by hiring additional staff or by training the existing staff on human rights issues;
- Training the delegations on human rights issues.

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<sup>46</sup> Interviewee C6.

### *b) Strengthening coherence of policy frameworks*

- Reduce and simplify policy documents and consolidate them in the internal and external framework;
- Link human rights issues to the Agenda 2030<sup>47</sup> and to the Sustainable Development Goals.<sup>48</sup> This would harmonise the specialised focuses of some DGs on certain human rights issues.

### *c) Reducing interest-based incoherence*

- Fully implement the HRBA in planning and programming of development cooperation, also in the evaluation of policies;
- Provide those, who implement the HRBA at country level with more practical tools (make use of the tools, which MS apply in development cooperation);
- More cooperation between the EU and MS in terms of sharing information, instruments and tools (e.g. in trade policies);
- A better coordination of the EU and MS actions, tools and trade agendas in third countries.

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<sup>47</sup> United Nations General Assembly, 'Resolution adopted by the General Assembly on 25 September 2015 Transforming our world: the 2030 Agenda for Sustainable Development', A/RES/70/1, Distr.: General 21 October 2015, available at <[http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E)> accessed 16 June 2016.

<sup>48</sup> United Nations, 'Sustainable Development, Knowledge Platform', available at <<https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals>> accessed 16 June 2016.

## B. Council of the European Union<sup>49</sup>

The Council of the European Union is one of the key decision makers in the EU and is where national ministers meet to negotiate and adopt EU laws, coordinate Member States' policies, develop EU common and foreign security policy, conclude international agreements and adopt the EU budget.<sup>50</sup> In its role in coordinating the positions of Member States, by definition it faces the task of harmonising their divergent policy positions, including in the field of human rights, and may be seen as one of the crucial bodies tasked with ensuring vertical coherence.<sup>51</sup> As such it represents a key agent of vertical human rights coherence, while working with all other institutions in promoting horizontal coherence. Further, interest-based incoherence, which goes hand in hand with policy creation in political environments, may underlie much of the Council's approach to policymaking including in the areas human and fundamental rights. Such interest-based incoherence may be further exacerbated by the division into different configurations and working parties, which also present as certain degree of structural incoherence as discussed below. Further, horizontal coherence in the law-making processes as well as coordination with other institutions may present their own challenges in the work of the Council.

Given the complexity of its institutional structure, but mainly given its role in uniting different Member State interests in such a broad array of policy areas, on one hand it should be recognised that perfect coherence in the political context of the Council may be impossible to achieve, and perhaps not always compatible with democratic processes in which different interests by definition seek common solutions. In the words of one of the EU officials working in the context of the Council: 'I don't think you'll ever get perfect coherence because you do have different interests which means that inevitably the policies will never be entirely coherent... I think a degree of realism is necessary here'.<sup>52</sup>

On the other hand, it must be recognised that a full account of human rights policy incoherence in the work of the Council would be impossible to provide in the context of multiple interests and complex law-making processes in interaction with other actors, which are at risk of incoherence in most policy areas, and would need to be individually assessed in terms of coherence with the structures, processes and substantive legal content. By way of example one of the officials working in the context of the Council interviewed for this section, - in referring to the widely controversial EU-Turkey deal, which they were explicit in recognising was not an 'orthodox way of dealing with things' - identified a broader trend in the Council's law-making processes post Lisbon:

After Lisbon...somehow [...] the policymaking moves, or is grabbed sometimes by the Council to a greater extent than it was before Lisbon [...] it certainly contributes to fragmentation because

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<sup>49</sup> This section was written by Lisa Ginsborg.

<sup>50</sup> See <[www.consilium.europa.eu](http://www.consilium.europa.eu)>, accessed 1 June 2016.

<sup>51</sup> Tamara Lewis, Adina Portaru (Raducanu), Ricki Schoen, Karen Murphy, TJ McIntyre, and Graham Finlay, 'EU and Member State competences in human rights', *FRAME Deliverable 8.2*, 31 October 2015, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/23-Deliverable-8.2.pdf>>.

<sup>52</sup> Interviewee C9.

you cannot... somehow it bypasses this analysis, which could be done, it requires time of course and consultations... that is normally the task of the Commission...[...] whatever they propose they speak to... as they say, all relevant stakeholders, meaning ministries, NGOs, courts... everybody... somehow it is kind of thrown in at the very high political level, which makes it difficult then to manage... and somehow the politics has a tendency to often come first or overtake all the other aspects... and then there is a decision [...] very often this high-level policymaking is a shortcut, and we have to deal with the consequences... this certainly does not contribute to coherence.<sup>53</sup>

While the complex law-making process post-Lisbon cannot be fully addressed here, it appears clear that the policy work of the Council, often touching upon human rights issues, regularly has to contend with the broader political interests of the actors involved and a certain degree of interest-based incoherence. Further an in-depth analysis of individual policy initiatives, and resulting interest-based incoherence, is beyond the scope of this report. Investigating individual policy areas giving rise to interest-based incoherence in the human rights policy of the Council would require a much broader investigation of different actors and Member State positions, while in the current section would risk undermining the anonymity of the EU policymakers interviewed for this section. Therefore, in looking at the Council as an agent of human rights coherence the current section has chosen to focus specifically on the structures which may somehow aid the coherence of policymaking in the Council, in particular the Council secretariat and the two working parties dealing with human rights and fundamental rights issues, namely COHOM and FREMP, although bearing in mind that the human rights work of the Council stretches well beyond these avenues.

In a similar vein, interviewing EU policymakers in context of the Council is difficult by definition as the Council is made up of government representatives who hold their own positions as policymakers as well as members of the Council. Further Member State positions may be fragmented internally along different ministries, thereby making it difficult to assess precise policy positions within Member States, let alone in relation with each other. While some of the policymakers in Member States interviewed for section III at times spoke about their involvement in the Council,<sup>54</sup> the interviews conducted for the present section were aimed at EU officials working in the context of the Council, in particular its secretariat including the policy and legal department, as well as actors involved in some capacity in the COHOM and FREMP working groups. Nonetheless it must be recognised that the picture that emerges is a limited one when faced with the complexity of the incoherence issues emerging from the work of the Council.

The previous report in this work package (Deliverable 8.2) already found that 'the Council is susceptible to disagreements surrounding fundamental and human rights arising from the diverging political interests between Member States'.<sup>55</sup> Similarly Deliverable 8.1 found that the Council 'appears reserved when

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<sup>53</sup> Interviewee C8.

<sup>54</sup> See section III of this report.

<sup>55</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 32.

speaking of human rights coherence, mostly due to criticism for not fulfilling its duty to ensure consistency through all EU policies', but recently seemed to be more engaged in the matter. In particular the Council appears to be showing a growing interest, at least in terms of political commitment to the problem of internal/external coherence. The Council Conclusions of May 2014 in fact recognise 'the importance of consistency between internal and external aspects of human rights' protection and promotion in the Union framework in terms of enhancing the Union's credibility in its external relations and leading by example in the area of human rights'.<sup>56</sup> In 2015 the Council also adopted the new Action Plan on Human Rights and Democracy,<sup>57</sup> as a policy pronouncement of the Council.<sup>58</sup> The Action Plan contains some crucial human rights policy commitments and a dedicated section to the topic of 'Fostering better coherence and consistency'.<sup>59</sup> A number of specific areas of action are identified under this heading, while recognising more broadly the internal/external coherence issue. Also the annual rule of law dialogue established by the Council in December 2014 should be noted in this respect, in which the Member States update each other on the shape of the Rule of Law, including fundamental rights, in their respective countries.<sup>60</sup> While this mechanism was not discussed by any of the interviewees working in the context of the Council, it was raised by interviewees from specific Member States (see section III.B).

Without entering a detailed assessment of the Action plan, which has already been done in the context of FRAME,<sup>61</sup> and its contribution to coherence in EU human rights policy, which is partly contained in Deliverable 8.2,<sup>62</sup> it is important to note here the key role recognised by all interviewees to the Action Plan in terms of providing the political pronouncement and strong commitment by the Council to work on the issue of coherence more broadly throughout the EU institutions and Member States. Although

<sup>56</sup> European Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union, <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/143099.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/143099.pdf)>, accessed 1 July 2016.

<sup>57</sup> European Council Conclusions ST 10897 2015 'Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019' of 20 July 2015 < <http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf> >, accessed 1 June 2016.

<sup>58</sup> Tamara Lewis, Adina Portaru (Raducanu), Ricki Schoen, Karen Murphy, TJ McIntyre, and Graham Finlay, 'EU and Member State competences in human rights', *FRAME Deliverable 8.2*, 31 October 2015, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/23-Deliverable-8.2.pdf>>, 37.

<sup>59</sup> European Council Conclusions ST 10897 2015 'Council Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019' of 20 July 2015, < <http://data.consilium.europa.eu/doc/document/ST-10897-2015-INIT/en/pdf> >, accessed 1 July 2016.

<sup>60</sup> See < <http://www.consilium.europa.eu/en/meetings/gac/2016/05/24/> >, accessed 27 July 2016.

<sup>61</sup> See Jakub Jaraczewski, Out with the old, in with the new? A brief look at the 2015-2019 EU Action Plan on Human Rights and Democracy, < <http://www.fp7-frame.eu/2015-2019-eu-action-plan-on-human-rights-and-democracy/> >, accessed 1 July 2016; Joana Abrisketa, Cristina Churruca, Cristina de la Cruz, Laura García, Carmen Márquez, Dolores Morondo, María Nagore, Lorena Sosa, Alexandra Timmer, 'Report on the assessment of consistency in the prioritisation of human rights throughout EU policies', 31 July 2015, *FRAME Deliverable 12.2*, available at <<http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-12.2-Submitted-30-July-2015.pdf>>.

<sup>62</sup> Tamara Lewis, Adina Portaru (Raducanu), Ricki Schoen, Karen Murphy, TJ McIntyre, and Graham Finlay, 'EU and Member State competences in human rights', *FRAME Deliverable 8.2*, 31 October 2015, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/23-Deliverable-8.2.pdf>>.

limited to the internal/external dimension of policy incoherence, it still offers a positive step in drawing attention to one crucial aspect of EU human rights policy coherence.

One interviewee argued that the Action Plan constituted a clear 'cause for optimism' on the topic of coherence as, 'at least when we make commitments we feel somewhat obliged to come and talk about where we're at.'<sup>63</sup> Similarly another interviewee argued

we now have the legitimacy *vis a vis* the Commission, within the EEAS and Member States to dedicate more time on this topic... even if it is not spelled out in detail how we want to do it we always have a better leeway... the topic internal/external coherence is quite difficult to promote because of the different competences ... and it does help to have something... to say look this is something we've all committed to.<sup>64</sup>

There was also broad agreement among interviewees that the action plan had been transformed since the previous one, in being able to negotiate amongst 28 Member States 'commitments, albeit modest, in issues that would not have been considered our territory five years ago.'<sup>65</sup> Although clear problems remained in their view, including 'woolly time-frames', and piecemeal progress in its implementation, it remains according to interviewees an extremely important document for raising the issue of coherence and promoting human rights policy coherence more broadly. It is however worth mentioning the view that it was seen largely as an external document and failed to bring on board DGs dealing with internal issues, who although consulted in the process were not taking initiatives in the implementation, thereby perhaps perpetrating the internal/external divide.

...we're now seeing the problem with that in terms of implementation, in that if you want some of these actions that concern internal policies to be implemented properly, you need the relevant DGs to be engaged and to have an interest in actually dealing with this, and I'm not sure if that's the case... they signed up to these thing but they don't really feel like it's theirs.<sup>66</sup>

## 1. Structural incoherence in work of the Council

The competences for human rights of the Council have been discussed in detail in deliverable 8.1.<sup>67</sup> Looking at the structural coherence of the Council, it is impossible not to mention its different configurations, working parties and committees. The division into different areas of work, more or less specialised, is essential for effective policymaking, while at the same time inevitably presents risks of

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<sup>63</sup> Interviewee C2.

<sup>64</sup> Interviewee C6.

<sup>65</sup> Interviewee C2.

<sup>66</sup> Interviewee C4.

<sup>67</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 41.

fragmentation. As noted by Westlake and Galloway, while the Council is one institution in legal terms, different configurations have inevitably led to some degree of incoherence.

While such regular meetings of ministers from different policy sectors has undoubtedly been effective in 'socialising' them, and national administrations working to them, into the structures and workings of the Union, the practice has inevitably led to compartmentalisation of policy issues which, in turn, has to some extent allowed vested corporatist interests to flourish and at times worked against policy consistency across different sectors.<sup>68</sup>

One interviewee in particular noted that 'structurally the fact that you need to distribute work inevitably means that sometimes it's not entirely consistent'.<sup>69</sup> In particular with regard to different working parties they noted that '... although there is through COREPER a sort of horizontal 'check' on things... it happens that a working party will deal with something, without necessarily being fully aware of the position taken in other working parties'.<sup>70</sup> Of course the division of the human rights work of the Council in internal and external working groups, namely the Human Rights Working Group (COHOM) and the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP), may also showcase structural incoherence in EU human rights policy, which may in turn feed into both policy framework and interest-based incoherence.

Lack of awareness, heavy workloads and political tensions may all contribute to such division into silos including in the area of human rights policy.

I think it's mainly lack of awareness... or lack of involvement of everybody who's concerned... sometimes... probably in most cases just by not thinking that this is actually also relevant to others... maybe in some cases because they don't want to involve others... I don't know, but I think in most cases it's probably only lots of things going on... you don't always have the reflex to say 'I should also ask x and y and z'.<sup>71</sup>

One interviewee argued however that in the Council there was a very different approach to the overlap between the remits of the different working parties.

...when it comes to coherence, the Council has a completely different philosophy of those different remits of its preparatory bodies... different from the Commission and from the Parliament for example... I think it's quite a fundamental difference because whereas between different DGs of the Commission you have constant competition [...] whereas there they would be fighting for the files and for the responsibilities and who has got the last word to say, here we have and we preach the theory of the unity of the Council... that wherever you meet in which

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<sup>68</sup> Martin Westlake and David Galloway, *The Council of the European Union*, (Harper, Third Edition, 2004), 11.

<sup>69</sup> Interviewee C10.

<sup>70</sup> Interviewee C10.

<sup>71</sup> Interviewee C10.



place horizontally or vertically in this structure... it is all the emanation of...representation of the Council.<sup>72</sup>

While some structural incoherence in this context was considered inevitable because of 'the rhythm, the workload, the number of things that we deal with', the legal service was reported to be able at times to spot inconsistencies, especially in the context of COREPER.<sup>73</sup> However the problem went beyond structural incoherence in the context of the Council, to structural incoherence within Member States themselves. In the words of one interviewee:

In terms of coherence...depending on the ministry from which the experts come... they would have different opinions, different views on things... and even within one Member State... so if you have around the table 28 home interior ministers or experts, their views would be dramatically different from those within justice ministries, it's completely two worlds... I think this is one of the great structural sources of incoherence.<sup>74</sup>

There was broad recognition among EU officials interviewed in this context that there was also a need for better coordination at Member State level, to then be reflected in their positions within different Council configurations and working groups, and in particular there was a need for greater dialogue and coordination in line ministries on specific issues to ensure their position was in line with their human rights commitments.<sup>75</sup> As argued by one interviewee:

The Council is the representative of the governments of the Member States who are mandated to take commitments... to commit their governments in legal and political sense... which means that even if it is some agricultural working party... whatever the delegate says, it engages the whole country... so their position should be coordinated internally... and that's why... in order to enable them that coordination [...] they have to do their homework before... so information is rather spread than kept in different areas.<sup>76</sup>

Another example given was in the counter-terrorism field, during a US-EU dialogue, in which a number of Member State positions were not always coherent with the positions on human rights issues taken by Member States in the context of their own military operations abroad.<sup>77</sup>

One example of best practice identified by interviewees to overcome the problem of structural incoherence resulting from the different Council configurations and working parties was found in the codes on Council documents which are used for distribution. The codes, which were 'supposed to reflect every topic or area covered by the document'<sup>78</sup> allowed automatic distribution internally to all EU officials,

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<sup>72</sup> Interviewee C8.

<sup>73</sup> Interviewee C10.

<sup>74</sup> Interviewee C8.

<sup>75</sup> Interviewee C5.

<sup>76</sup> Interviewee C8.

<sup>77</sup> Interviewee C10.

<sup>78</sup> Interviewee C10.

working parties and relevant Member State interested sectors, 'the idea behind it is that they have to coordinate nationally their positions, even if it takes a number of ministries to sit together.'<sup>79</sup> The system was reported to generally work well internally, as a positive example of how information in the Council is 'spread rather than kept in different sectors'. It was then left to Member States to decide what they chose to engage in.<sup>80</sup> The example was given of Council conclusions on citizenship coming up in autumn 2016, which presented a 'very horizontal aspect... we will consult more or less 20 different working parties via the system code.'<sup>81</sup> However, the system was not perfect and problems remained with keeping the workload manageable as it was impossible 'for everyone to look at everything' and the possibility of 'things slipping through' the system.<sup>82</sup> Another key problem identified in the system of concern for human rights policy coherence was the fact that COHOM or the EEAS did not necessarily receive the codes, as reported by one interviewee

internally we can be coherent because of codes... externally to some extent... we can put the COHOM code on our paper so COHOM gets it, and they can put FREMP, but we don't have the guarantee that the delegations will be reached because the systems are not compatible... it's a different institution.<sup>83</sup>

A final problem deriving from the structures of the Council identified by some interviewees was the issue of the rotating Chair, which inevitably led to some degree of lack of continuity and incoherence. As noted in Deliverable 8.1, this resulted in the situation that 'agenda setting is at the mercies of the interests and favoured concerns of Member States holding the helm'.<sup>84</sup> This was true also in the context of the different working groups, although in the human rights working groups it presents a problem for FREMP but not for COHOM, which now has a permanent chair as described below.

## 2. FREMP

The mandate of FREMP, which covers fundamental rights, citizens rights and the free movement of persons, was described in Deliverable 8.1. FREMP reports to the JHA Council and delegates were reported to mainly come from ministries of justice or interior.<sup>85</sup> Overall the role of FREMP was perceived as being

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<sup>79</sup> Interviewee C8.

<sup>80</sup> Interviewee C8.

<sup>81</sup> Interviewee C9.

<sup>82</sup> Interviewee C10.

<sup>83</sup> Interviewee C9.

<sup>84</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 77.

<sup>85</sup> Interviewee C3.

quite limited, in the words of one interviewee, 'FREMP is actually as I understand it mainly a shop window for internal policy... they don't really lead on anything themselves, they're simply the channel...' <sup>86</sup>

Another interviewee argued that they have little influence over fundamental rights issues as a lot of key human rights internal issues were not discussed in FREMP, such as migration and asylum.<sup>87</sup> One interviewee working in the context of FREMP explained the difficulties for FREMP as a political body to have legal opinions on specific issues:

the concept of FREMP is that it is built of experts on fundamental rights from 28 Member States so there might be differences... it's the first reason... and the second thing how do we establish such an opinion... by voting? we don't have any procedural aspect on how to give an opinion... that's why we rely on the Council legal service giving this opinion to us... and we are having much more... let's say political based discussions on how for instance to shape the fundamental rights policy... not so much how to influence the discussion in...or problems in other Council working parties, but a little bit more in the future how to change something in Europe.<sup>88</sup>

Its limited influence on key human rights issues in other Council compositions may make its potential as an agent of coherence in fundamental rights more limited. Two main problems were discussed in relation to coherence of FREMP's work, which again originated in the structures of the Council. The first was the problem of the rotating chair, which was considered to influence the coherence as well as the strength of the work of FREMP.<sup>89</sup> One interviewee explicitly expressed the view that 'they could do much more if they would have a few dynamic presidencies.'<sup>90</sup> A suggestion put forward in this respect by one interviewee was the idea of strengthening the secretariat of FREMP, in the sense of 'becoming more and more a policy adviser, not just a group secretariat in the traditional sense of organising agendas and reports, but helping the presidency to drive forward certain policy areas.'<sup>91</sup> A second key area of incoherence identified by interviewees deriving from the structures of the Council in relation to human rights policy was the lack of coordination between FREMP and COHOM. This issue is returned to below.

Finally one area of best practice was identified by interviewees working in the context of FREMP to increase human rights policy coherence in the work of the Council: the revised Guidelines for Council preparatory bodies on Fundamental Rights Compatibility,<sup>92</sup> which were prepared by FREMP in close collaboration with the Council Legal Service. The purpose of the guidelines, which were to be considered 'non-binding legal advice', was to 'help the Council preparatory bodies to take the methodological steps necessary to identify and deal with fundamental rights issues arising in connection with the proposals under discussion at the relevant Council preparatory bodies', as well as raise awareness of fundamental rights matters including Council preparatory bodies.<sup>93</sup> To this aim a number of concrete steps were

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<sup>86</sup> Interviewee C2.

<sup>87</sup> Interviewee C5.

<sup>88</sup> Interviewee C9.

<sup>89</sup> Interviewee C3.

<sup>90</sup> Interviewee C5.

<sup>91</sup> Interviewee C3.

<sup>92</sup> Council of European Union 'Fundamental Rights Compatibility: Guidelines for Council preparatory bodies', 2015.

<sup>93</sup> Ibid. at 5.

mentioned in the guide, which appear important to contribute to fundamental rights coherence in the work of the Council and FREMP. These included for the Council Secretariat to include the Guidelines in the general training provided to incoming Presidencies of the EU, for the chairpersons of the Council preparatory bodies to circulate them on a six-monthly basis to experts in relevant preparatory bodies, and for delegations to inform the FREMP Working Party or other preparatory body specialising in a specific fundamental rights about their fundamental rights related discussions and possible doubts. The Guidelines explicitly note in this context:

The exchange of available information and expertise could help to find the best solution which is in accordance with fundamental rights, avoid duplication of discussions, and increase coherence in the application of the Charter. The acronym FREMP should be inserted in notes, opinion and contributions from the Council Legal service where they contain legal assessments and advice on matters relevant for fundamental rights. This will also ensure that the FREMP Working Party is kept systematically informed.<sup>94</sup>

In this context FREMP appears to have a key role in oversight of human rights policy coherence, despite its inability to provide legal opinions. Kosta notes that in stipulating that they should be used at the beginning of the first reading of any proposal the Guidelines may encourage 'taking a fundamental rights perspective on proposals that do not blatantly raise these issues'.<sup>95</sup> Further although the Guidelines may not add anything new in substance, 'having such a written document in place may well turn out to be of practical importance in the sense that it can be invoked and relied upon during negotiations'.<sup>96</sup> One interviewee reported in relation to the tool, which was seen to 'increase the coherence in the Council':

we have the impression that in many working parties it is already used... we also had training together with FRA on this for the Justice people together with Home people and now we are planning to go to the Culture and Social and Employment Council... so we will continue with the training and we hope that the visibility of the Guidelines.. the use of them will increase.<sup>97</sup>

Finally with regard to the role of civil society it was reported that every presidency has two meetings with a network of NGOs, mainly for the purposes of information sharing about their program and to debrief them and the end.<sup>98</sup>

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<sup>94</sup> Ibid at 9.

<sup>95</sup> Vasiliki Kosta, *Fundamental Rights in EU Internal Market Legislation*, (Bloomsbury 2015), 73. See also discussion of the role of the Guidelines in Maria Elena Gennusa and Andrea Rovagnati, 'Implementation and Protection of Workers' Fundamental Rights. Innovations in the Post-Lisbon Treaty Landscape', in Giuseppe Palmisano, (ed.) *Making the Charter of Fundamental Rights a Living Instrument*, (Brill Nijhoff 2014), 114.

<sup>96</sup> Ibid. at 74.

<sup>97</sup> Interviewee C9.

<sup>98</sup> Interviewee C9.

### 3. COHOM

The mandate of COHOM, which covers human rights issues in the EU's external action, was extended in 2003,<sup>99</sup> and also described in deliverable 8.1.<sup>100</sup> Since 2003 COHOM's mandate is to look into human rights issues in all external action. COHOM delegates come mainly from Member States' foreign ministries, and in the words of one interviewee they are 'essentially Member State diplomats who happen to work in the human rights part of their foreign ministry'.<sup>101</sup> As such, there was no guarantee of their human rights expertise, especially in the case of smaller Member States, although this generally depended on their longevity.<sup>102</sup> Knowledge of more technical issues was reported to be limited in this setting. One interviewee was explicit in stating: 'My sense is that over the years the capacity and the expertise in COHOM to address human rights in all external action has gone down and not up... and also the interest has gone down'.<sup>103</sup>

While such a problem may also be true in the case of FREMP, it was not reported by interviewees in that context. On the whole there appeared to be consensus that in terms of structural coherence COHOM had a broader mandate than FREMP and more continuity thanks to its permanent Chair. In fact since January 2011, COHOM has a permanent chair, who is a staff member of the EEAS, as opposed to being chaired by a representative of the rotating Presidency.

As described in report 8.1, COHOM has two formations, the first capital-based was supplemented in 2012 by a Brussels-based formation of COHOM.<sup>104</sup> Although this was considered to be a welcome development by interviewees, it was also argued that it was important to build an '*esprit de corps*' within and between these two COHOM formations, who did not see each other often, as the capitals group would only come together once a month, while the Brussels group would also be following other working groups. Greater coherence in the work of COHOM could perhaps be fostered by a 'stronger level of integration and interchange' and a 'tighter understanding of everyone's priorities'.<sup>105</sup>

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<sup>99</sup> See European External Action Service, 'Mandate of the Working Party on Human Rights', <[http://eeas.europa.eu/human\\_rights/workgroup/docs/cohom\\_mandate\\_en.pdf](http://eeas.europa.eu/human_rights/workgroup/docs/cohom_mandate_en.pdf)>, accessed 1 July 2016.

<sup>100</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 43.

<sup>101</sup> Interviewee C2.

<sup>102</sup> Interviewee C2.

<sup>103</sup> Interviewee C5.

<sup>104</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 43.

<sup>105</sup> Interviewee C2.

Nonetheless lack of capacity to deal with all relevant issues and actors was reported broadly by interviewees working in the context of COHOM.

...in an ideal world this human rights person in a delegation of the Member State in Brussels would not only follow the Brussels COHOM but also reach into other areas. The problem is that in most cases this person also has to cover one or two working groups, which is a heavy workload, but still an opportunity for mainstreaming, but he might not have enough time to devote enough attention to all the other ongoing processes[...] they should reach out to the colleagues who are coming from line ministries [...] who are for instance dealing with migration issues, counter-terrorism issues and many other areas... this is happening only in a limited manner and in a way much more would need to be done... the challenge is that you are more and more confronted with different issues which are more and more cross cutting, such as business and human rights.<sup>106</sup>

It was clear from the interviews that sometimes entirely different actors were formulating areas of foreign policy and there was not enough interaction between them.<sup>107</sup> And the same can certainly be said in relation to the COHOM/FREMP collaboration as described below. In the view of one interviewee, such lack of knowledge often went hand in hand with an information overload context, coupled with the above mentioned lack of capacity, which all contributed to undermine coherence of human rights policy across different institutional settings.

It's what to do to bridge that gap... because genuinely it's an information overload context as well... so with the best will in the world I simply don't have the opportunity to find out much more than I hear at occasional meetings on what DG grow is doing on business and human rights... and I suppose it's a challenge back on civil society... we've had a number of seminars on business and human rights which essentially force all of us to sit together regularly on panels and I think that over time is providing a really important service... in building awareness and building relationships.<sup>108</sup>

As such civil society appeared to play a key role as an agent of coherence by informing COHOM of these aspects that 'we're simply not capable of being experts in.'<sup>109</sup> And meetings between COHOM and civil society were reported to be frequent.<sup>110</sup> Also the FRAME research project has addressed COHOM three times between 2015-2016.

Finally the key structuring role of the Action Plan for the coherence of COHOM's human rights work should be mentioned in this context, especially when compared to FREMP, which has no clear strategy document to base itself on. Further, as the author of the Action Plan, which as discussed above represents as an extremely important document for promoting human rights policy coherence more broadly, COHOM has clearly played a key role as an agent of coherence in EU human rights policy.

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<sup>106</sup> Interviewee C5.

<sup>107</sup> Interviewee C5.

<sup>108</sup> Interviewee C2.

<sup>109</sup> Interviewee C2.

<sup>110</sup> Interviewee C2.

#### 4. COHOM/FREMP relations and collaboration

The division of the Council's human rights working groups along the internal/external dimension is an obvious source of structural incoherence in EU human rights policy, which in turn may give rise to policy incoherence, especially in the often discussed separation between fundamental rights and human rights.<sup>111</sup> Information exchange and regular cooperation becomes especially pressing in this context. Deliverable 8.1 identified the COHOM/FREMP collaboration as a potential avenue in overcoming internal/external incoherence issues, and reported the Council position that regular exchange of information and joint thematic meetings should strengthen the cooperation of the two working parties.<sup>112</sup>

Interviews conducted in this context found that while cooperation between the two working parties had increased and was reported to be overall good, including some examples of positive collaboration in overcoming the internal/external divide, problems remained in terms of information exchange and awareness of each other's work. By way of example one official interviewed in the context of FREMP admitted to having very little knowledge of the Action Plan.<sup>113</sup> Similarly an official from COHOM stated explicitly, 'the reality is... absolutely I don't have any sense of what FREMP discusses in its normal meetings... I wouldn't be able to predict a FREMP agenda... so there's already a weakness... we have some practical lack of clarity about each other'.<sup>114</sup>

One interviewee argued that there may even be times when FREMP and COHOM delegates may not know each other, although in smaller administrations that would not be the case.<sup>115</sup> Further, as discussed above, different ministries may have different views, levels of political will and angles for analysing the same issue or legal instrument.<sup>116</sup> The context of the Council Conclusions on Child Labour was put forward as an example of this trend,<sup>117</sup> in which COHOM agreed internally that Member States should be parties to a specific convention on the topic and that they would promote ratification to third countries, but when the issue was discussed in FREMP 'there were Member States saying "but we don't want to have an invitation from MSs to accede, ratify, sign this convention" ... so you see the same topic, two different groups of people, two different opinions'.<sup>118</sup> One of the most basic ways to address incoherence was found to be in the coordination of information between the two working parties, especially when agreement

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<sup>111</sup> See section I.D.2.

<sup>112</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 44.

<sup>113</sup> Interviewee C9.

<sup>114</sup> Interviewee C2.

<sup>115</sup> Interviewee C2.

<sup>116</sup> Interviewee C9.

<sup>117</sup> European Council Conclusions on Child Labour, Foreign Affairs Council, 20 June 2016, <<http://www.consilium.europa.eu/en/press/press-releases/2016/06/20-fac-child-labour/>>, accessed 1 July 2016.

<sup>118</sup> Interviewee C9.

had been reached within one of the working parties 'to pass on the message "please try not to contradict us" is the easiest and usually the most productive way of trying to eradicate the incoherence.'<sup>119</sup> Yet the question remained about 'who should adapt to which policy, if the external should do what internally was agreed or the other way round'.<sup>120</sup> Further, another interviewee argued, 'so much of this is about people...[...] realizing... working through things together... that there isn't of necessity a competition in terms of policy areas that are being pursued... so we choose policy areas like child rights for instance as an entry point...'<sup>121</sup>

In fact the Council Conclusions on child labour were also put forward by a number of interviewees as an example of good practice of cooperation between the two groups and overcoming the internal/external divide, also through the work also of the Commission and DG Justice.<sup>122</sup>

Another key avenue for such collaboration have been the regular meetings since 2013 between FREMP and COHOM on the issue of coherence of the EU's internal and external human rights policies more generally. As already discussed in Deliverable 8.1,<sup>123</sup> the half-day meetings have been taking place twice a year since 2013,<sup>124</sup> once per semester in COHOM and once in FREMP,<sup>125</sup> and are of particular interest for the present research on coherence in EU human rights policy. In this context researchers from the FRAME project were invited to present their findings on the issue of coherence, in particular from Work Package 8. The definition of EU human rights policy coherence identified in Deliverable 8.1 was presented at the meeting, as well as some of the main recommendations from deliverables 8.1 and 8.2. The presentation was followed by a discussion among Member States on the issue of coherence in EU internal/external human rights policy, which included views from representatives of the Commission and the FRA. The meeting aimed to suggest possible ways forward in COHOM and FREMP to ensure attention is paid to coherence and consistency, while focusing on concrete examples of perceived incoherence and inconsistency between EU internal and external human rights policies. While the Presidency discussion paper which was circulated to delegations ahead of the meeting remains a restricted document and the views of individual Member States expressed in that context remain confidential, a number of specific issues were raised during the meeting which should be mentioned here

Interventions by most Member State delegates and EU officials started by emphasising the fact that perfect coherence could never be achieved in this context, also in light of the 'huge diversity between the 28 Member States'. Nonetheless, in the words of one delegate, coherence was 'like a polar star', and remained extremely useful in guiding their action. A number of delegates therefore advocated for a

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<sup>119</sup> Interviewee C9.

<sup>120</sup> Interviewee C9.

<sup>121</sup> Interviewee C2.

<sup>122</sup> Interviewees C2, C9.

<sup>123</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 44.

<sup>124</sup> Only once in the current year, interviewee C2.

<sup>125</sup> Interviewee C9.



dynamic pragmatic approach, rather than a one-size fits all to allow the necessary flexibility to deal with political realities. Further the issue of EU competence was seen as inevitably limiting the possibility of full coherence and consistency. Without repeating these well recited arguments, which have been addressed in detail in deliverables 8.1 and 8.2, suffice it to note that officials interviewed about the meeting reported that not all Member States are on the same page on the issue.<sup>126</sup> Further, interviewees reported that some Member States felt there were some competence concerns about even having the discussions themselves.<sup>127</sup>

Related to this, the lack of an effective mechanism to monitor internal behaviour was touched upon and Member States expressed curiosity about the recommendation from Deliverable 8.1 to extend the mandate of the FRA, especially among COHOM delegates who appeared less aware of the issues in this area. While Member States did not react to the suggestion during the meeting, some interviewees we spoke to during our research have expressed the opinion that 'for the time being it is out of discussion'.<sup>128</sup> The issue was also linked by one interviewee to the question of national human rights institutions as 'FRA's mandate is limited in a way that if it was applied to a NHRI [...] it would be ineligible for A status and possibly for B status at the UN'.<sup>129</sup>

Overall there appeared to be disagreement among delegates (as well as interviewees interviewed at a later stage) on the question of national human rights institutions and whether there was a 'need to be one hundred percent coherent' on the issue, in particular whether Member States thought that having A status - which not all EU Member States had - was important, although this was something that was being promoted externally by the EU.<sup>130</sup> One interviewee argued that 'formal coherence is not always the best solution, sometimes we don't really need to reach the standards which were preached to the outside but we have to explain always to the outside in my opinion...why we recommend to have a body that not everybody internally has'.<sup>131</sup> However there was consensus among interviewees about the importance of discussing the topic, at the very least. 'We need to be aware why don't we have certain standards that we propagate externally, and do we have maybe other mechanisms that help...that guarantee human rights... and to be able to argue it'.<sup>132</sup>

A similar argument was raised by delegates during the meeting concerning the issue of ratifications. While there appeared to be consensus that coherence with regard to ratifications was desirable in this context, and a number of international treaties were mentioned in this respect, including in relation to individuals complaints mechanisms in particular the OP ICESCR, here too delegates argued that it was important to understand the reasons behind the lack of ratification of any given treaty. In fact, many different explanations may underlie each lack of ratification, and 'we should at least discriminate between different

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<sup>126</sup> Interviewee C11.

<sup>127</sup> Interviewee C2.

<sup>128</sup> Interviewee C9.

<sup>129</sup> Interviewee C2.

<sup>130</sup> Interviewee C9.

<sup>131</sup> Interviewee C9.

<sup>132</sup> Interviewee C6.

reasons'.<sup>133</sup> One EU official explicitly stated 'coherence cannot mean legal obligation to ratify'. Similarly, an interviewee emphasised that ratification was too narrow a way of looking at the question of internal/external coherence. A treaty may at times not have been signed for administrative reasons and it was 'much more important to try and lead by example and to show that the situation in the EU is not perfect but we are doing our best to make it better, and we're not shying away from having frank conversations about it'.<sup>134</sup>

FRAME researchers were not present for the second part of the discussion, but interviewees we spoke to in the context of COHOM and FREMP also expressed their views on the discussion and the practice of the meetings more generally. The meetings were broadly recognised as a key avenue for collaboration on the issue of coherence in EU human rights policy. However, on the whole there appeared to also be general agreement among interviewees that the discussions were not as concrete and productive as they could be and remained fairly 'nebulous'.<sup>135</sup>

Some interviewees were convinced about the utility of the discussion, which may have been 'the most we could attain at the moment',<sup>136</sup> given the divergent views among Member States, about even having the discussion, but were essential in helping to keep the issue on the table, despite remaining 'very basic'. Further, it was considered important to continue to have these discussions jointly between COHOM and FREMP, to continuously raise and show where the EU is criticised externally and 'to demonstrate, where the EU could do more... to show them what reasons it has to not do more...'. Although nothing could be changed in the short term, in the long term the challenge was seen 'to convince Member States to act within their competence in order to improve internal-external coherence' and to 'come to common solutions that everyone takes responsibility also to change within their own competence'.<sup>137</sup> Other interviewees were more negative and expressed clear scepticism about the utility of the meeting due to unchangeable structural incoherence, or lack of political will. One interviewee argued '...it's going a little bit in circles... we can discuss it... we can identify the problem, but FREMP doesn't have a mandate and their superiors don't have the political will to really address it'.<sup>138</sup> Similarly, in the views of another interviewee, 'we can have these meetings every year [...] and talk about the coherence gap... but there's no clear next step because we don't have competence to change what Member States are doing internally, if that's what we perceive to be coherence'.<sup>139</sup>

Another interviewee argued that greater preparation ahead of the meetings was necessary to increase their usefulness. They also put forward the recommendation that the discussions should be moved to more concrete issues, as 'we make most progress in our discussions on internal/external... when we

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<sup>133</sup> Interviewee C2.

<sup>134</sup> Interviewee C11.

<sup>135</sup> Interviewee C2.

<sup>136</sup> Interviewee C11.

<sup>137</sup> Interviewee C6.

<sup>138</sup> Interviewee C5.

<sup>139</sup> Interviewee C4.

choose very discrete policy topics to brainstorm on'.<sup>140</sup> The best practice of the 2015 discussions on racism was identified in this context which constituted a tangible topic and favoured constructive discussions.<sup>141</sup> Overall there appeared to be consensus that if the discussion remained on the abstract level of coherence 'you always hear the same arguments'.<sup>142</sup> Finally, resource constraints were raised a problem contributing to the lack of preparation and utility of the meetings:

...we simply don't have the opportunity in a very structured way to prepare that discussion [...] in an ideal world I certainly would like to see us being able to devote the proper time to... I suppose to stoke up relationships with our colleagues on both sides of the fence...<sup>143</sup>

Although it remained unclear where the discussions were going and whether every presidency was going to give priority to the issue, and there was a feeling that 'the most important discussions about internal external coherence are taking place outside FREMP/COHOM on the various thematic issues',<sup>144</sup> a number of concrete suggestions were also put forward by interviewees in terms of moving these discussions forward. These included breaking the discussion into more concrete topics or themes,<sup>145</sup> and/or to have more formal preparation of the meeting and 'buy in' from both sides. For instance one interviewee suggested '...we could make it a given that as part of the next meeting we have to at least two months before hand come together as an inter-service group with the presidency to brainstorm'.<sup>146</sup> The importance of clarity of objectives, not being overambitious,<sup>147</sup> and circumventing the competence issue through more practical initiatives were all emphasised in this context.<sup>148</sup> In the words of one interviewee:

You need to give Member States solutions and policy opportunities and development objectives...none of these discussions can continue interminably if we're simply coming back in six months to have a discussion about internal/external coherence...[...] there's plenty of opportunities to say let's choose this topic, this is very topical at the moment.<sup>149</sup>

Regular exchanges on key human rights issues emerging from the UN system,<sup>150</sup> or linking the discussion to the Action Plan, in which discussing particular elements would give specific basis for discussion, were suggested as concrete avenues to push the discussions forward.<sup>151</sup>

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<sup>140</sup> Interviewee C2.

<sup>141</sup> Interviewee C2.

<sup>142</sup> Interviewee C11.

<sup>143</sup> Interviewee C2.

<sup>144</sup> Interviewee C11.

<sup>145</sup> Interviewees C11 and C2.

<sup>146</sup> Interviewee C2.

<sup>147</sup> Interviewee C2.

<sup>148</sup> Interviewee C5.

<sup>149</sup> Interviewee C2.

<sup>150</sup> Interviewee C5.

<sup>151</sup> Interviewee C2.

## 5. Council Secretariat

The General Secretariat of the Council is explicitly assigned the role of helping to 'organise and ensure the coherence of the Council's work', and as such may also be considered an agent of human rights policy coherence in the context of the work of the Council. In its task to 'assist, advise and help coordinate' the work of the Council, and 'to support the Council presidency',<sup>152</sup> the secretariat has assumed a number of more 'political' roles, including being a more active negotiation 'manager', acting as a political secretariat for the secretary-general and as a political counselor to the presidency.<sup>153</sup> As such it is one of the key actors responsible for maintaining the institutional memory in the context of the rotating presidency,<sup>154</sup> which as was seen above in the context of FREMP is also an essential element of human rights policy coherence.

As described by one interviewee the secretariat covers essentially three main functions: administrative, policy advice (assisting the presidency and steering the political agenda), and legal service.<sup>155</sup> While the policy department prepares the work on different levels for the different configurations of the Council, and political DGs correspond to different configurations of Council, the legal service is smaller and is a horizontal directorate that covers all of the aspects and functioning of the Council.<sup>156</sup> Although not involved in policy advice, the legal service was reported to be involved in advice in all Council opinions, either on their own initiative if a particular risk is identified, or they may be asked questions by delegations, either orally in working parties, or in COREPER, or in Council meetings, or through a written opinion in the case of more complex questions.<sup>157</sup> In this context, the legal service was identified as a key agent of coherence in the context of the human rights policy of the Council. Its legal expertise including in the field of international/European human rights law was seen as a key tool in ensuring the human rights compliance of EU policy. As noted by Bishop:

Thanks to its proven independence and the quality of its work, the legal service is highly valued and the Council nearly always follows its advice. On rare occasions, when the Council fails to do so, then the Court of Justice will usually rectify the situation later - even though the members of the legal service appointed to defend the Council as its agents will then have had to plead in favour of what they had originally advised against!<sup>158</sup>

Interviews conducted with members of the legal service presented a less black and white picture, in which their advisory role was seen more as a process, in which the result was often a compromise text. In the words of one interviewee, 'It's a purely advisory opinion, it's not binding on the Council, it's not obliged

<sup>152</sup> See <<http://www.consilium.europa.eu/en/general-secretariat/>>, accessed 1 July 2016 .

<sup>153</sup> Michael Bishop, 'Leadership and Continuity in the Council', in Martin Westlake and David Galloway (eds.), *The Council of the European Union* (Third Edition), Harper 2004, 349.

<sup>154</sup> Interviewee C9.

<sup>155</sup> Interviewee C8.

<sup>156</sup> Interviewee C9.

<sup>157</sup> Interviewee C12.

<sup>158</sup> Michael Bishop, 'Leadership and Continuity in the Council', in Martin Westlake and David Galloway, *The Council of the European Union* (Harper 2004, Third Edition), 364.

to follow, but more often than not our legal advice is followed, maybe not immediately, it's a process that goes on for quite some time'.<sup>159</sup>

Many conversations and email exchanges were reported to take place in the process. Similarly in the context of the legislative process, which was considered the most structured area of intervention by the legal service an interviewee argued 'it's a process, the texts that are submitted to the Council are analysed article by article and then probably at the end you would have some compromise text, and we would be involved very closely in the drafting of that'.<sup>160</sup> While some cases were of course less clear than others,<sup>161</sup> overall the process was reported to be 'very dynamic', in which the result was not always what was suggested by the legal service but it certainly 'exercised some influence',<sup>162</sup> and it was very rare for the Council to completely ignore the advice.<sup>163</sup> In the words of another interviewee:

We have a seat at the table which is already something... [...] and we can take the floor when we think it's necessary and we do. So I think it's fair to say that we are listened to and our advice is taken into account...that doesn't mean it's always followed...it's completely followed... and if it's not followed it may be either because there is a legal disagreement, Member States take a different legal view or because they may perhaps share the legal analysis but politically the willingness to do something is so strong that they are willing to take some legal risks even if they know some of the issues might be open to challenge.<sup>164</sup>

The attitude of the legal service was reported to be to always 'try and find a solution which meets the political concerns of the Council while respecting EU law, including human rights'.<sup>165</sup> As such they would work to find alternative routes to the same objective that complied with the law.<sup>166</sup> At the heart of the role of the legal service lies interest-based coherence, in which fundamental rights are often to be balanced with other political considerations. While areas of interest-based incoherence varied depending on the interviewee, and will not be discussed in full detail as they may put their anonymity at risk, there appeared to be consensus that specific 'crisis areas', such as currently migration and asylum and counter-terrorism make human rights coherence slip down the agenda at times, where 'the political and social dimension is very present and somehow it is not easy, to remind... the voice of international obligations is not so well heard'.<sup>167</sup> Similarly another member of the legal service emphasised that when balancing fundamental rights with other interests, 'depending on political circumstances often the balance will come down a bit further here or there'.<sup>168</sup> Other areas of human rights at risk of being undermined by political interest-based incoherence mentioned were trade and development, the imposition of sanctions, and

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<sup>159</sup> Interviewee C12.

<sup>160</sup> Interviewee C8.

<sup>161</sup> Interviewee C10.

<sup>162</sup> Interviewee C8.

<sup>163</sup> Interviewee C10.

<sup>164</sup> Interviewee C10.

<sup>165</sup> Interviewee C10.

<sup>166</sup> Interviewee C12.

<sup>167</sup> Interviewee C8.

<sup>168</sup> Interviewee C10.

'the question of collection of different types of information, personal data, and the way they could be exploited' including data retention.<sup>169</sup>

In general the role of the legal service as an agent of coherence in EU human rights policy was considered of particular importance as they were very often 'the only lawyer at the table' in the final stages of the policymaking process.<sup>170</sup> Further interviewees reported that they did have a role in 'spotting inconsistencies, whether on human rights issues or something else', in particular in the context of COREPER.<sup>171</sup> Further, the automatic system of distribution in the legal service was reported to work well in ensuring there was oversight by all relevant actors within the legal service.<sup>172</sup>

Further, interviewees working in the legal service reported that human rights/fundamental rights issues came up regularly in all areas of their work. It was clearly recognised as a 'cross cutting issue' and 'one of the standards by which we assess a piece of legislation'.<sup>173</sup> In the words of one interviewee, 'it's so horizontal and trans-sectorial that on a daily basis I have questions related to human rights and fundamental rights... I have to follow quite a big chunk of case law of both Strasbourg and Luxembourg case law'.<sup>174</sup>

Such a horizontal view and its bringing into the legislative process the analysis of the case law of the Court, which as described in section II.H has taken on its own role as an agent of structural coherence, make the legal service too particularly well placed as an agent of coherence in this context. The main sources referred to were the Charter and the ECHR - '...our work places us somewhere between Strasbourg and Luxembourg' -<sup>175</sup> as well as general principles of law and the case law of the CJEU. Although their work in relation to the sources of law had not changed much since the entry into force of the Charter as most of the substantive content of the Charter was already reflected in their previous work,<sup>176</sup> one interviewee argued that since the Charter became legally binding fundamental rights were 'more in people's mind'. Especially in light of the increasing case law by the CJEU invoking the Charter, but in particular the tendency of the Court to strike down secondary legislation, as described in section II.H.2, 'consciousness is building that this is something to be taken seriously'.<sup>177</sup> As such the concomitant roles of the Court and the legal service as agents of human rights policy coherence, appear to bridge the gap between the legislative and judicial branches of the EU and increase horizontal human rights policy coherence between the different EU institutions. This was also found to be the case with other EU institutions, including the Commission and the Parliament, on a more or less formal basis. In particular one interviewee in the Council legal service reported that on delicate questions they had close connections with the Commission and Parliament legal services to try and find common solutions. Further informal contact with other legal

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<sup>169</sup> Interviewees C8 and C10.

<sup>170</sup> Interviewee C8.

<sup>171</sup> Interviewee C10.

<sup>172</sup> Interviewee C12.

<sup>173</sup> Interviewee C12.

<sup>174</sup> Interviewee C8.

<sup>175</sup> Interviewee C8.

<sup>176</sup> Interviewee C10.

<sup>177</sup> Interviewee C12.

services were also reported by interviewees, including 'to know or influence proposals before they come up', which may also influence coherence of their human rights work.

we also seek coherence in that way... knowing that for all of us... we have the same two courts to deal with and the same treaty after all and we know that at the end of the day if it takes defending the case before the court, we will all meet in Luxembourg... it kind of aligns... I don't say that we are always of the same opinion... but this work of harmonisation at that level is certainly present.<sup>178</sup>

One interviewee expressed the opinion that although the concern of the legal service was always for their advice to be 'watertight and legally defensible', and they had prime interest in making sure they had a defensible case, it could be argued that with regard to fundamental rights this standard should be 'a bit higher' as a matter of principle.<sup>179</sup>

Finally, although a few human rights specialists were reported to work in that context overall a high level of human rights expertise was considered 'absolutely necessary for work in the legal service'.<sup>180</sup> Compulsory training in human rights for new staff joining the service was put forward as a possible suggestion to improve such expertise, which in general was reported to be present across the board.<sup>181</sup>

## 6. Conclusions

Given the multiplicity of interests at play, the internal processes in the Council remain one of the most difficult avenues in which to foster coherence in policymaking. Yet it also has huge potential to foster coherence through its pronouncements as demonstrated by the Action Plan. Given the complexity of the institutional structures, a number of best practices in terms of fostering structural coherence were reported to be present by interviewees. The challenge of the myriad of policymaking fora within and between Member States was perhaps there to stay, as was more or less interest-based coherence in different policy areas. In the words of one interviewee:

The tools in a sense are there... we have for instance these guidelines to ensure the implementation of the Charter throughout the work of the Council and we have the role of the legal service, we have the human rights working parties so I think structurally the tools are probably more or less there... it's a question of consistently ensuring that they are fully used to achieve that maximum possible coherence... I don't think you will even get perfect coherence, because you have different interests.<sup>182</sup>

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<sup>178</sup> Interviewee C8.

<sup>179</sup> Interviewee C12.

<sup>180</sup> Interviewee C8.

<sup>181</sup> Interviewee C12.

<sup>182</sup> Interviewee C10.

The FREMP/COHOM collaboration was found to be one such avenue of fostering coherence. Another was found to be the human rights work of the legal service. A number of recommendations were put forward by policymakers in this context to foster greater coherence, always bearing in mind the political sensitivities and multiplicity of interests which underlie the structures of the Council.

For instance, one interviewee in the policy department put forward the suggestion of a more structured internal policy cycle on fundamental rights with a five-year outlook as a way to aid forward planning and also provide greater coherence to human rights policy including in the cooperation between COHOM and FREMP. In the words of the interviewee:

it would mean specifically having an agenda for the next five years... what is to be reached... with some standards...maybe some evaluation process at the end...and this would maybe introduce a little bit of 'the red line' of the policy... we are trying to introduce this red line via different let's say traditions we have, once per year we are having evaluations on the use of the Charter... the Commission is issuing a report, we are following this report by council conclusions... every three years we are doing the same for the citizenship rights... so this is our policy cycle which is informally introduced and we always give the advice to the presidency to continue with these traditions so we can build up on this.<sup>183</sup>

Another interviewee emphasised the importance of fostering greater awareness and understanding of human rights issues and ensuing legal constraints in more specialised working parties, to ensure they take into account human rights considerations at earlier stages in the legislative process before it reaches COREPER. As explained by the interviewee: 'the sooner that's done the easier the process is...cause if we wait until the fire is closed, it comes to COREPER and then say you need to change this and this then people are not happy'.<sup>184</sup>

The main recommendations emerging from the research in the Council are listed below.

## 7. Recommendations

- The Council should not by-pass traditional EU law-making processes, including impact assessments
- FREMP/COHOM collaboration should continue although addressing more concrete issues and grounding in action plan on human rights and democracy.

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<sup>183</sup> Interviewee C9.

<sup>184</sup> Interviewee C10.



- A more structured internal policy cycle on fundamental rights with a five-year outlook should be put in place as a way to aid forward planning and also provide greater coherence to human rights policy including in the cooperation between COHOM and FREMP.
- Constant attention to human rights mainstreaming in the work of the Council to better link the legal and human rights work with the work in all Council formations and working parties, including relevant geographic groups.<sup>185</sup>
- Fostering greater awareness and understanding of human rights issues and ensuing legal constraints in more specialised working parties, to ensure they take into account human rights considerations at earlier stages in the legislative process before it reaches COREPER.
- Peer reviews among Member States on specific subjects, perhaps limited to Member States that are willing to work on this.<sup>186</sup>

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<sup>185</sup> Interviewee C10.

<sup>186</sup> Interviewees C8 and C12.

## C. European Parliament<sup>187</sup>

At the European Parliament (EP), three interviews were carried out with members of the Subcommittee on Human Rights (DROI) and one with a member of the Foreign Affairs Committee (AFET). Two interviewees are EU officials, one is Member of the Parliament and one is a political advisor to the Members of the Parliament.

### 1. Structural in-coherence

EU internal structures, including split competencies and responsibilities of EU institutions, and also conflicting visions on the work of EU institutions within the EP, act as obstacles towards achieving human rights coherence. The responsibility of different committees for human rights issues in the EP was seen by interviewees as a challenge to the development and implementation of coherent human rights policies. In particular the separation of DROI and LIBE was perceived critically,<sup>188</sup> as many fundamental rights issues, such as migration or counter-terrorism, cannot be pinned down only to the internal or external area, but require a coordinated strategy.

Within the EU institutions, the EP has the role of the 'critical and outspoken institution' when it comes to EU human rights coherence. Different from the executive institutions of the EU, the EP is a representative actor, whose members are elected and who advocates for a stronger role for human rights in the EU's internal and external policies.<sup>189</sup> Whenever the executive institutions of the EU (EC, EEAS) try to soften their language in terms of human rights implementation, the EP rectifies this and speaks against it.

The parliament has generally been more outspoken about human rights, even in sensitive regions. The EEAS tries to influence the Parliament in terms of softening its language or even stop the Parliament from adopting resolutions. So, if there are sensitivities on the executive side of the EU, they do have an influence on how the parliament also behaves. Of course, the EU is stronger if it speaks with one voice and consequently it could be a handicap if they speak differently. But turning the situation the other way around, if we have a problematic situation in e.g. Turkmenistan and the Parliament does not speak out, anybody speaks out. From that angle it can be useful that the parliament is not coherent with the policy line of the other EU institutions.<sup>190</sup>

Furthermore, interviewees are aware that the EC, the EEAS and other EU actors may use this critical and outspoken role of the EP in response to critics of the EU from third countries. If the EU is being criticised that for dedicating too little attention to human rights in its internal affairs, the EC and the EEAS can refer to the critical voice of the EP. Thus, interviewed members of the EP were aware, that their claims for

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<sup>187</sup> This section was written by Wolfgang Benedek, Isabella Meier and Maddalena Vivona.

<sup>188</sup> Interviewee P2.

<sup>189</sup> Interviewee P1, P3.

<sup>190</sup> Interviewee P1.

stronger human rights coherence can be used strategically by the executive institutions as a fig leaf when it comes to signalling to third countries the EU's commitment to human rights issues.

The Standing Delegations were also highlighted in their role to strengthen human rights coherence. Through their chairs, they speak for the European Parliament and therefore may be considered actors in European Union foreign policy. At the time of writing 41 delegations, with varying size, had been created by the EP.<sup>191</sup> Interviewees highlighted that the members of the standing delegations do not always have a foreign affairs background and how, whenever the position of the Parliament or of its competent committees on certain issues is not taken into account, they are a source of incoherence in the EU policies towards third states.

## 2. Policy frameworks and interests

In terms of policy framework incoherence, interviewees critically stress the cross-cutting character of human rights. According to the EP, the EU needs to be more consistent and coherent in its actions, not only in its policy concepts and papers. The discrepancy between commitments in principle and their translation into practice was highlighted as one of the main obstacles towards increasing coherence in human rights policies. EU policy frameworks and the related actions need to stand firm on human rights standards. EU institutions need to be mindful that human rights do not get watered down in the practice of politics. Human rights should actually play a stronger role in those policies that are not at a first glance linked to human rights. These are the claims and recommendations of the interviewees from the EP.<sup>192</sup> Interviewed members of the EP refer to the refugee crisis as a reminder of the lack of internal-external coherence in the EU:

So, the refugee crisis, the Syria crisis is a sad reminder on the difference between what we say and what we do and also the difficulties that the crisis has brought for the EU as a human rights promoter with respect to third countries in terms of credibility. Now it is much harder for the EU to preach human rights values in third countries. So, the lacking coherence of the EU's human rights policies came up through the refugee crisis, but affects the EU's credibility also in other human rights matters. But still it is good that it came up, critical voices were strengthened by the refugee crisis.<sup>193</sup>

Various examples were brought by interviewees of the necessity of better integrating human rights in policymaking. Maybe the most striking example brought was on the issue of the death penalty: against the background of a strong commitment of the European Union against the death penalty, the EU runs the risk of actively contributing to increasing the number of people executed worldwide through its funding of anti-drug enforcement policies. The European Parliament called the executive bodies of the

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<sup>191</sup> European Parliament, 'Delegations', <[www.europarl.europa.eu/delegations/en/about-delegations.html](http://www.europarl.europa.eu/delegations/en/about-delegations.html)> accessed 17 June 2016.

<sup>192</sup> Interviewee P1, P3, P4.

<sup>193</sup> Interviewee P4.

European Union to make EU funding for drug enforcement policies to third states conditional on the abolition of the death penalty for such offences.<sup>194</sup>

Furthermore, interviewees addressed areas of incoherence between policy commitments and concrete action by the EU. By way of example, interviewees from the EP were critical of the EU openly opposing the ongoing negotiations on a UN binding instrument on transnational corporate accountability.<sup>195</sup> Interviewees considered this instrument as one of the main ongoing initiatives in the field of human rights. Along the same lines interviewees discussed the discrepancy between the launch of the EU4HumanRights campaign,<sup>196</sup> which aimed at strengthening the role of civil society in multilateral fora, and the human rights tone in the negotiations of the Partnership and Cooperation Agreement with Turkmenistan, a country known for its dire human rights track record.<sup>197</sup> Although a “one size fits all-approach” in external action was criticised by interviewed members of the EP, more coherence between policy objectives, political commitment and concrete actions is demanded.

What the EU writes in its policy papers (guidelines, abstracts, etc.) and what it does concretely even in the same policy area, are the critical points about the coherence issue. At the same time, I would like to minimize the importance of the external/external coherence in terms of double standards. Since that it is simply in the world of politics too much to ask for. The “one size fits all approach” goes beyond what is reasonable to expect. The only thing that is expectable is honesty, e.g. in terms of the partnership agreement with Turkmenistan, where the EU is saying: it is an honest assessment of the situation.<sup>198</sup>

A fundamental tension between human rights as standards and human rights as policies was pointed out in the interviews. While human rights standards need to be implemented, the implementation of human rights policies depends on political will and the value attributed to human rights *vis-à-vis* other competing interests. In practice, human rights issues are linked to other policy issues, such as trade and development cooperation. Human rights clauses allow the EU to suspend trade agreements whenever serious human

<sup>194</sup> Interviewee P3, see also European Parliament, ‘Resolution of 8 October 2015 on the Death Penalty (2015/2879(RSP))’ P8\_TA(2015)0348, <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+TA+P8-TA-2015-0348+0+DOC+PDF+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+TA+P8-TA-2015-0348+0+DOC+PDF+V0//EN)> accessed 15 June 2016.

<sup>195</sup> Human Rights Council, ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’, A/HRC/26/L.22/Rev.1 of 24 June 2014, <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement>> accessed 15 June 2016.

<sup>196</sup> European External Action Services, ‘#EU4HumanRights’, <[http://eeas.europa.eu/eu4humanrights/index\\_en.htm](http://eeas.europa.eu/eu4humanrights/index_en.htm)> accessed 2 June 2016. Within the campaign the EU delegation to the UN invited to discuss on the shrinking role of civil society in multilateral fora. European External Action Services, ‘New York launch of #EU4HumanRights: Making more space!’, <[http://eeas.europa.eu/top\\_stories/2016/280416\\_eu4humanrights-making-more-space\\_en.htm](http://eeas.europa.eu/top_stories/2016/280416_eu4humanrights-making-more-space_en.htm)> accessed 2 June 2016.

<sup>197</sup> Interviewee P3.

<sup>198</sup> Interviewee P2.

rights violations occurred. But in practice, DG TRADE is expected to focus on trade rather than human rights.<sup>199</sup>

Ensuring coherence in the external area was also perceived as a challenge: third states often accuse the EU of applying double standards on third countries. Compared with the internal area, the external area of EU action appears to be shaped by a more pragmatic approach, which takes into consideration what can be realistically achieved in the dialogue with third countries. As an example, an interviewee mentioned the different leverage that the EU has for example with the Cotonou countries, compared to China. Interviewed members of the EP commented on the EEAS' institutional structure in explaining this, since they identify the distribution of competencies within the EEAS as source for these competing policy priorities in external action. The geographical units of the EEAS (and not the human rights unit of the EEAS) set the priorities for particular countries and at the same time are perceived as more cautious in raising human rights issues in strategically important countries, such as China and Central Asia, than in other countries.

Of course, we can always say: the competencies of the EU are limited. Nevertheless, the question is: is the EU – within its competencies – trying to do the best it can? And even if one recognizes that realistically the EU cannot push China as far as it can push Lithuania, because the relations to the third country are so different. Then still, we have to ask whether the EU is doing the best within its competencies in order to push China in the area of human rights. [...] One can see that the EU in its relations to South Asian or Central Asian countries is not so pushy in implementing human rights than in other Third countries in the world, where the EU has no economic interests.<sup>200</sup>

On the other hand, interviewees highlighted the increasing difficulties in discussing human rights issues with third countries. Third countries' delegations increasingly feel lectured about human rights by the EU representatives that are not "living up to what they preach". This lack of coherence is being increasingly brought up by third country partners. Interviewees note that within this context promoting human rights in third countries has become increasingly difficult. A critical point on internal/external coherence, addressed by interviewees in this regard is related to the current migration flows to the EU. In this area the interviewees demand more respect for the core values of the European Union. They discussed the Khartoum Process,<sup>201</sup> a cooperation agreement between the EU and certain African states, such as Sudan, Ethiopia, Egypt and even Somalia, to manage migration towards the EU. Within this framework the EU is actively supporting states that are well-known for violating human rights in order to protect EU borders.

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<sup>199</sup> On these issues see also: Laura Beke, David D'Hollander, Nicolas Hachez, Beatriz Pérez de las Heras, 'Report on the integration of human rights in EU development and trade policies', 30 September 2014, *FRAME Deliverable 9.1*, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/07-Deliverable-9.1.pdf>>; Nicolás Brando, Nicolas Hachez, Brecht Lein, Axel Marx, 'Assessing the impact of EU trade and development policies on human rights', 30 June 2015, *FRAME Deliverable 9.2*, available at <<http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-9.2-Submitted-30-June-2015.pdf>>.

<sup>200</sup> Interviewee P2.

<sup>201</sup> Declaration of the Ministerial Conference of the Khartoum Process (EU-Horn of Africa Migration Route Initiative) Rome, 28th November 2014, available at <<http://italia2014.eu/media/3785/declaration-of-the-ministerial-conference-of-the-khartoum-process.pdf>> accessed 1 June 2016.

On the issue of migration and border control, one interviewee also mentioned how the EU appears more interested in pushing for more countries to be qualified as secure third countries, like Senegal and Morocco, without thoroughly thinking about the right of refugees to be protected.

### 3. Recommendations

The following recommendations were made by the interviewed members of the EP in order to strengthen the EU's human rights coherence:

- A coordinated cooperation and exchange of information between the EP and other EU institutions;<sup>202</sup>
- More coordination at the Parliament when it comes to implementing human rights; more coordination at the EP Secretariat level was highlighted as a key issue to avoid that the Parliament's own formal positions change from week to week;<sup>203</sup>
- Measures to raise awareness on human rights issues among the members of the EP;<sup>204</sup>

The following measure to strengthen more human rights coherence was discussed as problematic by interviewed members of the EP and thus need to be avoided:

- Harmonising the inter-institutional approach of the EU on coherence may lead to a levelling-down of the intensity with which human rights coherence is claimed for and not to a coherent approach.
  - Argument: the executive EU institutions (EC) are more quiet and cautious for strategic reasons when it comes to claiming for human rights coherence and implementing the related measures than the representatives EU institutions (EP).<sup>205</sup>

There are controversial views on factors influencing the human rights coherence:<sup>206</sup>

- The influence of strategic interests and diplomatic relations on human rights actions. This interest-based incoherence is perceived as problematic by interviewed members of the EP and as understandable by others.  
Within the EP, there exist different views on whether forced stability can be legitimised or not. In the course of the Arab Spring, the EU is more willing to accept to force stability with military and security services.

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<sup>202</sup> Interviewee P1, P2, P4.

<sup>203</sup> Florence Benoit-Rohmer and others, 'Human Rights mainstreaming in EU's External Relations' (2009) European Parliament Directorate General for External Policies of the Union PE407.003, <[www.europarl.europa.eu/RegData/etudes/etudes/join/2009/407003/EXPO-DROI\\_ET\(2009\)407003\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/407003/EXPO-DROI_ET(2009)407003_EN.pdf)> accessed 10 June 2016.

<sup>204</sup> Interviewee P1, P2, P3, P4.

<sup>205</sup> Interviewee P2.

<sup>206</sup> Interviewee P1.

## D. European External Action Service<sup>207</sup>

The EEAS is a relatively new EU service created by the Treaty of Lisbon in 2009 and formally launched in 2011.<sup>208</sup> As envisaged by the Treaty of Lisbon it brings together officials from the relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of Member States.<sup>209</sup> It has its headquarters in Brussels and operates around 140 EU delegations worldwide. The human rights competences of the EEAS have been described in Deliverable 8.1.<sup>210</sup> Both the novelty of the agency, with a somewhat unclear place among other EU institutions, and the internal structure of the EEAS have made it susceptible to a certain degree of structural incoherence from its early days.<sup>211</sup> As noted by one interviewee 'The EEAS is still a nascent or emerging actor in some respects... it's still a young child.'<sup>212</sup>

The following section is based on the views of five current or former officials working in the structures of the EEAS, while two EEAS officials had already been interviewed for deliverable 8.1.<sup>213</sup> It appears clear from the interviews that the EEAS is one of the institutions of the EU which is most alive to the problem of incoherence in EU human rights policies, especially in its internal-external dimension and the ensuing incoherence between fundamental rights and human rights,<sup>214</sup> as the criticism from third countries about the lack of internal EU action and commitment to human rights often hinders their work. While interviewees often perceived the main problem to derive from the lack of competences of the EU and the position of Member States internally, the external mandate of the EEAS limits the extent to which they can address the issue of human rights incoherence internally.

<sup>207</sup> This section was written by Lisa Ginsborg.

<sup>208</sup> See European External Action Service <[http://eeas.europa.eu/background/about/index\\_en.htm](http://eeas.europa.eu/background/about/index_en.htm)>, accessed 1 July 2016.

<sup>209</sup> Art. 13(a).

<sup>210</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 56.

<sup>211</sup> See also Ana Juncos and Karolina Pomorska, 'Manufacturing Esprit de Corps: The Case of the European External Action Service', 52(2) *Journal of Common Market Studies* [2014] Volume 52(2), 302.

<sup>212</sup> Interviewee C3.

<sup>213</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, annex.

<sup>214</sup> See Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 80.

The EEAS staff also regularly uses its own three-pronged classification of coherence/incoherence issues in their work. They distinguish between internal-external coherence, which has to do with the problem that within the EU 'we don't practice what we preach';<sup>215</sup> internal-internal coherence, which refers to 'how we deal with each other internally'<sup>216</sup> and the extent of 'internal foreign policy coherence' and 'measuring each country with the same yardstick';<sup>217</sup> and finally external-external coherence, which has to do with the external unintended effects of certain foreign policies, which may be 'sometimes unintended, sometimes different interests represented by different arms of the institutions'.<sup>218</sup> These definitions partially overlap with the different strands of incoherence identified and defined in this Work Package.

## 1. Structural Coherence/Incoherence in the work of the EEAS

As already described in 8.1 the creation of the EEAS carried with it potential incoherence in human rights policy because of its prominence in external action, and evidence of structural tensions had already arisen in the first half of the High Representative's term.<sup>219</sup> For example the report found that 'the relations between the Commission and the High Representative and EEAS have evidenced struggles over competence (turf battles), particularly because the Commission retained competence over several important dossiers - humanitarian aid, development, trade and employment'.<sup>220</sup>

Similarly academic literature has documented inter-institutional disputes in the setting up of the EEAS and acknowledged that its effective functioning is a process that is going to 'take time and constant adjustment'.<sup>221</sup> Further, 'the legal and policy issues that its functioning raises within the multi-layered system of foreign affairs set out in the Union's primary rules are formidable'.<sup>222</sup> One of the interviewees shared this view and emphasised that one of the biggest problems in the formulation of EU policy in its external action more generally, including in the field of human rights was that:

there's so many actors involved and so many processes and so many documents being drafted and negotiated at the same time... that I have a feeling that there's nowhere all these different

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<sup>215</sup> Interviewee C3.

<sup>216</sup> Interviewee C6.

<sup>217</sup> Interviewee C3.

<sup>218</sup> Interviewee C3.

<sup>219</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 75.

<sup>220</sup> Ibid.

<sup>221</sup> Panos Koutrakos, 'External Action: Common Commercial Policy, Common Foreign and Security Policy, Common Security and Defence Policy', in Anthony Arnall and Damian Chalmers (Eds.) *The Oxford Handbook of European Law*, (Oxford University Press 2015), 288.

<sup>222</sup> Ibid. at 289.



floors are coming together and there's nowhere a system in place to ensure that these different processes know about each other, inform each other...are coherent with each other.<sup>223</sup>

Against this background interviewees have emphasised inter-institutional sources of structural incoherence, which may undermine their human rights work. However, interviewees were also very open about potential sources of structural incoherence deriving from the internal organisational set up of the EEAS and its working methods. Both issues are analysed below through the views of the interviewees.

## 2. Internal structural coherence

The EEAS is divided between the Headquarters in Brussels and its 140 Delegations worldwide. Its composition is made up of officials coming from different institutions as well as civil servants from EU Member States. Such a complex structure has by its very nature some level of incoherence built into it. Deliverable 8.1 found that:

The composition of the EEAS as a mixture of staff from the Commission and Council Secretariat as well as some posts from national diplomats is equally acknowledged in the mid-term review as posing 'complex challenges of combining different traditions and organisational cultures alongside the difficult task and on-going inter institutional negotiations linked to setting up the service'.<sup>224</sup>

At Headquarters level the EEAS uses the same structure as the Commission and is divided into Directorates-General. The directorates have thematic or geographic dossiers. Alongside the geographic departments, which cover different areas of the world (Asia-Pacific, Africa, Europe and Central Asia, the Greater Middle East and the Americas), there are thematic departments dealing with global and multilateral issues and within the Global Issues department are two human rights divisions. Within the human rights division, policy officers cover specific areas of geographic and thematic responsibility, and have to liaise closely with the relevant geographic department.<sup>225</sup> EU Delegations are responsible for maintaining political dialogue in countries, administering development aid, overseeing trade issues and building cultural contacts, and since the Lisbon Treaty they have taken over responsibility for the human rights dialogues.<sup>226</sup>

One of the key difficulties reported by one interviewee resulting directly from the internal institutional set up of the EEAS has been the division of responsibilities and difference of priorities between the

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<sup>223</sup> Interviewee C5.

<sup>224</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, quoting EEAS, EEAS Review at 4.

<sup>225</sup> Interviewee C4.

<sup>226</sup> See European External Action Service <[http://eeas.europa.eu/human\\_rights/index\\_en.htm](http://eeas.europa.eu/human_rights/index_en.htm) last accessed>, accessed 1 July 2016.

thematic divisions and geographic departments within the EEAS Headquarters, which has directly impacted the human rights work at third country level. One interviewee clearly explained:

the human rights division is always trying to push its agenda but at the end of the day the bilateral geographic divisions who cover the particular country usually have the final say when it comes to how we approach these issues in relation to these countries... this has been an ongoing tension within the EEAS and to a certain extent it's natural and almost productive that we have these kind of discussions.. but at times it's not necessarily helpful [...] the way it's been structured to date has not been particularly productive in that the human rights divisions have been doing a lot of the human rights work in terms of organising human rights dialogues... organising meetings with civil society actors and so on... but then the final say on how we approach the issues has rested with the geographic divisions... so say if a statement is to be issued or we're to raise a particular case.. they would usually have the final call.<sup>227</sup>

The structural division within the EEAS Headquarters, between thematic departments on one hand - and human rights divisions in particular - and political departments on the other, illustrates the trend of structural incoherence giving rise to other sources of incoherence, whether policy framework or interest-based, in which human rights is just one side of the coin in a broader country strategy. Whether competing priorities or interests are at stake, such as trade, security or migration, or whether the broader interest in maintaining good diplomatic relations with the government takes precedence over specific human rights issues, the current structural set up lends itself to the possibility of human rights work taking a back seat and potential incoherence in the EU's external human rights policy. As noted by one interviewee it is clear that political knowledge and strategy and human rights priorities do not always go together. 'Even if something is meriting a response from the EU we may not respond necessarily because it may be viewed as detrimental to our bilateral relationship.'<sup>228</sup> Some officials were reported by one interviewee to view the tension as a 'zero sum game', in which the amount of human rights work that could be done without ruining the political relationship with a country was limited.

In some instances the tension was considered to be positive, exemplifying the finding that at times some level of incoherence in EU human rights policy may be productive in advancing debate and effective strategies. One interviewee recognised that in some cases political knowledge may be correct and human rights may be pushed too far at times, or too frequently, with the result of being counterproductive. In the words of the interviewee

it shouldn't always be top of the agenda and if it is you actually limit your capacity to influence the other side because they don't want to hear about it all the time.... they'll stop listening to you to a certain extent unless you have some other serious leverage.<sup>229</sup>

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<sup>227</sup> Interviewee C4.

<sup>228</sup> Interviewee C4.

<sup>229</sup> Interviewee C4.

On the other hand, they were of the view that geographic divisions are in some cases 'overly cautious, or not sufficiently prioritising human rights and not being ready to push things as much as they possibly could'.<sup>230</sup>

Further, such structural division between thematic and geographic divisions was also found to be generally detrimental to human rights mainstreaming within the EEAS Headquarters. The human rights work was reported to be 'compartmentalised' and to have had 'the opposite effect of mainstreaming'.<sup>231</sup> This resulted in the human rights work being led by the thematic division, and posing problems for the human rights work itself which in turn suffered from lack of geographic expertise, including in the context of human rights dialogues. One interviewee reported that 'the human rights heads of division have been chairing dialogues with countries that they can never really know that much about'.<sup>232</sup> They expressed the view that such dialogues would be more effective if done by the geographic departments, while ensuring that the human rights division continues to provide thematic expertise and ensures that human rights are not sidelined in the process. Given the priority of mainstreaming, it should be the geographic divisions 'who and foremost think about the human rights issues [...] because they are the ones who can do it most effectively because they actually understand who the right people to talk to are... how far you can push things'.<sup>233</sup> The arrangement had started to change a bit at the time of writing this report and the lead for the organisation of human rights dialogues had started to be moved back to the geographic departments. This was reportedly 'partly due to resources and partly due to a recognition that it wasn't the best way to do things'.<sup>234</sup>

Heads of delegations were also reported to be involved and influential in the discussion during human rights dialogues. Although it largely depended on individual heads of delegation, they too were reported to often 'err on the side of caution that's kind of to be expected...[...] they are the ones who are most concerned about upsetting the local authorities, because for them to do their job they need to be on good terms'.<sup>235</sup> In general it was argued that, although understandable, there are situations in which heads of delegations were sometimes reluctant to take a strong line on human rights issues and at times given 'a bit too much leeway in terms of blocking things'.<sup>236</sup>

Overall relations with delegations on human rights issues were reported to be good and the work of delegations to really constitute the 'eyes and ears' of the organisation. Further human rights focal points had been established in all delegations, as committed in the 2012 Action Plan,<sup>237</sup> and were helping to improve the coherence of the EEAS human rights work. However, within delegations the human rights

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<sup>230</sup> Interviewee C4.

<sup>231</sup> Interviewee C4.

<sup>232</sup> Interviewee C4.

<sup>233</sup> Interviewee C4.

<sup>234</sup> Interviewee C4.

<sup>235</sup> Interviewee C4.

<sup>236</sup> Interviewee C4.

<sup>237</sup> European Council, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' (Luxembourg, 25 June 2012) 11855/12 <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/131181.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf)> accessed 11 May 2016.

brief was often covered by less senior members of staff, reportedly giving rise to limitations not in the quality of their work but in the degree to which they are able to influence the work in their relations with more senior staff.<sup>238</sup> Again the institutional set up was found to be at risk of influencing the coherence of human rights within the delegations. However, such a risk was reported to depend very much on the individuals involved, including in particular the head of delegation.<sup>239</sup>

Such a problem was highlighted more broadly within the EEAS structures, partly due to the 'institutional set up' which lends itself to being exploited by individuals who are not willing to cooperate with each other 'even just for personality differences'<sup>240</sup> and partly due to the recent establishment of the organisation. As reported by one interviewee: '....the way the service evolved in five years, it's been pretty much on good persons doing good things and connecting with each other, and now it might be time to look at having it a bit more officialised... more functionally'.<sup>241</sup>

Interviewees clearly expressed the need to make the Service 'more functional' and 'less personal', and the need to build stronger networks and to make the sharing of information more efficient through automatic systems such as distribution lists based on functions.<sup>242</sup>

Further, the problem of the quality and expertise of staff was also raised in relation to the issue of staff mobility in which expertise was seen as often being 'rotated away'. One interviewee spoke about the general trend in all EU institutions encouraging greater staff mobility:

...in part this is an answer to the lack of upstream career perspectives...[...] if it gets to a point where you basically rotate away all your expertise you're going to be meeting difficulty... and then coherence can be simply a function of the organisational challenges [...] in practice I have noticed and it surprised me actually in the beginning when I started working how much the human factor after all is important and how much such things can actually undermine good policies, good strategies and so on.<sup>243</sup>

One official interviewed for Deliverable 8.1 argued that EEAS mobility scheme encourages frequent turnover, which contributes to perennial loss of institutional memory.<sup>244</sup> The importance of human rights expertise, to spot potential hazards and to advise on measures which least impact human rights, was seen to be at odds with the idea of staff rotation. Not only was it reported to be difficult and time consuming

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<sup>238</sup> Interviewee C4.

<sup>239</sup> Interviewee C4.

<sup>240</sup> Interviewee C3.

<sup>241</sup> Interviewee C3.

<sup>242</sup> Interviewee C3 see also recommendations section. This was found to be a good practice among Council working groups.

<sup>243</sup> Interviewee C5.

<sup>244</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 77.

for new staff to 'get into complex and technical areas'.<sup>245</sup> All officials interviewed in the context of this report also recognised this issue in which the policy of rotation contributed to the lack of standing capacity and expertise in human rights issues. This was seen to be in tension with the need to recruit and retain human rights expertise,<sup>246</sup> and the lack of capacity to deal with all human rights issues with which the EEAS is confronted.<sup>247</sup> Undoubtedly all these aspects undermine human rights policy coherence.

The lack of expertise, capacity and resources to deal with all human rights issues was also reported quite broadly by interviewees. One official was open that there was a lack of human rights expertise as there were 'only very few specialists and some specialists were rotated out',<sup>248</sup> and that there was 'general human rights policy expertise thematically, but that doesn't go as deep as knowing the law in depth,' and there was no real hub of expertise in the legal department.<sup>249</sup> As proposed by one interviewee:

....since we have no real hub of expertise on this particular subject in the legal department... it's a small unit only... you don't really have an in house council to go to... I kind of think that perhaps at some point they need to establish something like a senior expert position on human rights...so you have something like a senior legal adviser on human rights law but also processes... in part it's about soft law processes.<sup>250</sup>

Further, while specialised posts in human rights were still recruited, they argued there was 'a critical mass but it's not necessarily in the staffing policy'.<sup>251</sup> Lack of expertise within the EEAS at times led to certain human rights work being 'contracted out', which involved collaboration with the Commission or other agencies including the FRA. '...so we reach a point in our discussions with third countries in which we know... for example...now we need a judge, or we need a prosecutor, or we need a prison expert, we can't handle this... or a disability expert, or whatever it depends on the subject'.<sup>252</sup>

Aside from a lack of in depth human rights expertise in specific areas, capacity issues and lack of resources were also reported. In the words of one interviewee 'generally speaking the capacity is rather weak... and now with restructuring the capacity is being reduced and not increased'.<sup>253</sup> In general it was felt that the thematic department had a heavy work burden and capacity was at times overstretched to cover different geographic and thematic areas, and shifting the geographic work back was seen as a possible solution to lighten the burden.<sup>254</sup>

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<sup>245</sup> Interviewee C5.

<sup>246</sup> Interviewee C3.

<sup>247</sup> Interviewee C5.

<sup>248</sup> Interviewee C3.

<sup>249</sup> Ibid.

<sup>250</sup> Interviewee C3.

<sup>251</sup> Interviewee C3.

<sup>252</sup> Interviewee C3.

<sup>253</sup> Interviewee C5.

<sup>254</sup> Interviewee C4.

The issues of expertise and capacity were also related to what was termed a 'knowledge management problem', in which staff were not always completely up to date with all relevant knowledge given the complexity of the external relations landscape, and the composite nature of the work which was made up of the following aspects: being involved in intergovernmental processes in which specific issues were being discussed including inter alia UN, OSCE, CoE; watching for thematic developments; third country relations and advocacy relations. Further, it was not always easy to be aware of what is negotiated in the various forums.<sup>255</sup> Such 'work-intensive' knowledge was considered especially important when dealing with issues of incoherence and work promoting human rights policy coherence. In the words of the interviewee

coherence requires knowledge of the themes, also the history of negotiations... if you want to ensure for instance coherence of texts, how they evolve, how the overall human rights acquis evolves you have to be quite aware of what was negotiated in the UN and then link that up with the OSCE 'cause otherwise, those who are against a strong... those who are the spoilers... they are quite well organised and they tend to specialise... [...] they do one thing... multilateral, forever, they will not change as we do, and they know exactly... I can't get it through at the UN I couldn't get it through at OSCE but I will try x now. [...] People need to read documents...[...] it's extremely time consuming.<sup>256</sup>

While human rights training were found to already be in place, including peer to peer training and specific trainings with external experts, it was recognised that there was also scope for improvement, although it may not substitute the lack of specialised expertise. Human rights trainings were reported to often be oversubscribed, however there was no general requirement for staff to attend, and it was suggested that it could be made compulsory for all new members of staff joining the organisation or at least part of the induction process.<sup>257</sup> The best practice of UNDP training requirements, which have made human rights training a condition of becoming resident coordinator for UNDP was offered by one interviewee as a positive example that could be followed. The importance of human rights training for fostering coherence in EU human rights policy was already recognised in report 8.1 in the example of the Commission Directorates.<sup>258</sup> Another example of good practice in human rights training within the EEAS was found to be the promotion of the Action Plan during trainings for focal points in delegations.

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<sup>255</sup> Interviewee C3.

<sup>256</sup> Interviewee C3.

<sup>257</sup> Interviewee C4.

<sup>258</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 77.

### 3. Vertical structural coherence

The issue of vertical coherence among the EEAS and Member States, especially in relation to diplomatic presences in third countries is obviously a key issue for the coherence of the work of the EEAS, although it was not discussed in detail by the interviewees. As one interviewee put it

It's of course another source of incoherence... that is when you have your foreign policy partners aligned but then you have a line ministry in a Member State that really doesn't come on board... we have tools to reach out to that, for instance for some difficult big countries we have common lines to take or common reference lines [...] so that we have the same song sheet [...] but again it requires quite a lot of coordination to get those [...] it needs to be distributed and agreed with whole membership and then make sure that the Member State also implement them.<sup>259</sup>

While the EEAS does not have a lot of control on whether Member States follow the line of the EU delegation,<sup>260</sup> a best practice in this context was found in the human rights country strategies, which had been adopted by COHOM, with the EEAS facilitating the process that started in 2012. Such country strategies were found to be very useful to encourage Member States to cooperate, and overall they were reported to have improved the coherence of EU human rights policy in third countries.<sup>261</sup> New country strategies were being drafted between 2016-2020.

A different example of best practice in the context of vertical policy coherence was the idea of 'cross-fertilization' of strategies with like-minded partners among Member States, which could also aid vertical coherence, or touch upon issues of human rights policy coherence more broadly:

these discussions can extend also to coherence or how you bring the political dialogue together with the human rights dialogue...so we may sometimes discuss how we got a bigger place for human rights in an emerging partnership with a third country for instance... and we really compare notes beyond just the facts but on 'how to' issues.<sup>262</sup>

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<sup>259</sup> Interviewee C3.

<sup>260</sup> Interviewee C3.

<sup>261</sup> Interviewee C4.

<sup>262</sup> Interviewee C3.

#### 4. Horizontal structural coherence

Most interviewees reported good levels of cooperation with different Commission branches, including DG Devco, DG Justice, DG employment and DG trade,<sup>263</sup> as well as regular cooperation in the context of the inter-service groups.<sup>264</sup>

Commission experts on specific themes were also regularly involved in the context of EEAS work and their need to 'contract out' expertise, although within the limits of available resources and thematic areas that were overly in demand such as gender equality experts.<sup>265</sup>

While inter-service groups could offer a key avenue to foster greater horizontal coherence, one interviewee found their coordination to come at a stage which is 'too late and you can't really influence anymore', while 'the lens of human rights expertise needs to be put in at the very beginning of the process.'<sup>266</sup> Another interviewee found the inter-service groups often just to be a way for the EEAS to update the Commission on their work, while the key relationship remained with DG Devco.<sup>267</sup>

As introduced above, Deliverable 8.1 had found tensions about competence and responsibilities between the EEAS and the Commission and in particular in relation to DG Devco. Cooperation between the EEAS and DG Devco was broadly reported to be improving, and human rights cooperation between the relevant actors was reported to be positive, although some problems remained, and were considered to be largely a result of the ambiguity in the design of the EEAS, especially in terms of responsibilities.<sup>268</sup> In the words of one interviewee, 'there's still a real issue there in terms of coherence, we're not always fully informed of what each other are doing... it's not always deliberate it's just by virtue of the fact that we're different institutions, with completely separate reporting lines'.<sup>269</sup>

Incoherence in the work of the two institutions thereby derived in part from working relations, in part from institutional structures. This in turn has the potential to influence different areas of substantive policy giving rise to policy and interest-based incoherence in a number of areas, and the problem appeared to originate in both institutions. On one hand, one interviewee reported

In the past there was not a clear commitment by the hierarchy of the EEAS to raise concerns when it comes to integrating human rights in external action in a serious manner with different Commission services [...] on some issues sometimes different Commission services were more progressive on human rights than the EEAS side, when it came to the relations with specific

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<sup>263</sup> Interviewee C6.

<sup>264</sup> Inter-service groups are discussed in detail in section II.A on the Commission.

<sup>265</sup> Interviewee C3.

<sup>266</sup> Interviewee C3.

<sup>267</sup> Interviewee C4.

<sup>268</sup> Interviewee C4.

<sup>269</sup> Interviewee C4.



countries because the *realpolitik* approach was more dominant sometimes in the geographic departments in the EEAS than in Commission services.<sup>270</sup>

On the other hand, EEAS officials interviewed reported being regularly left out of thematic human rights discussions as well as impact assessments. By way of example a couple of interviewees reported the EEAS was 'hardly consulted' on a number of quick proposals by DG Home on the issue of migration, despite it clearly not being an entirely internal issue, albeit a very high profile one.<sup>271</sup> The lack of full involvement of the EEAS in impact assessments is also discussed in section II.A on the work of the Commission.<sup>272</sup>

Interviewees generally reported that the EEAS had hardly contributed in practice to commenting on draft impact assessments,<sup>273</sup> neither geographic nor human rights colleagues, 'so far it hasn't really happened because there is not the awareness, the capacity and the expertise to do so in an informed manner'.<sup>274</sup> The EEAS was reported to have worked closely with the Commission when they adopted the better regulation package in 2015,<sup>275</sup> and had ensured that the package also refers to 'impact assessments for human rights'. One interviewee reported: 'it took us quite a while to convince them that it is important to also assess the impact externally on human rights'.<sup>276</sup> However, the question now remained of how to implement the package,<sup>277</sup> and how to ensure the EEAS can be included in the process which has become 'very formalised', and how they could be made aware of new initiatives. In the words of one interviewee,

This is very much a green field site in a way between the EEAS and the Commission to the extent that we are still scoping out how do these impact assessments happen, how are they shared, how do we find out what's being impact assessed, how does the EEAS involve itself.<sup>278</sup>

In practice the key question for another interviewee was how to ensure that the EEAS representatives are involved in the steering group and can thereby bring in the EEAS expertise, which was clearly not happening at present.<sup>279</sup> Deliverable 8.1 had found an EEAS official interviewed in that context to argue that the greatest challenge to achieving coherence is to change the culture within the institutions.<sup>280</sup>

Such structural incoherence and the difficulties of bringing together the human rights and the fundamental rights policy perspectives and actors is reflective of a much broader incoherence which lies

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<sup>270</sup> Interviewee C5.

<sup>271</sup> Interviewee C4.

<sup>272</sup> See section II.A of this report.

<sup>273</sup> Interviewee C5.

<sup>274</sup> Interviewee C5.

<sup>275</sup> See section II.A.

<sup>276</sup> Interviewee C6.

<sup>277</sup> Interviewee C6.

<sup>278</sup> Interviewee C2.

<sup>279</sup> Interviewee C6.

<sup>280</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 76.

at the heart of EU human rights policy and is reflected in the internal/external incoherence which is reported to be a central concern in the work of the EEAS.

## 5. Policy framework coherence

Deliverable 8.1 found the separation between internal and external EU policy regimes to lie at the heart of the false dichotomy between human rights and fundamental rights and the main source of incoherence in its human rights policy regimes.<sup>281</sup> Such incoherence was a key source of concern which remained very central to the work of all the EEAS officials interviewed for this report. Without repeating these well-known debates and the most frequently discussed dimension of EU human rights policy incoherence, as a key actor in the external dimension the internal/external incoherence resulted in lack of credibility and lack of effectiveness in their work, on a number of fronts, both in how they related to third countries and in multilateral organisations. As one interviewee noted, the importance of the EU 'practising what it preaches' upholding internally the human rights standards which it promotes externally, was important not only for human rights protection itself but also because of the

way UN politics work, the moment you are caught not doing what you preach of course your credibility and thereby the whole convening power of the EU... the important role of the EU as global human rights champion is really undermined... and since Lampedusa you can really sketch a downward trend.<sup>282</sup>

Among the topics raised on a regular basis either by third countries or in multi-lateral fora as a criticism to the EU internal human rights policy the following were mentioned by interviewees: migration (in the past in relation to the ratification of the Migrant Workers Convention, now the topic had become much broader); non-discrimination and treatment of minorities; lack of commitment to ESC rights, including lack of ratification of the Optional Protocol to the ICESCR by many Member States; prison overcrowding; NHRIs (in particular the fact the some EU Member States did not have A status NHRIs); and ratifications of international treaties more broadly. Many more could of course be added to the list, but these were highlighted as recurring often in the discussions with third countries or in multilateral fora. One interviewee recognised that although the internal/external human rights policy coherence was a key issue that needed to be addressed broadly, it was often raised by countries in a self serving manner. 'Especially migration related criticism is very self-serving, often countries who are either originators of migration flows because they are human rights violators or they are not delivering on basic goods for the population [...] and also countries who don't do anything to host refugees'.<sup>283</sup>

Interviewees recognised that the internal/external coherence issue had been more prominent over the last few years, was regularly raised in dialogues, also by civil society and human rights generally were

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<sup>281</sup> Ibid., 80.

<sup>282</sup> Interviewee C3.

<sup>283</sup> Interviewee C3.

becoming more of a priority.<sup>284</sup> In the words of one interviewee '...everyone talks and acknowledges the problem, how you actually do anything about it is unclear, especially in light of responsibilities, mandates and competences'. Overall there was widespread agreement that the 'competence issue' was the main obstacle to ensuring greater coherence in EU human rights policy in this respect,<sup>285</sup> and things were unlikely to change because of human rights dialogues, they required much broader political will from Member States.<sup>286</sup>

Further, the role of the EEAS as a foreign policy actor, and its limited competence in this respect, was also reported by interviewees to be an obstacle to working on the issue of internal/external coherence. While it was recognised as a crucial problem in their work, one interviewee argued that as a foreign policy actor they could not devote too many resources to the issue, and what they could do was limited beyond communication.<sup>287</sup> Nonetheless EEAS officials appeared to be actively engaged in the issue in a variety of communication strategies and to be investing thought and time in constructive ways forward to push or at least respond to the issue and to aid their human rights work. As such they could even be seen as an agent of internal coherence, while fostering ways to overcome the internal /external structural and policy framework incoherence. One interviewee explicitly spoke about the need 'to convince other colleagues that the issue deserves to be worked on and deserves time investment,<sup>288</sup> as it was a complex, time-consuming issue which required long term commitment and an approach which involved many actors.

Potential responses to the issue reported by the interviewees, varied between outreach and communication strategies towards other relevant institutional actors, EU Member States, and advocacy about the issue more generally, to changing the approach in relations with third countries and in particular human rights dialogues. One interviewee considered the most effective approach to increase awareness of the issue and 'advertise this topic among Member States and EU institutions', with the aim of getting increasing support both from the institutions and from Member States themselves.<sup>289</sup> Similarly another interviewee argued

...if you are to talk about philosophies of how to get over barriers or policy disagreements on internal external, I think a lot of it is through building those relationships in the inter-service groups... not just when you come to look at a particular policy proposal but actually in a more general way...<sup>290</sup>

'Liaising with Commission colleagues with persuasive arguments', engaging with COHOM and FREMP, encouraging internal engagement with human rights mechanisms, for instance UN Special Procedures<sup>291</sup> or working through briefings and reports of for instance discussions in UN fora in which the main issues for which the EU is criticised are drawn out, were all mentioned as possible avenues for fostering greater

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<sup>284</sup> Interviewee C6.

<sup>285</sup> Interviewee C6.

<sup>286</sup> Interviewee C4.

<sup>287</sup> Interviewee C4.

<sup>288</sup> Interviewee C6.

<sup>289</sup> Interviewee C6.

<sup>290</sup> Interviewee C2.

<sup>291</sup> Interviewee C3.

policy framework coherence, this time through increased inter-institutional cooperation and awareness raising. One interviewee argued:

reporting is important, so we care to spread reports that we write on for instances discussions of the Third Committee of the UN in New York or the Human Rights Council... we share them with Commission colleagues and there we often draw out the lines... for instance we say the EU often addressed on migration... is frequently criticised on for instance the effect of the economic adjustment programs on economic social and cultural rights, racism... I think these are perhaps the most important ones in the last three years.<sup>292</sup>

On the other side, interviewees reported taking a more measured approach to what was asked for externally, for instance in terms of ratifications and implementation of international agreements, or trying to develop parallel communication strategies *vis a vis* third countries and having defensive lines on the issues of internal-external coherence for human rights dialogues with third countries.

In this context a number of practical communication tools had been developed, including a database of responses from Member States on the human rights issues in their countries based on issues that are raised during appearances before treaty bodies, which has resulted in a document that was reported to be hundreds of pages long and 'practically very difficult to use in dialogues'.<sup>293</sup> Another 'defences document' from DG Just and DG Home on EU level policies was reported to be more useful because much shorter and to be regularly used in EEAS dialogues. Similarly the EU Member States commitments to ratifications of key conventions expressed in the 2012 Rule of Law high level conference, were also considered a useful source to point to in this respect. On the whole while communications tools may be useful to aid the daily work of the EEAS, they did little to address the policy framework incoherence underlying the work of the EEAS. In the words of one interviewee, 'What that does to bridge the coherence gap I'm not sure but at least it means that our messaging is a bit more credible.'<sup>294</sup>

## 6. Interest-based incoherence

As introduced above a number of interests may come in the way of the work of the EEAS in promoting human rights in third countries, and thereby undermine the coherence of its human rights policy. Related to this, concerns are often expressed about inconsistency in the EU's position towards third countries as was documented in Deliverables 8.1 and 8.2. While such interest-based incoherence received less attention in the views of interviewees, (perhaps unsurprisingly as it is perhaps the most sensitive area of human rights external policy incoherence), a number of interests were mentioned which may potentially undermine human rights in the engagement by the EEAS with third countries. The issues of trade, energy and migration were considered to be particularly sensitive in this respect. A task force was created by the

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<sup>292</sup> Interviewee C3.

<sup>293</sup> Interviewee C4.

<sup>294</sup> Interviewee C4.

EEAS on migration issues, which included Commission representatives and tries to raise the human rights agenda.<sup>295</sup> Despite this one interviewee reported that the issue has 'taken on a life of its own at a very senior level', which made the debate difficult to influence.<sup>296</sup>

Some of the areas of interest-based incoherence which were discussed by interviewees again in part appeared to result from the structures of separation between human rights and other issues in a frequent pattern of structural incoherence and interest-based incoherence going hand in hand. One area of tension was reported to be the area of security and counter-terrorism. While the area of counter-terrorism requires a certain level of confidentiality by definition, the lack of information sharing in the context of the Security/Counter-terrorism dialogues made inserting human rights on the agenda very difficult. As reported by one interviewee

I don't know how much we know about what's going on always [...] we try to get in but we don't always know about it necessarily until a late stage, and even then it's not always that easy to get them to talk about it in the dialogue and that's down to security mind-sets that still exists among some people... it really depends...[...] some people are fully on board with importance of talking about rule of law...[...] and others still reluctant or don't see the relevance '.<sup>297</sup>

Other problems were reported in the area of CSDP, where despite the presence of human rights advisers in CSDP missions, they were 'not necessarily listened to' and often complained about their views not being taken into account especially in the context of civilian missions.<sup>298</sup> There is no question that many other sources of interest-based incoherence characterise the work of the EEAS on a daily basis, with its relations with 140 countries making perfect coherence in all area of human rights policy by definition impossible. However, interviewees appeared more reluctant to discuss specific thematic areas, which is perhaps not surprising in light of the sensitivity of some of the issues, or the preference to remain anonymous.

## 7. Conclusions and Recommendations

Overall officials interviewed in the context of the EEAS appeared very aware and open to discussing issues of incoherence in EU human rights policy, especially structural incoherence and that deriving from the internal/external tension which often affected and undermined their work. The findings of this section appear to indicate that although some of the sources of incoherence may be more difficult to address and may require more long-term political solutions, starting from the issue of EU competences and how it affects the human rights/fundamental rights divide, the policymakers interviewed are thinking about

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<sup>295</sup> Interviewee C6.

<sup>296</sup> Interviewee C4.

<sup>297</sup> Interviewee C4.

<sup>298</sup> Interviewee C4.

creative solutions in their human rights work including in their working methods and communication strategies.

One interviewee outlined what they thought would be the ingredients to support the coherence in human rights policy in the work of the EEAS, and the EU more broadly, which included political will, structures, working methods and critical staff, combined with networks and leadership.<sup>299</sup> While this may seem like a tall order, some of the ingredients are already in place and the interviewee expressed their hope that the political will pronouncement already reflected in the Strategic Framework and the Action Plan will also be reflected in the Global Strategy, which had not been released at the time of the interview.<sup>300</sup> With regard to structures, and the already mentioned limitations of competences, change was perceived harder to bring about internally and

as long as the internal rule of law mechanism has not enough teeth it will not be credible internal mechanism to deliver what we ask of our partner countries when it comes to human rights violations... of course the equation with the national system of review, redress, legal recourse is imperfect because of the way the EU is set up.<sup>301</sup>

Further, the importance of appropriate working methods, critical staff, networks and communication strategies have been addressed in detail in this section, and the idea that 'coherence requires knowledge' emerges clearly from the experts at the EEAS. A number of concrete recommendations from policymakers have been put forward to improve structures, working methods, networks and communication strategies. These should be complemented by 'leadership towards working together', and better communication to get people on board, create an *esprit de corps*, including intellectual leadership to overcome the mindset of the false dichotomy between interests and human rights, and adopt a more long term constructive approach.<sup>302</sup> Further the importance of Member States 'buy in' was also essential to this solution.<sup>303</sup> While these may seem abstract and in part utopian answers to achieve human rights coherence, a number of very concrete recommendations have also emerged from the views of policymakers. These include:

- Compulsory human rights training for everyone, for instance within five years of joining the Service, or as part of the induction process.
- Better information flow between EU delegations and EEAS, including making the Service more functional and less personal, for example by means of automatic distribution lists of reports per function<sup>304</sup>
- Counteracting staff mobility policy through retention of expertise in specific human rights policy areas

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<sup>299</sup> Interviewee C3.

<sup>300</sup> See European Union Global Strategy at <<https://europa.eu/globalstrategy/en/global-strategy-foreign-and-security-policy-european-union>>, accessed 1 July 2016.

<sup>301</sup> Interviewee C3.

<sup>302</sup> Interviewee C3.

<sup>303</sup> Interviewee C6.

<sup>304</sup> Interviewee C3.

- Increased cooperation with the Commission services and regular involvement of the Service in impact assessments
- Human rights units to provide geographic teams with concrete realistic recommendations that are 'actually usable' in human rights dialogues.
- Improve mainstreaming, while retaining an expert human rights structure, and in particular overcoming geographic/thematic division
- Establish a senior expert position on human rights within the EEAS.

## F. Fundamental Rights Agency<sup>305</sup>

This section addresses the role of the Fundamental Rights Agency (FRA) as agent of coherence in EU human rights policies. It is based on two interviews with members of the FRA. In both interviews, the recommendations established in the course of Deliverable 8.1,<sup>306</sup> and related to the FRA were discussed. Apart from that, the interviewees commented more on the work and the tools of other institutions (such as the Parliament, the Commission and the Council of Europe) rather than on those of the FRA. Nonetheless, the following remarks will provide information on the role of the FRA as EU actor of coherence, rather than on the FRA's perceptions and views on the work of other EU actors.

The FRA was established in 2007 with the specific task to

provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.<sup>307</sup>

The FRA collects data and information on fundamental rights, based on which it offers advice to the EU institutions and the member states.<sup>308</sup>

According to an interviewed member of the FRA, the concept of coherence is not used very frequently by the FRA, because it is considered too abstract for certain contexts. The FRA rather focuses on concrete thematic areas, and thereby encounters incoherence or has to deal with issues of coherence. Thus, the FRA encounters issues of coherence only through its thematic work on fundamental rights. Consequently, the FRA does not promote coherence as such, it rather contributes to ensuring that the EU's policies respect fundamental rights.<sup>309</sup>

The following sections outlines the opinions of the interviewed FRA members on the recommendations targeting the FRA, as developed in the course of Deliverable 8.1.

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<sup>305</sup> This section was written by Wolfgang Benedek, Isabella Meier and Maddalena Vivona

<sup>306</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>.

<sup>307</sup> Council Regulation (EC) No.168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/1.

<sup>308</sup> European Union, 'The European Union Agency for Fundamental Rights' (16 July 2013) <[http://ec.europa.eu/justice/fundamental-rights/agency/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/agency/index_en.htm)> accessed 26 July 2016.

<sup>309</sup> Interviewee F2.



*a) Expanding the mandate of the FRA*

The interviewees commented on both ways of extending the mandate of the FRA: extending the thematic area and including a monitoring task into the mandate. For one interviewee it was clear that a thematic widening of the FRA's mandate will not solve the problem of the EU's human rights incoherence at structural level. Even if the mandate of the FRA was extended, some thematic areas or inquiry areas might nonetheless be left out. However, according to this interviewed FRA member, the FRA's Management Board was of the view that FRA should have a mandate, which deals with all the rights in the Charter.<sup>310</sup> The other interviewee could imagine including the issues of judicial and police cooperation into the mandate of the FRA. This interviewee could envisage implementing this suggestion in the negotiations on the future Multi-Annual Framework in which the future activities of the FRA are defined and which is presently under preparation. However, the interviewee was not very optimistic about this happening.<sup>311</sup>

Both interviewed FRA members were not in favour of extending the FRA's mandate with monitoring tasks. According to one interviewee, a monitoring mandate will not help to implement the purpose of the FRA, namely delivering evidence based advice to EU institutions and member states in order to strengthen their capacities and shaping their policies in a way that it is compliant with fundamental rights.<sup>312</sup>

Another argument against the monitoring-task brought by the interviewee was that there are already enough human rights monitoring bodies outside. For this interviewee, the question is rather how the FRA can support the monitoring of other bodies at the CoE, UN and at Member State level or on how FRA can make better use of the results of other monitoring bodies.<sup>313</sup>

In terms of gathering information on the fundamental rights performance of EU Member States, the other interviewed FRA member suggests establishing a "Fundamental Rights Information System", rather than carrying out monitoring.<sup>314</sup> The information system could be based on an analysis of all reports by international monitoring bodies that could provide EU institutions with a quick overview about the human rights situation of Member States. Lack of information regarding the fundamental rights performance of Member States is believed to be one of the main challenges in achieving coherence of fundamental rights policies in the European Union. However, no monitoring is needed to fill this gap, an information system is sufficient. An information system would provide the EU institutions with a quick overview of where a certain Member State stands with regard to certain human rights.<sup>315</sup>

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<sup>310</sup> Interviewee F1.

<sup>311</sup> Interviewee F2.

<sup>312</sup> Interviewee F1.

<sup>313</sup> Interviewee F1.

<sup>314</sup> Interviewee F2.

<sup>315</sup> Within the framework of the FRAME project an Access Guide to Human Rights information was developed and will be available online on the FRAME website. The Access Guide analyses strengths and limitations of existing human rights information for selected human rights and discusses how to relate these information to the normative content

The interviewed FRA member has already proposed this idea at meetings with other EU institutions. According to the interviewee, the idea was received very well, but needs more political will for implementation. Furthermore, in terms of extending the mandate of the FRA, the interviewee would envisage that each legislative proposal is reviewed by FRA for its compliance with the relevant human rights standards.<sup>316</sup>

### *b) Training and capacity building on fundamental rights*

Both interviewed FRA members suggest more training on fundamental rights issues for EU officials and more measures to raise awareness of fundamental rights issues. According to them, this would strengthen the EU's policy coherence in terms of fundamental rights. According to one interviewee, it is not resistance towards human rights, but rather lack of awareness among EU officials that their work is fundamental rights related work and that the outputs of their work strengthen or weaken fundamental rights. However, according to the interviewee it is important that these trainings are targeted to the fundamental rights aspects of the EU officials' working areas. A simple training on the Fundamental Rights Charter for all EU officials will not help.<sup>317</sup>

## **2. Recommendations**

The following recommendations were made by the interviewed members of the FRA. Not all of them are perceived as realistic to be implemented, because the political will is lacking.

- Extend the mandate of the FRA to cover
  - all human rights issues as pointed out in the Charter of Fundamental Rights;<sup>318</sup>
  - the thematic issue of judicial and police cooperation;<sup>319</sup>
- Establish a Human Rights Information System on the fundamental rights performance of MS, rather than mandating the FRA with the task of fundamental rights monitoring;
- Training and capacity building on fundamental rights among all EU institutions, since lacking human rights commitment is not always explainable through political resistance, it is rather lacking awareness.

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of the human rights provisions at hand. Maddalena Vivona, Markus Möstl and Klaus Starl (eds.), 'FRAME Access Guide to Human Rights Information', *forthcoming 2016*, <[www.fp7-frame.eu/reports](http://www.fp7-frame.eu/reports)> accessed 17 June 2016.

<sup>316</sup> Interviewee F2.

<sup>317</sup> Interviewee F1.

<sup>318</sup> Interviewee F1.

<sup>319</sup> Interviewee F2.

## G. European Ombudsman<sup>320</sup>

*‘The title ‘European Ombudsman’ is slightly flattering because I am not the ombudsman of Europe, I am ombudsman of European institutions.’<sup>321</sup>*

### 1. The mandate and responsibilities of the European Ombudsman

The European Ombudsman (hereinafter referred to as Ombudsman) is empowered to investigate maladministration in activities of the EU institutions with the exception of the jurisdiction of the Court of Justice of the European Union (CJEU). The Ombudsman’s procedure is initiated by complaints from EU citizens or any natural or legal person residing or having its registered office in a Member State. Beyond her investigative function, on the basis of complaints submitted or on her own initiative, she shall conduct inquiries.<sup>322</sup> These inquiries aim ‘to clarify any suspected maladministration in the activities of Community institutions and bodies’.<sup>323</sup> The institutions are obliged to provide the Ombudsman with any requested information and access to related documents.<sup>324</sup> The Ombudsman seeks a solution ‘with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint’.<sup>325</sup> During its procedure, the Ombudsman may initiate both oral and written communications. As a first step, she forwards the complaint to the institution concerned and requests its opinion on the matter. The institution has, as a rule, three calendar months to reflect. The EU institutions are required to provide the Ombudsman with any information she requests from them and to give her access to the files concerned. As regards her powers, she may examine documents and interview officials and servants. In cases where rapid solution is needed, the Ombudsman may use less formal procedures, such as phone calls.<sup>326</sup> If the Ombudsman discovers maladministration, he or she informs the institution or body concerned and makes recommendations. The institution or body has three months to communicate its detailed opinion.<sup>327</sup> The Ombudsman shall submit an annual report to the European Parliament on the outcome of these inquiries.<sup>328</sup>

<sup>320</sup> This section was written by Veronika Haász.

<sup>321</sup> Interview with the European Ombudsman conducted by Veronika Haász in Brussels on 28 January 2016.

<sup>322</sup> Art. 228(1) TFEU.

<sup>323</sup> Art. 3(1), European Ombudsman, Statute.

<sup>324</sup> Art. 3(2), European Ombudsman, Statute.

<sup>325</sup> Art. 3(5), European Ombudsman, Statute.

<sup>326</sup> European Ombudsman, The European Ombudsman’s guide to complaints <<http://www.ombudsman.europa.eu/en/resources/staffguide.faces#/page/1>> accessed 21 July 2016.

<sup>327</sup> Art. 3(6), European Ombudsman, Statute.

<sup>328</sup> Art. 228(1) TFEU.

Thus, the Ombudsman has a mandate that is comparable to that of a classical ombudsman institution, namely to closely examine the practice of the EU administration. It aims to assist the EU in creating a more effective, accountable, transparent and ethical administration.<sup>329</sup>

Performing her duties, the Ombudsman shall be completely independent.<sup>330</sup>

The jurisdiction of the Ombudsman was extended by the Treaty of Amsterdam when the subject of visas, asylum, immigration and other policies was incorporated in the Treaty and when she was given the competence to monitor the activities of institutions and bodies engaged in third pillar activities concerning police and judicial cooperation in criminal matters.<sup>331</sup> Hence, the areas of work of the Ombudsman cover all the policy areas, where EU institutions, agencies or other bodies are active.

The strategic objectives of the institution are to ensure relevance, achieve greater impact, maintain high visibility, and improve efficiency.<sup>332</sup> In order to fulfil these objectives, the Ombudsman's Annual Management Plan contains priority actions and concrete activities to be performed.<sup>333</sup>

Considering the human rights aspects of the Ombudsman's work, we first have to refer to the EU Charter of Fundamental Rights (CFR). The right to complain to the Ombudsman itself embodies a fundamental right as it is listed in the CFR when it states that

[a]ny citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.<sup>334</sup>

Furthermore, there are two fundamental rights that directly relate to the work of the Ombudsman. Art. 41 of the CFR contains the right to good administration that includes

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; and (c) the obligation of the administration to give reasons for its decisions.<sup>335</sup>

<sup>329</sup> European Ombudsman, Strategy of the European Ombudsman - "Towards 2019" <<http://www.ombudsman.europa.eu/en/resources/strategy/strategy.faces>> accessed 30 May 2016.

<sup>330</sup> Art. 228(3) TFEU.

<sup>331</sup> European Union, Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, O.J.C 325/01 (24.12.2002), Title VI, Art. 41(1).

<sup>332</sup> European Ombudsman, Strategy of the European Ombudsman - "Towards 2019" <<http://www.ombudsman.europa.eu/en/resources/strategy/strategy.faces>> accessed 30 May 2016.

<sup>333</sup> European Ombudsman, Annual Management Plan – Year 2016 <<http://www.ombudsman.europa.eu/en/resources/strategy/amp.faces/en/64084/html.bookmark>> accessed 30 May 2016.

<sup>334</sup> Art. 43 CFR.

<sup>335</sup> Art. 41 CFR.

Art. 42 refers to the right of access to documents of the institutions, bodies, offices and agencies of the Union.<sup>336</sup> That is the core element of the Ombudsman's investigations in relation to transparency.

'Ensuring that EU institutions respect fundamental rights is a key part of the Ombudsman's work.'<sup>337</sup> Therefore, any other fundamental rights embodied in the CFR and violated by EU institutions can be the subject of a complaint to the Ombudsman. From year to year, the main topics that are subject to the individual complaints relate to transparency, institutional and policy matters such as conflict of interests, or delays and other shortcomings in the institutions' procedure, competition and selection procedures, administration and staff regulations.<sup>338</sup>

## 2. The European Ombudsman's interaction with other actors

The Ombudsman interacts with rights holders, as well as EU institutions, bodies and agencies. She either transfers complaints to other national or European institutions or the EU institutions become subjects of her inquiries. In 2015, more than half of the complaints (52.7%) were transferred to a member institution of the European Network of Ombudsmen or the complainant was advised to contact one, and 14.1% of the complaints fell within the competences of the European Commission.<sup>339</sup> In 2015, more than half of the inquiries conducted by the Ombudsman (55.6%) related to the European Commission. The other half of inquiries related to EU agencies (11.5%), the European Personnel Selection Office (10%), the European Parliament (8%), the EEAS (4.6%), and the European Anti-Fraud Office (1.9%).<sup>340</sup>

At the national level, the Ombudsman interacts especially with the European Network of Ombudsmen (hereinafter referred to as Network) that it is chairing. The European Ombudsman and the Network share information, experiences, and have seminars together. Regarding their cooperation, the Ombudsman's aim by the time of entering the office was 'to make the work more useful, relevant and have a higher impact'.<sup>341</sup> Therefore, in 2015 the idea was developed to use the Network in a more dynamic and strategic way by starting a series of 'parallel investigations': the Ombudsman does the EU part and her colleagues do their investigations as they relate to the Member States. The first example of such a parallel investigation related to the Frontex return flights in 2014. The Ombudsman – in parallel to the Network – investigated whether the fundamental rights of migrants forced to return to their home countries are being respected. The Ombudsman examined the role of Frontex in EU returns while national ombudsmen offices examined how forced returns were carried out by Member States.<sup>342</sup>

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<sup>336</sup> Art. 42 CFR.

<sup>337</sup> European Ombudsman, Annual Report 2015, 14.

<sup>338</sup> European Ombudsman, Annual Report 2015, 35; European Ombudsman, Annual Report 2014, 20.

<sup>339</sup> European Ombudsman, Annual Report 2015, 25.

<sup>340</sup> European Ombudsman, Annual Report 2015, 34.

<sup>341</sup> Interview with the European Ombudsman.

<sup>342</sup> Interview with the European Ombudsman.

Another investigation that is at its early stages is lobbying transparency within the Member States. According to the Ombudsman, 'lobbying transparency is a huge issue in the EU, especially in Brussels'.<sup>343</sup> One of the biggest scandal that relates to lobbying transparency is the VW scandal, in which the company admitted in September 2015 that millions of diesel cars had been fitted with a software allowing them to cheat emissions tests.<sup>344</sup> In March 2016, the European Parliament began an investigation into the scandal, with special regard whether regulators could have done more to prevent it.<sup>345</sup> At the national level, 'relatively few ombudsmen would have direct involvement in lobbying transparency'.<sup>346</sup> Therefore, the Ombudsman tries to sensitise Member States' ombudsmen towards this issue, and explore ways how they can act together. As a best practice, the Ombudsman mentioned the Irish example, where the ombudsman is member of a Commission that has just appointed a lobbying registrar.<sup>347</sup>

There are further examples of interaction with national level ombudsman institutions. The Ombudsman visited her colleagues in Austria and Hungary in December 2015. Considering the constitutional crisis situations in Hungary and Poland, the ombudsman's role is sensitive in these countries, and the Network aims to support these members also in a sensitive way considering the national situations.<sup>348</sup>

The Ombudsman also accepts invitations – not only from ombudsman institutions, e.g. the Dutch Parliament invited the EU Ombudsman in June 2015.<sup>349</sup>

At the European level, the Ombudsman cooperates with the European Parliament,<sup>350</sup> where the Committee on Petitions is responsible for relations with the European Ombudsman.<sup>351</sup> Their working together 'helps to better advise EU citizens and residents in their concerns'.<sup>352</sup> There is a division of labour between them. The Ombudsman deals with complaints against the EU institutions, bodies and agencies, while the Committee on Petitions deals with petitions as regards the EU's areas of activity across Europe.<sup>353</sup>

Since the European Commission is especially active in the area of EU administration, the Commission is the subject of the majority of complaints to the Ombudsman. As a result, the Ombudsman maintains

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<sup>343</sup> Interview with the European Ombudsman.

<sup>344</sup> The Guardian, Volkswagen's handling of emissions scandal a shambles, say investors, 22 June 2016 <<https://www.theguardian.com/business/2016/jun/22/volkswagen-handling-emissions-scandal-shambles-investors-agm-german-carmaker>> accessed 28 June 2016.

<sup>345</sup> Reuters, EU politicians begin inquiry into VW emissions scandal, 2 March 2016 <<http://www.reuters.com/article/us-volkswagen-emissions-parliament-idUSKCNOW41TN>> accessed 28 June 2016.

<sup>346</sup> Interview with the European Ombudsman.

<sup>347</sup> Interview with the European Ombudsman.

<sup>348</sup> Interview with the European Ombudsman.

<sup>349</sup> Interview with the European Ombudsman.

<sup>350</sup> See the Framework agreement on cooperation between the European Parliament and the European Ombudsman <[http://www.ombudsman.europa.eu/showResource?resourceId=1336551258000\\_Agreement%20-%20Cooperation%20Agreement%20signed%20on%2015.03.2006.pdf&type=pdf&download=true&lang=en](http://www.ombudsman.europa.eu/showResource?resourceId=1336551258000_Agreement%20-%20Cooperation%20Agreement%20signed%20on%2015.03.2006.pdf&type=pdf&download=true&lang=en)> accessed 3 June 2016.

<sup>351</sup> European Parliament, Rules of Procedure of the European Parliament, Annex VI, XX(3).

<sup>352</sup> Interview with the European Ombudsman.

<sup>353</sup> European Ombudsman, Annual Report 2015, 21-22.

strong relations with the Commission. Beyond liaising with it in the course of inquiries and investigations, the Ombudsman meets the members of the Commission on a regular basis.<sup>354</sup>

Furthermore, the Ombudsman has strong connections to the European Data Protection Supervisor.<sup>355</sup>

### 3. The European Ombudsman's experiences of coherence/incoherence

It is difficult to draw a line between the different kinds of, namely policy, structural, and interest-based coherence/incoherence that the Ombudsman experiences in her practice. Her investigations relating to fundamental rights, transparency and access to documents often discover more types of incoherence or rather permit to discover possible incoherence in policies and policymaking.

#### a) *Frontex case – structural incoherence*

The EU's human rights policy is not an area where the Ombudsman acts directly. However, her work does naturally touch on human rights issues. The above mentioned Frontex case is one example of that. It was an investigation into whether Frontex, the EU borders agency, was upholding the fundamental rights of migrants who are being returned to their country of origin.<sup>356</sup> The Ombudsman formulated the following proposals towards Frontex:

A) Adopt and publish a document describing the actions its representatives may take during a joint return operation (JRO) in situations of human rights violations or ill-treatment before or during the flight. This could be included in its Best practices on JROs or issued as a separate publication.

B) Produce a complaint form for returnees, as well as an information sheet about the complaints procedure, drafted in cooperation with the Member States; co-finance translations of these documents into the most frequently used languages. The information should include contact details of agencies or individuals who might assist returnees to submit a complaint when they are back in the country of return, for example NGOs, pro bono lawyers, and third country ombudsmen.

C) Support projects aimed at documenting the means of restraint allowed for return operations in each Member State or launch such a project itself; list those restraint means to which it would never agree in a JRO, and make these documents public.

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<sup>354</sup> European Ombudsman, Annual Report 2015, 22.

<sup>355</sup> See the Memorandum of Understanding between the European Ombudsman and the European Data Protection Supervisor, 2007/C 27/07  
<[https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/EDPS/PressNews/News/06-11-30\\_EO\\_EDPS\\_MoU\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/EDPS/PressNews/News/06-11-30_EO_EDPS_MoU_EN.pdf)> accessed 3 June 2016.

<sup>356</sup> Interview with the European Ombudsman.

D) Establish a requirement in the JRO Implementation Plan, and scrutinise compliance with it, that families with pregnant women and families with children are enabled to board the aircraft separately and are seated separately from other returnees.

E) Require, in the pre-JRO procedure, that the compulsory physical presence of monitors in the JRO is dealt with in the relevant documents (namely, in the offer of a return flight, the Conditions attached to the acknowledgement of the offer and in the Implementation Plan). Frontex could also make the plan for upcoming JROs public, at least one week in advance, and make it clear on its website that it pays for monitors' presence in the JRO; Frontex could, finally, prepare and publish country sheets on the allowed use of means of restraint in each Member State and provide training for monitors in this respect.

F) Require in the JRO Implementation Plan (or Conditions) that monitors' reports are forwarded to Frontex; publish on its website: Frontex's JRO Evaluation Reports, including monitors' observations and Frontex recommendations; the section of the JRO Implementation Plan, which refers to the agreed use of means of restraint; Frontex Best Practices for JROs; monitors' reports.

G) Ensure that fundamental rights are respected in so-called Collecting JROs; in particular, explain publicly (i) the legal framework for Collecting JROs, including the working arrangements with third countries concluded in accordance with Art. 14(2) of the Frontex Regulation, and (ii) how Frontex complies with its own human rights obligations in fulfilling its role as coordinator of Collecting JROs.<sup>357</sup>

Frontex agreed to implement the Ombudsman's proposals.<sup>358</sup> In the light of the Ombudsman's recommendations, inter alia, Frontex has committed itself to review and amend its Best Practice for joint return operations (JROs), the JRO Implementation Plan, and the Frontex Code of Conduct for JROs.

The findings of the Ombudsman's inquiries can have an indirect effect as well. Also in relation to Frontex, the European Parliament in December 2015 backed an earlier Ombudsman proposal, made in 2013 that Frontex should have a complaints mechanism for potential fundamental rights breaches arising from its work.<sup>359</sup> The European Commission subsequently proposed a draft regulation for a European Border and Coast Guard to replace Frontex. The proposal includes such a complaints mechanism.<sup>360</sup> In June 2016, the

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<sup>357</sup> European Ombudsman, Decision of the European Ombudsman closing her own-initiative inquiry OI/9/2014/MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), Strasbourg, 4 May 2015 <<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/59740/html.bookmark>> accessed 1 June 2016.

<sup>358</sup> Frontex, Response to the European Ombudsman's Decision closing her own-initiative inquiry OI/9/2014/MHZ and the conclusions <[http://www.ombudsman.europa.eu/showResource?resourceId=1448353769285\\_FOLLOW-UP%20CFR\\_201401114\\_OI92014\\_20151021-162215.pdf&type=pdf&download=true&lang=en](http://www.ombudsman.europa.eu/showResource?resourceId=1448353769285_FOLLOW-UP%20CFR_201401114_OI92014_20151021-162215.pdf&type=pdf&download=true&lang=en)> accessed 25 July 2016.

<sup>359</sup> European Ombudsman, Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex, Strasbourg, 12 November 2013 <<http://www.ombudsman.europa.eu/cases/specialreport.faces/en/52465/html.bookmark>> accessed 1 June 2016.

<sup>360</sup> Interview with the European Ombudsman.



European Parliament, Council and Commission have reached an agreement on the Commission's proposal on a European Border and Coast Guard.<sup>361</sup>

The Frontex example illustrates well that the Ombudsman does not participate in EU policymaking directly but its activity definitely has a shaping effect on it. In accordance with its mandate, the Ombudsman's role is 'to ensure that the decision-making in the EU institutions that leads to policies is carried out in a transparent and ethical manner as possible'.<sup>362</sup> She does not look into the 'what' but rather into the 'how'. Fundamental rights and ethical norms guide her in this.

*b) Access to documents – prerequisite for discovering structural and/or policy coherence/incoherence*

Releasing documents and the perception of their content are prerequisites and therefore essential in discovering structural and/or policy incoherence. 'Once documents are released, this can influence the debate on coherence and/or incoherence.'<sup>363</sup>

According to Regulation 1049/2001 on access to documents,<sup>364</sup> wider access should be granted to documents of the European Parliament, the Council and the Commission 'in cases where the institutions are acting in their legislative capacity, including under delegated powers'.<sup>365</sup> This includes access to policy documents. Nevertheless, it is also highlighted that while providing public access to these documents 'to the greatest possible extent',<sup>366</sup> the effectiveness of the institutions' decision-making process must be preserved.<sup>367</sup> The Ombudsman needs to take a sensitive path and balance between the public interest to access documents and the institutions' decision-making sovereignty.

As an example, the Ombudsman could get access to documents requested in relation to the EU Agency for Fundamental Rights (FRA). The Ombudsman can check whether FRA has released a document or not released a document according to Regulation 1049/2001 on access to documents.<sup>368</sup> In such cases, it is not the Ombudsman who is interested in the content of the given document, her role is to facilitate the

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<sup>361</sup> European Commission, European Border and Coast Guard agreed, Press release, Brussels, 22 June 2016 <[http://europa.eu/rapid/press-release\\_IP-16-2292\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2292_en.htm)> accessed 25 July 2016.

<sup>362</sup> Interview with the European Ombudsman.

<sup>363</sup> Interview with the European Ombudsman.

<sup>364</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, pp. 43–48.

<sup>365</sup> Ibid. Preamble 6.

<sup>366</sup> Ibid.

<sup>367</sup> Ibid.

<sup>368</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, pp. 43–48.

access to documents upon justified request. Contributing to the accessibility of documents, the Ombudsman opens the way to discover any possible coherence and/or incoherence.<sup>369</sup>

Incoherence arises very often from the controversial use and interpretation of the content of policy instruments. There is often incoherence between access to documents and data protection. 'People fundamentally misunderstand that they both in different ways regulate which documents can and should be accessed. Data protection is often used wrongly to prevent transparency and prevent access to documents, e.g. privacy rights of public officials.'<sup>370</sup> The Ombudsman is of the view that the policy tools are clear enough, the inconsistency is caused rather by the fact that people actually choose not to understand the policy tools. 'It can be too easy to hide something on the basis that it will be revealing personal information about something. At the same time sometimes they forget that in both access regimes there is a public interest test to be done and that there is no absolute right to getting personal information. Sometimes, it is just an easy way to prevent important information coming out.'<sup>371</sup>

Hence, referring to data protection as the obstacle to access to documents may cause incoherence. This came out in the Transatlantic Trade and Investment Partnership (TTIP) case, for example, that will be discussed below. When the European Commission declared that 'data protection reasons stand in the way of it publishing the names of meeting participants without their consent', the Ombudsman established that 'data protection should not be used as an automatic obstacle to public scrutiny of lobbying activities in the context of TTIP'.<sup>372</sup>

The legal environment clarifies in which cases access can be denied. In January 2012, the European Commission proposed a comprehensive reform of EU data protection rules. On 4 May 2016, the official texts of the Regulation<sup>373</sup> and the Directive<sup>374</sup> have been published in the EU Official Journal. The Regulation entered into force on 24 May 2016, but it shall be applied from 25 May 2018. The EU Member States have to transpose the Directive into their national law by 6 May 2018.<sup>375</sup> The Ombudsman is of the

<sup>369</sup> Interview with the European Ombudsman.

<sup>370</sup> Interview with the European Ombudsman.

<sup>371</sup> Interview with the European Ombudsman.

<sup>372</sup> European Ombudsman, Ombudsman commends Commission for progress on transparency in TTIP negotiations, Press release no. 6/2015, 23 March 2015 <<http://www.ombudsman.europa.eu/en/press/release.faces/en/59353/html.bookmark>> accessed 30 June 2016.

<sup>373</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1–88.

<sup>374</sup> Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89–131.

<sup>375</sup> European Commission, Justice – Data protection, <<http://ec.europa.eu/justice/data-protection>> accessed 1 June 2016.

view that there is a lot of work to be done on the Data Protection Regulation<sup>376</sup> as the new data protection framework contains some onerous obligations, many of which will take time to prepare for.<sup>377</sup>

### *c) Transparency of Trilogues*

Another example that can have an effect on coherence and/or incoherence in the EU are the so-called Trilogues. 'Trilogues are informal negotiations between the European Parliament, the Council and the Commission aimed at reaching early agreements on new EU legislation.'<sup>378</sup> In May 2015, the Ombudsman launched an own-initiative inquiry concerning the disclosure of documents relating to trilogues and transparency of trilogues in general.<sup>379</sup> The reason why the Ombudsman decided to look into the transparency of these informal negotiations is that they are 'an established feature of the ordinary legislative procedure' where the institutions increasingly 'decide on the negotiated content of the final legislation text'.<sup>380</sup> 'Transparency as regards the law-making process is vital for building trust in the EU'<sup>381</sup> and the institutions emphasise greater transparency at every stage of their legislative work.<sup>382</sup>

In the Ombudsman's view, 'trilogues work very well, they are efficient because 85% of the regulations go through in the first stage, there is no need for second reading etc.'<sup>383</sup> As mentioned above, it is important to find the balance between requiring transparency but respecting the institutions' efficiency. During its inquiry, the Ombudsman asks 'questions to the EU institutions about what the public can access' on the one hand, and engages in public consultations 'asking people where they feel greater transparency should be' on the other hand.<sup>384</sup> The Ombudsman's inquiry into the transparency of trilogues is an example of how to draw a line between transparency and private space for negotiations. Transparent policymaking process has an impact on the policy itself.<sup>385</sup>

As the two examples above illustrated, the Ombudsman's inquiries in relation to access to documents and transparency are important channels to discover incoherence in policies and policymaking. If documents

<sup>376</sup> Interview with the European Ombudsman.

<sup>377</sup> See a summary on the new regulation: Allen & Overy, The EU General Data Protection Regulation, 2016 <<http://www.allenoverly.com/SiteCollectionDocuments/Radical%20changes%20to%20European%20data%20protection%20legislation.pdf>> accessed 25 July 2016.

<sup>378</sup> European Ombudsman, Ombudsman opens investigation to promote transparency of "trilogues", Press release no. 9/2015, Strasbourg, 28 May 2015 <<http://www.ombudsman.europa.eu/press/release.faces/en/59975/html.bookmark>> accessed 29 June 2016.

<sup>379</sup> European Ombudsman, Letter to the Council of the EU opening the European Ombudsman's own-initiative inquiry OI/8/2015/FOR concerning transparency of trilogues, 28 May 2015, Case: OI/8/2015/JAS <[http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59978/html.bookmark#\\_ftnref3](http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59978/html.bookmark#_ftnref3)> accessed 29 June 2016.

<sup>380</sup> Ibid.

<sup>381</sup> Ibid.

<sup>382</sup> Interinstitutional agreement on better law-making by the European Parliament, Council, and the Commission, OJ [2003] C 321, p.1, para. 10.

<sup>383</sup> Interview with the European Ombudsman.

<sup>384</sup> Interview with the European Ombudsman.

<sup>385</sup> Interview with the European Ombudsman.

and information remain hidden, we can hardly recognise incoherence and identify its causes and responsible actors.

#### *d) Experiences of interest-based incoherence*

Interests behind policymaking can be linked to human rights breaches.

Very often very small things that are happening (e.g. small administrative changes, small political decisions) can lead to human rights breaches. That is the value in the Ombudsman's investigations on transparency, lobbying transparency, revolving doors (that refers to influential EU officials who leave their jobs to join, for example, multinational companies or lobbying firms),<sup>386</sup> and access to documents generally. 'Beyond that these investigations cover activities that are hidden from the public, they often make the link to something that is incoherent or poor.'<sup>387</sup>

An example of lobbying transparency relates to a complaint from 2014. The NGO, Corporate Europe Observatory complained to the Ombudsman that the European Commission was not meeting its obligation, under the Tobacco Control Convention, to be accountable and transparent in its dealings with the tobacco industry. 'The Ombudsman took the view that parties to the Convention are required to take active measures both to limit the extent of interactions with the tobacco industry and to ensure transparency where such interactions occur.'<sup>388</sup> The Ombudsman recommended that

the Commission should ensure that the proactive transparency policy put in place by DG Health, requiring the publication online of all the meetings its staff have with tobacco industry representatives and the minutes taken of those meetings, should apply across all of the Commission's services irrespective of the seniority of the official concerned and including, specifically, members of its Legal Service.<sup>389</sup>

As was said before, the Ombudsman sets a very sensitive path between administration and policy. The strategic inquiry into the transparency of trilogues does not only help to discover structural incoherence but it can be understood as interest based incoherence. This is well indicated by the fact that when the Ombudsman announced it was going to look into the transparency of trilogues, 'it caused slight disquiet

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<sup>386</sup> European Ombudsman, Annual Report 2014, 12.

<sup>387</sup> Interview with the European Ombudsman.

<sup>388</sup> European Ombudsman, Recommendation of the European Ombudsman in the inquiry into complaint 852/2014/LP against the European Commission regarding its compliance with the Tobacco Control Convention, Strasbourg, 1 October 2015 <<http://www.ombudsman.europa.eu/cases/recommendation.faces/en/61021/html.bookmark>> accessed 7 June 2016.

<sup>389</sup> European Ombudsman, Recommendation of the European Ombudsman in the inquiry into complaint 852/2014/LP against the European Commission regarding its compliance with the Tobacco Control Convention, Strasbourg, 1 October 2015 <<http://www.ombudsman.europa.eu/cases/recommendation.faces/en/61021/html.bookmark>> accessed 7 June 2016, para. 38.

in the EU institutions’ and ‘people had the fear that the Ombudsman might be entering into the policy arena’.<sup>390</sup>

Another example of lobbying transparency is the Ombudsman’s strategic inquiry aimed at making negotiations on Transatlantic Trade and Investment Partnership (TTIP) more transparent. In July 2014, the Ombudsman opened an own-initiative inquiry towards the European Commission concerning transparency and public participation in relation to the TTIP negotiations as she was of the view that these negotiations are of significant public interest given their potential impact on the lives of citizens. In her letter opening this inquiry, she made a range of suggestions, encouraging the Commission to publish documents proactively and to make information about meetings available.<sup>391</sup> As a result of her inquiry, the Commission started to publish proactively more documents of the TTIP negotiations.<sup>392</sup>

#### 4. Conclusions

Based on her mandate, the European Ombudsman makes recommendations to EU institutions, bodies or agencies to correct an instance of maladministration. As the examples above showed, the Ombudsman can also decide to open a strategic inquiry in relation to a specific matter if she believes that there is a systemic problem in the institution or policy concerned. If the act or omission resulting in maladministration can be led back to incoherent policy measures, especially if it causes systematic violations, the Ombudsman’s recommendation aims to improve the policy itself – beyond overcoming the violation.

The above mentioned inquiries relate in one or the other way to incoherence in EU policies and policymaking or at least make it possible to investigate further whether the given policy or procedure is coherent enough. The Frontex case discovered structural problems in Frontex procedures and the Ombudsman’s recommendations and Frontex’ action upon them contribute to better promotion of the fundamental rights of migrants. The investigations into the transparency of Trilogues showed the importance of transparency as a prerequisite to discover policy and/or structural incoherence in EU policymaking. The Ombudsman is of the view that ‘transparency cannot be taken out of policy’.<sup>393</sup> The Ombudsman’s work in relation lobbying transparency draws our attention to interest-based incoherence that occur in EU policymaking.

The level of transparency obviously as a by-product affects the policy. This is one of the chief areas where the Ombudsman is obliged to operate and make sure that law making is as transparent as possible. That is a Charter right and a Treaty right.<sup>394</sup>

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<sup>390</sup> Interview with the European Ombudsman.

<sup>391</sup> European Ombudsman, Decision of the European Ombudsman closing her own-initiative inquiry OI/10/2014/RA concerning the European Commission, Case: OI/10/2014/RA, 6 January 2015 <<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark>> accessed 30 June 2016.

<sup>392</sup> Interview with the European Ombudsman.

<sup>393</sup> Interview with the European Ombudsman.

<sup>394</sup> Interview with the European Ombudsman.

We can sum up that an accountable, transparent and ethical, ultimately effective administration is source of coherence. Therefore, the Ombudsman's recommendations regarding abolishing maladministration are of high relevance. Nevertheless, recommendations will have an effect on improving coherence and overcoming incoherence if the institutions addressed accept the Ombudsman's proposals, i.e. solutions, recommendations, and critical remarks, to improve the EU administration. The Ombudsman publishes a yearly statement on how EU institutions responded to the Ombudsman's proposals. In 2014, the overall figure in terms of compliance with the Ombudsman's proposals was 90%.<sup>395</sup> This rate is high considering the fact that the Ombudsman's decisions are not legally binding.

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<sup>395</sup> European Ombudsman, Putting it Right? - How the EU institutions responded to the Ombudsman in 2014 <<http://www.ombudsman.europa.eu/en/cases/followup.faces/en/61644/html.bookmark#hl9>> accessed 28 July 2016.

## H. Court of Justice of the European Union<sup>396</sup>

The European Court of Justice has a relatively small role to play in ensuring the coherence of EU external action, yet internally it may be considered one of the key agents of coherence in human rights action by the EU. In its role at the top of the hierarchical chain as the 'constitutional court' of the EU, the Court has wide ranging potential to oversee and enhance the coherence of EU action in the field of human rights. While the Court is not strictly speaking an agent of policymaking, it retains significant power to determine the respect of fundamental rights and to a certain extent the 'human rights coherence' of the policymaking of EU institutions and Member States in specific circumstances. Such power has been amplified by the entry into force of the Lisbon Treaty and the Charter becoming legally binding.

As a judicial institution like any domestic court, the Court of Justice does not set its own agenda, and 'can only become active - in law making, interpretation and application, enforcement and judicial review of acts of political institutions - when a case is brought to it by a party or national court entitled to do so'.<sup>397</sup> In this context the Court plays a key role in the more traditional process of negative integration in the context of EU fundamental rights, which focuses on the limits of EU activity and the classic negative function of fundamental rights as a 'shield' in contrast to positive policymaking.<sup>398</sup> However, it may be argued that the Court has an active role in furthering the human rights coherence of the EU system, and that also 'legalization beyond mere dispute settlement is taking place'.<sup>399</sup> The core of policymaking by political institutions to promote and protect fundamental rights should not subtract attention from the importance of institutions and Member States not acting in violation of fundamental rights, which is a key element of coherence in human rights policy broadly understood. Further the principle of legality, of which the Court remains the prime enforcer, can never be forgotten when talking about coherence in fundamental rights terms. Some scholars have argued that assessments of the CJEU's contribution to lawmaking through interpretation can only be understood by analysing the CJEU as an institutional actor of the EU alongside the Union's political organs and as a 'leading policymaker in European integration with competence to adjudicate in a direct and immediate sense on the outer limits of EU law'.<sup>400</sup> It is in this sense that the Court will be analysed as a prime agent of coherence of EU human rights policy.

Previous reports for this work package and in particular Deliverable 8.2 assessed the key role vested in CJEU as an agent of coherence since the Charter became legally binding, and highlighted its potential role in aiding coherence in EU human rights policy, in particular in the case of *Digital Rights Ireland*.<sup>401</sup> However the authors also highlighted some of the critical considerations that showcase the challenges associated

<sup>396</sup> This section was written by Lisa Ginsborg.

<sup>397</sup> Interviewee J4.

<sup>398</sup> Vasiliki Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart 2015).

<sup>399</sup> Ibid. at 170.

<sup>400</sup> Thomas Horsley, 'Reflections on the Role of the Court of Justice as the 'Motor' of European Integration: Legal Limits to Judicial Lawmaking' [2013] 50 Common Market Law Review; he continues: "Much of what the Court now produces can, in fact, be read as functionally equivalent - in terms of output; i.e. its legal effects within the Member States - to the activities of the Union's legislative organs. Indeed [...] there is a strong argument that the Court of Justice is actually the most powerful supranational policymaking institution.", 941.

<sup>401</sup> Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] ECR.

with vertical coherence *vis-a-vis* the CJEU's treatment of human rights, including this question of 'balance' between economic freedoms and fundamental rights, and the coherence between CJEU's rulings and those of international, regional and domestic courts. In particular they found that:

The Court clearly sees itself as perhaps the crucial institution for maintaining and promoting vertical coherence, not least for structural reasons. Nevertheless, the Court's protection of its structural autonomy leads to further tensions in the area of conceptual or discursive coherence, adding to the tensions internal to its own understanding of human rights discussed above. While the Court's concern for its own autonomy is, perhaps, understandable and helps to explain its increasing reluctance to engage with international human rights jurisprudence, the Court's opinion sets it at odds with the conceptual development of human rights in other fora, not least by the European Court of Human Rights.<sup>402</sup>

The following section builds on the findings of Deliverable 8.2, and is based on the anonymous views of a limited number of members of the Court who were interviewed for this purpose. The chapter focuses on the role of the Court of Justice as an agent of coherence in EU human rights policy, both horizontally *vis a vis* other Union institutions and vertically *vis a vis* Member States, since the Charter became legally binding. The interviews conducted tested out the findings of Deliverable 8.2 and developed new areas of investigation, when looking at the Court as an agent of human rights policy coherence. Despite guarantees of anonymity the role of the interviewees as members of the Court is expected to influence the views contained in this section.

## 1. Case law coherence in the work of the CJEU

The notion of coherence acquires particular meaning and connotations when dealing with a court of law. Without entering complex debates about the role of coherence in legal reasoning,<sup>403</sup> which has long been debated in legal philosophy, suffice it to note here that like any court of law, coherence in the judgments of the CJEU lies at the heart of its work, its credibility and its obligations as a judicial institution bound by the rule of law. Further, the principles of legality and legal certainty require predictability as far as judicial decision-making is concerned. Scholars have also argued that sustaining case law coherence is also a vital constitutional responsibility of the CJEU.<sup>404</sup> Viewing the CJEU as a constitutional court as well as a policymaker adds a further layer to their responsibility to act coherently. In fact, the acknowledgement of the policymaking function of the CJEU as the constitutional court of the EU makes the importance of

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<sup>402</sup> Tamara Lewis, Adina Portaru (Raducanu), Ricki Schoen, Karen Murphy, TJ McIntyre, and Graham Finlay, 'EU and Member State competences in human rights', *FRAME Deliverable 8.2*, 31 October 2015, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/23-Deliverable-8.2.pdf>>.

<sup>403</sup> Stanford Encyclopedia of Philosophy, 'Interpretation and Coherence in Legal Reasoning', February 2010, <<http://plato.stanford.edu/entries/legal-reas-interpret/>>, accessed 1 June 2016.

<sup>404</sup> Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2013).



adequate legal reasoning and case law coherence more critical.<sup>405</sup> As one interviewee put it 'Coherence is holy word for us... if we think about coherence of our case law'.<sup>406</sup>

Most of the members interviewed highlighted this aspect as a crucial dimension of coherence in the work of the Court, not only with regard to fundamental rights issues but with respect to their case law more broadly. While one interviewee saw the role of coherence in the judgments of the Court as being linked to the role of any court of law, and 'the role of the Judge [...] to smooth and to solve societal conflicts... and inconsistency or incoherence is a type of a societal conflict',<sup>407</sup> other interviewees highlighted potential areas of incoherence deriving from the structures of the Court and the importance of case law coherence not only with respect to fundamental rights but in its interpretative practice more broadly. As one interviewee put it, discussing coherence of the case law:

it's another thing whether we succeed but I mean... what we try by different internal devices... and this of course concerns all questions, whether fundamental rights or something completely different, but we try to see to it, as we have five chambers of five judges and five chambers of three judges that work in parallel to try to avoid that there would be incoherence between them and that's a sort of institutional coherence in the different formations of the court, but obviously we also at least try to see to it that when we apply and interpret a certain article, today it would probably be an article in the Charter, that we don't change line and interpret it in very different ways.<sup>408</sup>

The potential incoherence deriving from the organization and composition of the Court<sup>409</sup> as well as the variety of topics and countries covered, may be seen as an example of structural or institutional incoherence, which in turn may give rise to other types of incoherence including interest-based incoherence and discursive incoherence in the interpretative practice of the Court. However, the issue of coherence in the judgments of the Court acquires particular complexity when it comes to fundamental rights, which as is well known form a part of the EU legal order not only through the Charter but also through the constitutional traditions of Member States and the European Convention of Human Rights. As noted by one member of the court:

Our work must be coherent, otherwise it would be against legal certainty... [...]that's how the whole construction works...human rights as developed in the constitutional traditions of Member States, then as laid down in the Strasbourg Convention and now in the Charter... it's our task to be coherent... that's all our work. Of course it's not always easy to be coherent in every little aspect... I'm not so much thinking of human rights which are not so really extremely difficult, but also in little technical things and other areas of the law because the Strasbourg Court is a huge

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<sup>405</sup> Ibid at 12.

<sup>406</sup> Interviewee J2.

<sup>407</sup> Interviewee J3.

<sup>408</sup> Interviewee J2.

<sup>409</sup> The Court may sit in plenary session, usually depending on the importance and complexity of the case, or in chambers of three or five judges. Art. 251 TFEU.

institution with so many judges from so many different members states and from different cultures, and the same for us... we are meanwhile many judges with different backgrounds and I think it is really an art and a challenge to keep everything together and you have this challenge also in the Court of First Instance, with its many chambers... how to stay coherent even if we are not just seven as for example the Inter-American Human Rights Court, but really a huge institution where everybody does everything without specialised chambers... and with broad competence on types of material.<sup>410</sup>

Such a situation has the potential to give rise to all types of incoherence identified in previous reports in this work package. While the potential for structural incoherence deriving from such a complex architecture is easy to see, potential discursive incoherence or tensions in the conceptual development of human rights within the different institutions, as well as possible interest-based incoherence deriving from the broad competence and mandate of the Court are tied up in the work of the Court and naturally interrelated. Further, the role of the Court as an agent of structural coherence, both internally and externally acquires particular significance in light of such complex architecture. Both aspects will be analysed in turn as reflected in the views of the interviewees.

## 2. The CJEU as an agent of structural internal human rights coherence

The institutional structure of the EU by definition provides the Court with a key role in ensuring structural coherence with respect to fundamental rights, which has been enhanced since the Charter of Fundamental Rights became legally binding. In fact, since the entry into force of the Lisbon Treaty, it may be argued that the Court has become, at least in hierarchical terms, the prime agent of structural coherence in upholding or at least adjudicating respect for fundamental rights in the EU. When looking at horizontal coherence among EU institutional actors, the Court, following a request for a preliminary ruling by a national court or based on an action for annulment, may strike down legislation deemed not to be in compliance with fundamental rights, thereby working to ensure a fundamental rights compliant coherent structure among EU actors, based on the common interpretation offered by the Court.<sup>411</sup> Further, the Court also plays a key role in ensuring vertical coherence among EU institutions and Member States in the field of fundamental rights, although this dimension raises a number of complex issues, including the scope of application of the Charter and any possible incoherence which may arise from human rights obligations binding Member States domestically or internationally, including most prominently the European Convention of Human Rights (ECHR). As is well known the issue of the scope of the application of the Charter to Member States is regulated by Art. 51 of the Charter, which 'are addressed to [...] the Member States only when they are implementing Union law.'<sup>412</sup> While the concept is not a new one, and was already enshrined in previous CJEU case law, the issue of how to interpret the notion of

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<sup>410</sup> Interviewee J1.

<sup>411</sup> See Art. 263 and Art. 267 of the Treaty on the Functioning of the European Union (TFEU).

<sup>412</sup> Art. 51(1), Charter of Fundamental Rights.

'implementing' remains hotly debated, with interpretations ranging from its application only when Member States are implementing a regulation or transposing a Directive, to broad interpretations of implementation to mean 'in the scope of EU law', as also formulated in the *Explanations* dealing with the Article.<sup>413</sup>

One of the interviewees discussed at length such structural position of the Court, both as an agent of fundamental rights coherence and in its role as the constitutional court of the EU more broadly. While it does not set its own agenda and can only become active when a case is brought to it, the role of the court in upholding and developing the law, which is grounded in Art. 19 TEU, was emphasised in this context.<sup>414</sup> In particular its task to ensure 'the law' is observed in the interpretation and application of the Treaties,<sup>415</sup> gives a precise role to the court of 'filling out' the concept of the law and developing the law as part of its core mission statement. As mentioned by the interviewee 'Member States, as masters of the treaties [...] were aware that the Court of Justice in its core mission would have to develop 'law', almost like the common law', in order to make the interpretation and application of the Treaties, and primary Union law 'work'.<sup>416</sup> In their view, the Court's role in developing the law has been recognised since the early days of the European Union, when it was still the EEC, and is clearly exemplified by the Court's extensive case law which includes under the notion of 'the law' general principles which are drawn from the legal traditions of Member States and the ECHR. In fact, during the 1970s the Court developed its case law in relation to fundamental rights and in particular it recognised fundamental rights as general principles of EU law.<sup>417</sup> Such general principles were drawn in by the Court as the primary inspiration source to fill out the concept 'the law' and were eventually codified in primary law in 1993 by the Maastricht Treaty,<sup>418</sup> and now in the Charter.

Without repeating the well known story of the emergence of fundamental rights in the case law of the Court,<sup>419</sup> the Court may be seen as the prime agent of promoting some degree of internal coherence in EU human rights policy. In fact, through its primary task as overseer of the 'law', it was the first institutional actor to assess the legality and coherence of EU action in terms of fundamental rights taking into account the constitutional traditions of Member States as well as the European Convention of Human Rights. And it is well known that well before the entry into force of the Charter, the Court had already 'discovered'

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<sup>413</sup> Explanations relating to the Charter of Fundamental Rights, EUR-Lex - 32007X1214(01) - EN.

<sup>414</sup> Interviewee J4.

<sup>415</sup> Art. 19 TEU.

<sup>416</sup> Interviewee J4.

<sup>417</sup> Francesca Ferraro and Jesus Carmon, *Fundamental Rights in the European Union: The role of the Charter after the Lisbon Treaty*, European Parliamentary Research Services, (EPRS March 2015), 5-6.

<sup>418</sup> By virtue of Art. F the EU was to "respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States as general principles of Community law".

<sup>419</sup> For a concise overview see Francesca Ferraro and Jesus Carmon, *Fundamental Rights in the European Union: The role of the Charter after the Lisbon Treaty*, European Parliamentary Research Services, (EPRS March 2015); see also Allan Rosas, 'The Applicability of the EU Charter of Fundamental Rights at National Level' [2013], 13 *European Yearbook on Human Rights*, 101.

fundamental rights as general principles of EC law.<sup>420</sup> Further, as noted by the current vice-president of the Court Tizzano:

[...] the Court of Justice discovered a rich and diversified body of rights, expanding over the years' time well beyond economic freedoms to include civil and political rights such as, *inter alia*, freedom of expression and association, the right to manifest one's religion, protection of privacy and respect for family life or the principle of non-retroactivity of penal provisions and so on.<sup>421</sup>

There appears to be broad consensus also in legal literature that the 'protection of fundamental rights for the first 40 years of European integration developed through the case law of CJEU'.<sup>422</sup> And, it was precisely the work of the Court which paved the way for the drafting of the Charter through a series of political and constitutional initiatives.<sup>423</sup>

There was consensus among all interviewees that since the Charter became legally binding with the entry into force of the Lisbon Treaty, the role of the Court in upholding fundamental rights vis a vis Union institutions and Member States had been enhanced. One interviewee argued that the Charter had increased the importance of fundamental rights in the work of the Court also through its expanded competences, yet the change was not necessarily about coherence as such.

The entry into force of the Charter underlines the importance of human rights... that's sure...anyway they become ever more important because we just have more competences, and even some executive competences and some competencies in areas which are very sensitive in the matter of human rights, like... kind of penal competences... and criminal law competences in parental matters and child care and competences in security... [...] I think it emphasizes human rights, it gives them more importance... coherence... I think it's not that big a difference.<sup>424</sup>

Similarly Grainne De Burca has argued that:

the Lisbon Treaty increased the likely extent of the CJEU's case law on fundamental rights issues in three ways: by repealing the constraints under the former Article 68 of the EC Treaty as regards the making of preliminary references by national courts in the area of freedom, security and justice, by including the acts of EU agencies such as FRONTEX and the Asylum Support Office

<sup>420</sup> Grainne De Burca and Jo Beatrix Aschenbrenner, 'European Constitutionalism and the Charter', in Steve Peers and Angela Ward (Eds.) *The European Union Charter of Fundamental Rights*, (Hart 2004), 18.

<sup>421</sup> Antonio Tizzano, 'Foreword', in Giuseppe Palmisano (Ed.) *Making the Charter of Fundamental Rights a Living Instrument*, (Brill Nijhoff 2014), 2.

<sup>422</sup> Sionaidh Douglas-Scott, 'The EU and Human Rights after the Treaty of Lisbon' [2011], 11(4) *Human Rights Law Review*, 649.

<sup>423</sup> Antonio Tizzano, 'Foreword', in Giuseppe Palmisano (Ed.) *Making the Charter of Fundamental Rights a Living Instrument*, (Brill Nijhoff 2014).

<sup>424</sup> Interviewee J1.

within the scrutiny powers of the Court, and by strengthening the application of the accelerated procedure and the urgent preliminary ruling procedure for cases where a person is in custody.<sup>425</sup>

However, other interviewees emphasised a change in tide not only in the importance of fundamental rights, which 'changed the type of discourse', 'put the Charter in the fore by making it binding primary law', but also 'allowed the court to be more assertive' also in terms of fundamental rights judicial review.<sup>426</sup> A number of cases were mentioned by interviewees to exemplify this trend, including the progeny of the *Kadi* case,<sup>427</sup> *Schecke*,<sup>428</sup> *Test-Achats*,<sup>429</sup> and *Digital Rights Ireland*.<sup>430</sup>

As is well known, prior to 2008 there was widespread criticism from academic scholarship that the Court never reviewed and quashed EU legislative acts on fundamental rights grounds, which was seen as a possible but extremely unlikely eventuality. The 2008 judgment by the ECJ in *Kadi*,<sup>431</sup> just before the Charter became legally binding, was seen as a ground-breaking decision, as much as an exceptional one. Yet since the Charter acquired the same legal value as the Treaties there appears to be a clear change in tide that is gradually being recognised by commentators and was widely reported by the interviewees. As one of them put it: 'when you look at the amount of annulments of secondary measures since the treaty of Lisbon... I'm not saying it's avalanches, but it's considerable units, which when you compare with the stage before that...I mean that would be non-existent, to be annulled solely on fundamental rights grounds'.<sup>432</sup> In fact, the Charter is increasingly being used to test the legality of EU acts,<sup>433</sup> and since *Kadi* there has been a steady stream of cases quashing different types of EU legislative acts, and culminating in the case of *Digital Rights Ireland*,<sup>434</sup> in which the CJEU annulled an entire EU directive.<sup>435</sup> There appeared to be consensus that this trend exemplified the most significant shift in the approach of the Court when investigating its role as an agent of structural coherence, by overseeing the European legislature's compliance with fundamental rights, and using the Charter as a constitutional threshold. As noted by one interviewee:

<sup>425</sup> Grainne De Burca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' [2013] 20 Maastricht Journal of European and Comparative Law, 170.

<sup>426</sup> Interviewee J3.

<sup>427</sup> *Joined Cases C-584/10 P, C-593/10 P and C-595/10 P European Commission Council of the European Union United Kingdom of Great Britain and Northern Ireland v Yassin Abdullah Kadi*, (18 July 2013).

<sup>428</sup> *Joined Cases C-92/09 and C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*, (9 November 2010).

<sup>429</sup> *Case C-236/09 - Association Belge des Consommateurs Test-Achats and Others*, (1 March 2011).

<sup>430</sup> *Joined Cases C-293/12 and C-594/12 Digital Rights Ireland and Seitlinger and Others* (8 April 2014).

<sup>431</sup> *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, (3 September 2008).

<sup>432</sup> Interviewee J3.

<sup>433</sup> Sara Iglesias Sanchez, 'The Court and the Charter: the Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' [2012] 49 Common Market Law Review, 1580.

<sup>434</sup> *Joined Cases C-293/12 and C-594/12 Digital Rights Ireland and Seitlinger and Others* (8 April 2014).

<sup>435</sup> See discussion of this case in Tamara Lewis, Adina Portaru (Raducanu), Ricki Schoen, Karen Murphy, TJ McIntyre, and Graham Finlay, 'EU and Member State competences in human rights', *FRAME Deliverable 8.2*, 31 October 2015, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/23-Deliverable-8.2.pdf>>.

...it's legality control of all the normativity... that's maybe the way to say it... all the norms existing at legislative level...the delegated, the implementing acts, whether they emanate from the Union or they are implementing acts of the Member States but implementing Union acts... it's a uniform set of legality control standards which apply in all the fields... and that's of course absolutely crucial. It is there that you see that we come close to a constitutional court.<sup>436</sup>

In line with the findings of 8.2, there appears to be hope that as 'the EU constitutionalises, structural coherence should improve'.<sup>437</sup> Further, in upholding legality and asserting its role as a constitutional court, the Court plays a key role in upholding structural coherence both horizontally, vis a vis EU institutions and vertically, vis a vis Member States.

While dependent on requests for preliminary ruling, the Court's role in checking the legality of EU legislative acts *vis a vis* fundamental rights and thereby ultimately enhancing horizontal structural coherence in EU human rights policy should not be underestimated. Not only is the Court ensuring that legislation which is not Charter coherent is quashed, and is the only institution able to do this hierarchically, but it is indirectly also influencing the legislative process *ex ante*. As such the court is acquiring an increasing role in ensuring horizontal human rights coherence in EU human rights policy, understood here as a constitutional check on the legality and fundamental rights conformity of acts by EU institutions. As noted by the Council the recent case law of the CJEU confirms that "the Court of Justice will not satisfy itself with anything less than a strict assessment of the proportionality and necessity of measures that constitute serious restrictions to fundamental rights, however legitimate the objectives pursued by the EU legislature."<sup>438</sup> The impact on the EU legislative bodies is thereby not only inevitable but also likely to enhance horizontal coherence in EU fundamental rights policy under the guises of the Charter.

The Court also plays a key role in ensuring structural vertical coherence, which has been clearly enhanced since the Charter became legally binding. Although a large number of cases since 2009 have dealt with the issue of the Charter's applicability at the national level, demonstrating the Charter's increasing interaction with national legal systems,<sup>439</sup> this aspect received less attention from interviewees. One interviewee was explicit about the Court's role in horizontal coherence being more important than in vertical coherence, in this respect.

For me it actually means much more assertive review vis a vis EU institutions... I'm not that much concerned about MSs quite frankly, because most of the MSs ...26 out of 28, will have a fundamental rights review already on two levels... they will have a national bill of rights and very

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<sup>436</sup> Interviewee J4.

<sup>437</sup> Tamara Lewis, Adina Portaru (Raducanu), Ricki Schoen, Karen Murphy, TJ McIntyre, and Graham Finlay, 'EU and Member State competences in human rights', *FRAME Deliverable 8.2*, 31 October 2015, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/23-Deliverable-8.2.pdf>>, 129.

<sup>438</sup> Council of the European Union, 'Implementation of the Charter of Fundamental Rights of the EU: Presidency Discussion Paper', (11451/14, 9 July 2014).

<sup>439</sup> European Commission, '2013 Report on the Application of the EU Charter of Fundamental Rights', (European Union, 14 April 2014), 10.

likely a national constitutional court or supreme court which does the job, and then there is Strasbourg... however what you really need to be more assertive to... and do more effective fundamental rights review to... are the EU institutions.<sup>440</sup>

However, another interviewee emphasised a 'much more subtle but crucially important area' of entirely post Lisbon developments,<sup>441</sup> in which the Court has also played as an agent of structural vertical coherence: that is in relation to the principles of mutual recognition and mutual trust between Member States, especially in the Area of Freedom Security and Justice (AFSJ). In the words of the interviewee:

that is matters of civil justice, commercial justice, but especially criminal justice cooperation, police cooperation, customs cooperation, administrative cooperation, asylum and immigration law... so many aspects which are extremely fundamental rights or human rights sensitive in various ways...there the task of this court... and that's really horizontal coherence in our case law [...] is to enforce the Charter of Fundamental Rights level of protection vis a vis the member states which are implementing Union law normative instruments, such as the framework decision of the European Arrest Warrant, the Dublin Regulation on the repatriation... the spreading of asylum seekers of the Member states etcetera etcetera... we have now many requests for preliminary rulings from national courts which are testing the relationship between mutual trust and fundamental rights protection.<sup>442</sup>

The principle of mutual recognition gained an explicit legal basis in the Lisbon Treaty in Art. 82(4), and is now commonly recognised as a constitutional principle that underpins the AFSJ. While at first the principle played a key role in the development of the internal market, it was later seen as 'the right avenue to overcome the opposition of some Member States to the harmonisation of substantive aspects of their criminal laws, as that principle would strike the right balance between 'unity and diversity'.'<sup>443</sup> Differently from its application to the internal market context where it was used to enhance individual freedoms, in the AFSJ the principle of mutual recognition implies a limitation to fundamental rights.<sup>444</sup> In fact in this context the principle favours the extraterritorial application of judicial decisions in civil or criminal matters that may involve the application of coercive measures by the Member States.<sup>445</sup> Closely related, the principle of mutual trust justifies automaticity in inter-state cooperation in the AFSJ. As explained in clear terms by the Court of Justice in the most recent case of *Aranyosi and Căldăraru*.<sup>446</sup>

Both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without

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<sup>440</sup> Interviewee J3.

<sup>441</sup> Interviewee J4.

<sup>442</sup> Interviewee J4.

<sup>443</sup> Koen Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice', Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford, 30 January 2015, 2.

<sup>444</sup> *Ibid.* at 3.

<sup>445</sup> For an overview see Christine Janssens, *The Principle of Mutual Recognition in EU Law*, (Oxford University Press 2013).

<sup>446</sup> Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, (5 April 2016), para 78.

internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.

As recognised also by legal scholars, since the entry into force of the Charter the Court has started to emphasise the requirement to examine the specific impact of cooperation on fundamental rights, and the need to take into account the position of the individuals affected by different forms of cooperation in the AFSJ, and not just the interests of the State expressed in automaticity based on mutual trust.<sup>447</sup> A number of recent cases were mentioned by the interviewee as examples of the court stepping in to ensure a 'floor level protection of human rights', including *Aranyosi and Caldăraru*,<sup>448</sup> *JN*,<sup>449</sup> and *Melloni*.<sup>450</sup> In the words of the interviewee:

...the principle is mutual trust, but this trust must be earned and deserved everyday... you must be worthy of that trust, and this may place some burden of proof on the Member State requesting from the other Member State a surrender...that is the trust in its system as an emitting Member State... but that emitting Member State must convince the executing Member State that the emitting Member State - at the very least for the case of the person to be surrendered - is worthy of the trust, which as a principle of union law the executing member state is obliged to show for the emitting Member State. And that's basically the core message of these cases.<sup>451</sup>

Therefore, at the core of these cases is the finding that some level of proof may be requested by states, courts and ultimately individuals themselves. While there is very little harmonisation of the substantive law in the area, a 'common layer' under all national systems remains which is 'a floor under all the national systems of principles and fundamental rights, which need to be satisfied'.<sup>452</sup> On one hand this provides the Court with another avenue to ensure structural vertical coherence, through the uniform application of rules, in compliance with the Charter. On the other, the Court is also likely to become an agent of ensuring horizontal normative coherence across Member States in the AFSJ. In fact such case law may also provide impetus for Member States to have uniform standards of fundamental rights protection even in wholly domestic settings, because of their potentiality to become cross border issues, as was the case in *Melloni*.<sup>453</sup> This has the potential to give rise to another area of horizontal fundamental rights coherence among Member States enforced by the Court in the AFSJ with the Charter as a benchmark. And a number of legislative initiatives in relation to minimum standards on the rights of individuals in criminal procedure

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<sup>447</sup> Valsamis Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' [2012], 31(1) Yearbook of European Law, 320.

<sup>448</sup> Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, (5 April 2016).

<sup>449</sup> Case C-601/15 (PPU) *J.N. v Staatssecretaris van Veiligheid en Justitie*, (15 February 2016).

<sup>450</sup> Case C-399/11, *Melloni*, (26 February 2013).

<sup>451</sup> Interviewee J4.

<sup>452</sup> Ibid.

<sup>453</sup> Interviewee J4, see Case C-399/11, *Melloni*, above.



are also following suit since the entry into force of the Charter moving towards greater horizontal coherence across EU institutions in this less regulated areas of EU law.<sup>454</sup> As noted by the interviewee:

...there you also see some legislation coming based on Articles 82-83 of the TFEU, in the criminal field...if you see all these recent - that is post 1 December 2009, post Charter - Directives which the Commission has initiated, about the right to be assisted by a lawyer from the very first interrogation... [...] the rights of the victims...the rights for translation in criminal proceedings and that sort of thing.<sup>455</sup>

Overall, it appears clear from the interviews conducted and from academic scholarship in this area that the Court has a key role to play in ensuring structural horizontal and vertical coherence, since the Charter became legally binding.

### 3. External coherence and relations with the European Court of Human Rights

Despite the key role recognised to the Charter in ensuring structural coherence in the fundamental rights work of the Court, one interviewee emphasised the fact that any role of the Court in ensuring 'Charter compliance' had to take into account the fact that the Charter is really an 'empty document', 'content-less', or even 'a copy of the Convention with bits and pieces added here and there'. Although this could be seen as a somewhat limited interpretation of the Charter, especially in its apparent disregard for economic, social and cultural rights and collective rights, the interviewee underlined the fundamental importance of 'looking to Strasbourg' when interpreting the Charter, also in light of Art. 52(3). In their words:

...what we are really talking about is to look a bit into Strasbourg and to translate it into the Charter or developing your own standards within the Charter, which must be at the same level or going further than Strasbourg does. [...] So from this point of view... doing vertical coherence...imposing something on Member States...yes... you might indirectly, but primarily you always look at what Strasbourg do and then you translate it into the Charter.<sup>456</sup>

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<sup>454</sup> Art. 82(2) TFEU provides an express legal basis for the adoption of minimum standards on the rights of individuals in criminal procedure. See Directive on the right to interpretation and translation in criminal proceedings [2012] OJ L 280/1, 26.10.2010; Directive on the right to information in criminal proceedings [2012] OJ L 142/1, 1.6.2012; Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294, 6.11.2013; Directive establishing minimum standards on the rights, support and protection of victims of crime, [2012] OJ L 315, 14.11.2012.

<sup>455</sup> Interviewee J4.

<sup>456</sup> Interviewee J3.

In this sense when acting as an agent of structural vertical coherence, the Court could also be seen as an agent of substantive policy coherence between the different European human rights normative frameworks, or as a promoter of discursive human rights coherence. Such a view appears to be in contrast with some of the findings in Deliverable 8.2 and in particular the idea that since the Charter became legally binding the Court has been looking less to the European Convention on Human Rights as a point of reference. On the basis of a survey of the CJEU's output between 2009-2012 conducted by Grainne De Búrca and her findings of 'a remarkable lack of reference on the part of the Court of Justice to other relevant sources of human rights and jurisprudence', and that the Court had made 'very occasional and selective use of the case law of the European Court of Human Rights', and 'virtually no references to other human rights jurisprudence or rulings',<sup>457</sup> the report raised concerns

[...] both with regard to the coherence of case law between the CJEU and domestic courts (many of which refer to international and regional jurisprudence in their adjudications) and between the CJEU and its sister courts [...] - in particular the ECtHR and international courts and UN treaty bodies.<sup>458</sup>

It found that the Court's lack of references to the jurisprudence of European and International Courts or treaty bodies, and its protection of its structural autonomy led to tensions in the area of conceptual or discursive coherence between its practice and the wider development of human rights in international fora, especially while developing its understanding of key principles such as the principle of proportionality.<sup>459</sup>

One interviewee recognised there had been a period in which references to the European Convention had decreased, but attributed the trend mainly to chance and to how the cases had been argued by the petitioners, and whether there had been a strong emphasis on the European Convention in the petition, which would make it more likely to be mentioned also in the judgment. Further the style of the judgments - which 'are written a little bit in old style...which means that they are meant to lead up to [an] end result'<sup>460</sup> - was also adduced as a reason for which 'if there is material that is not directly relevant we normally don't cite it', which does not necessarily mean the case law of the European Court of Human Rights has not been looked into by the Court.

...we nowadays take the Charter as a point of departure... and we don't necessarily always cite the European Convention and Strasbourg case law. But that also goes a little bit like this... I think mostly by chance, for instance lately I've seen a lot of judgments that again cite the European Convention, but there was a certain period when it was not cited perhaps very often...but I think it just happens to be so. We are very much dependent also on what people argue before us... and

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<sup>457</sup> Grainne De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' [2013] 20 Maastricht Journal of European and Comparative Law, 173-174.

<sup>458</sup> Tamara Lewis, Adina Portaru (Raducanu), Ricki Schoen, Karen Murphy, TJ McIntyre, and Graham Finlay, 'EU and Member State competences in human rights', *FRAME Deliverable 8.2*, 31 October 2015, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/23-Deliverable-8.2.pdf>>, 49.

<sup>459</sup> Ibid. at 52.

<sup>460</sup> Interviewee J2.

if the parties only argue on the Charter, and nobody is saying that...well... you can't interpret article whatever in the Charter in this way, because if you do then that would be a violation of the case law of Strasbourg... if that is made as a serious argument the we would certainly look into it and probably then that would be also reflected in the judgment, but if it has never been an issue we have no need to cite the European Convention simply to show that we like our friends in Strasbourg [...]<sup>461</sup>

All interviewees seemed to agree on the view that ECHR and the Strasbourg case law remain the main point of reference for fundamental rights cases in the work of the CJEU, and the coherence between the two systems was in no way under threat, also in light of articles 6 and 52(3) of the Charter. Another interviewee argued

...our case law should be coherent with the case law of the Strasbourg Court because it would not be wise to undermine mutually one's authority and also it's just written down in the Charter... we must take into account the human rights as guaranteed in the Strasbourg human rights Convention... that's how the whole construction works...<sup>462</sup>

With regard to references to international treaties and treaty bodies, interviewees agreed that such references were less frequent, also because of the nature of the case law, which is 'more tenuous' unless there is a clear treaty body of reference dealing with individual complaints, such as the Human Rights Committee, and reference to the text is often less meaningful than to the case law. Nonetheless international standards would be checked and referenced at times.<sup>463</sup>

If substantive discursive coherence between the two courts appeared to be in no way in danger in the views of interviewees, whether structural external coherence was in danger in light of opinion 2/13 also, perhaps unsurprisingly, did not appear to be a matter of great concern, in light of the existence of such discursive coherence.

I think the difference will not be so huge, whether we are a member of the Convention or not, because it's our legal obligation to be coherent, for one thing, and second it is just [a] wise jurisprudential approach... we quote the Strasbourg court so often... we do not quote other courts very often, we do not quote literature or articles but we quote the case law of the court very very often and of course there has not been a different approach since non accession... so we just continue as we did and I think it's relatively coherent, so we adapt our jurisprudence sometimes to the Strasbourg case law.<sup>464</sup>

If accession would not necessarily change much in terms of substantive discursive coherence between the two courts, another interviewee emphasised that it was much more important to be bound by the substance of the case law of the ECtHR than adding layers of procedure which would not necessarily aid coherence and individual human rights protection, especially in light of the complex and time consuming

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<sup>461</sup> Interviewee J3.

<sup>462</sup> Interviewee J1.

<sup>463</sup> Interviewee J2.

<sup>464</sup> Interviewee J1.

procedure envisaged by the accession agreement. 'This system is already bound to Strasbourg by 52(3), you have a substantive obligation to take it into account... it's already connected. Would a formal accession change that much?'. Although it could be argued that at present such obligation is not enforceable and the CJEU could decide to interpret the ECtHR case-law the way it chooses, while accession would further guarantee that the CJEU is bound to follow Strasbourg. One interviewee, on the other hand, saw the current standstill as a potential tension between internal vertical structural coherence and external coherence.

accession yes maybe has been rejected to safeguard internal coherence, within the union legal order including Member States because of art 51 of the charter, [...] which by its presence requires internal vertical coherence, but then we are talking indeed of internal, but then of course if one says that there must be coherence, partly because of article 52(3)... so another provision... between EU law and the Convention on Human Rights, then obviously you could turn it around and say that accession probably would facilitate that coherence, but that in turn may create problems, for instance for the area of liberty, security and justice, and mutual recognition.<sup>465</sup>

They further argued that when looking at possible tensions in this respect between mutual recognition and fundamental rights, the importance of avoiding impunity in the context of mutual recognition was seen as a crucial human rights principle which is 'considered essential in international human rights law, but somehow here seems to be forgotten'.<sup>466</sup>

Such positions highlight the complexity of researching coherence, in which different types of coherence may have significantly different meanings and implications. While different strands of incoherence are often found to be pulling in the same direction, such as structural incoherence giving rise to policy or interest-based incoherence, other patterns may also be found in which two types of coherence may be pulling in opposite directions, such as structural internal coherence and structural external coherence, which appear to be at odds in the context of the CJEU's accession to the ECHR.

Finally, individual human rights protection needs to be looked into carefully in this context and how it relates to coherence in human rights policy. Although commentators have been extremely critical of the human rights implications of Opinion 2/13, both on human rights grounds and on grounds of undermining 'coherence', Halberstam has argued that in so doing critics partly forgot about the constitutional dimension of EU governance.<sup>467</sup> In particular he argued that:

Participation in international human rights regimes should be encouraged and, indeed, brought about. But signing on to a particular rights regime ought not to come at the expense of the

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<sup>465</sup> Interviewee J2.

<sup>466</sup> Interviewee J2.

<sup>467</sup> Daniel Halberstam "'It's the Autonomy Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' [2015], 16 German Law Journal, 109.

constitutional nature of the EU's legal order, which is geared to vindicating all three constitutional values (including rights).<sup>468</sup>

Numerous elements in the opinion may be problematic from a human rights perspective, ranging from procedural to substantive issues, which are widely debated in legal literature and will not be addressed here.<sup>469</sup> The opinion has been termed 'a clear and present danger to human rights protection',<sup>470</sup> and it has been argued that accession on the terms that the CJEU insists upon would diminish rather than enhance the protection of human rights within the EU legal order.<sup>471</sup> Yet the Court's view of itself as the prime agent of structural vertical fundamental rights coherence in this context is undisputable and may in itself be an important element in fundamental rights coherence.

#### 4. Interest-based incoherence?

A number of interests may conflict with human rights in the work of the Court and may lead to more or less legitimate restrictions to fundamental rights, as contained in the Charter, under the principle of proportionality. These may include security, public order but are most prominently raised in the area of market freedoms, with the EU born as an institution of economic integration, with its well rooted four Treaty freedoms.<sup>472</sup> Just like other concerns such as security or public order, economic freedoms are likely to lead to some degree of potential interest based incoherence, in which the court is caught in the adjudication of different interests, fundamental rights on one hand and fundamental freedoms on the other. In this respect, one of the most frequent criticisms of the human rights approach of the CJEU has been that the EU never abandoned its original emphasis on integration and that human rights within the EU project remain secondary to "treaty obligations setting out the economic integration project".<sup>473</sup> Similarly De Vries has argued that "the economic origins of the European Union and the freedoms, which continue to remain the backbone - or spine - of the Union, entail that fundamental rights do not prevail

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<sup>468</sup> Ibid., 4.

<sup>469</sup> For an overview see Jed Odermatt, 'A Giant Step Backwards? Opinion 2/13 on the The EU's Accession to the European Convention on Human Rights', FRAME Working Paper No. 150, February 2015.

<sup>470</sup> Steve Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection', 18 December 2014, EU Law Analysis Blog, <<http://eulawanalysis.blogspot.it/2014/12/the-cjeu-and-eus-accession-to-echr.html>>, accessed 3 July 2016.

<sup>471</sup> Ibid .

<sup>472</sup> Albertine Vieldman and Sybe de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights: a Thorny Distribution of Sovereignty', in Ton van den Brink, Michiel Luchtman and Miroslava Scholten (eds.) *Sovereignty in the Shared Legal Order of the EU: Core Values of Regulation and Enforcement*, (Intersentia 2015).

<sup>473</sup> Richard Burchill, 'Assessing the EU's Position on Human Rights', in Jan Wetzel (Ed.), *The EU as a 'Global Player' in Human Rights?*, (Routledge 2011), at 20. See also discussion in Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 53.

over economic freedoms, at least not in the Union model."<sup>474</sup> Because of institutional separation and incoherence in these areas, conflicts between these two at time conflicting interests are often left to the CJEU to decide.<sup>475</sup>

There was widespread recognition among interviewees that different issues, areas of law and interests reach the docket of the Court, as the constitutional court of the EU. This was seen to be a structural feature of the Court, which they were explicit to emphasise is not a human rights court, while 'taking fundamental rights very seriously'. As one interviewee noted 'like national courts we apply fundamental rights in the context of something like 100 and 150 thousand pages of fine print of binding law... whereas for the European Court on human Rights, they only have one source of law, that's the European Convention, so that's of course a true human rights court.'<sup>476</sup> Similarly another interviewee emphasised the limited role fundamental rights play statistically in the case law of the court. 'Look at the docket... the docket is heavy economic litigation all along the way'.<sup>477</sup> Finally one interviewee recognised that although there was a need to balance such interests in the work of the court, and even at times protect the market or bigger transnational entities to the detriment of the smaller ones, which was also a historical heritage, there was no contradiction in terms of fundamental rights vs other interests as ultimately they should all be seen as fundamental rights.

I don't see such a huge difference or contradiction between market freedoms and human rights, after all freedom of workers, freedom of establishment and freedom to provide services, they are kind of entrepreneurial human rights, which you also find in [...] the Human Rights Convention... so it's the same idea of giving freedom to the individuals... and otherwise we are confronted as every other constitutional court or human rights court in the world, between this basic tension between individual freedom and the interest of the state or of the society or of the group... so it's a basic tension underlying all human rights, and of course in the past our task was specific to promote or to protect market freedoms but now that we have more competences the picture becomes more contextual.<sup>478</sup>

There is no doubt that the Court's adjudicative approach to market freedoms is rooted in the history of the EEC and the recognition by the Court that establishing a common market, and closer integration through law was the central task of the organization. Scholars have argued that this developed into "a structural preference for free movement, produced by the two-stage breach/justification methodology,

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<sup>474</sup> Sybe De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the Court of Justice', [2013] *Utrecht Law Review*, 177-178. See also discussion in Tamara Lewis, Adina Portaru (Raducanu), Ricki Schoen, Karen Murphy, TJ McIntyre, and Graham Finlay, 'EU and Member State competences in human rights', *FRAME Deliverable 8.2*, 31 October 2015, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/23-Deliverable-8.2.pdf>>, 44-51.

<sup>475</sup> Albertine Veldman and Sybe de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights: a Thorny Distribution of Sovereignty', in Ton van den Brink, Michiel Luchtman and Miroslava Scholten (eds.) *Sovereignty in the Shared Legal Order of the EU: Core Values of Regulation and Enforcement*, (Intersentia 2015), 78.

<sup>476</sup> Interviewee J2.

<sup>477</sup> Interviewee J3.

<sup>478</sup> Interviewee J1.

[...] laid down, consistently applied, and therefore entrenched".<sup>479</sup> The historical priority given to economic freedoms, and what many scholars argue remains the main interest and purpose of the Union - market integration - has thereby given rise to some degree of incoherence in fundamental rights adjudication in the case law of the Court. In the past this has led to a fundamental difference between Strasbourg, where "proponents of economic rights might have to justify a restriction on human rights", and Luxembourg, where the opposite appears to be the case and restrictions on free movement have to be justified on the basis of protecting fundamental rights.<sup>480</sup> Such a difference in approach has the potential to lead to further tensions in hierarchy, discursive incoherence, and ultimately lead to normative incoherence or substantively incoherent judgments between the two European courts. Whether things have changed since the entry into force of the Charter remains debated, and the case law of the Court has yet to fully test this. Overall interviewees did not recognise any source of incoherence in this respect, except those naturally deriving from the role of the Court as the constitutional court of the EU.

## 5. Conclusion

The institutional structure of the EU provides the Court with a key role in ensuring structural coherence with respect to fundamental rights. As such the Court's role as an agent of structural human rights coherence, historically, and even more so since the Charter of Fundamental Rights became legally binding, shows great potential to foster structural horizontal and vertical human rights coherence in the EU more broadly. In its use of the Charter as a constitutional threshold to test the legality of EU legislative acts, as well as through its recent case law in new areas of fundamental rights adjudication, the Court is acting as a prime agent of structural vertical coherence, while at the same time fostering greater horizontal human rights coherence among EU institutions. Nonetheless significant avenues for human rights incoherence remain, partly resulting from the Court's focus on autonomy and (market) integration.

The EU policymakers' views reported in this section reflected such a key role of the Court in ensuring structural and discursive coherence. Their views provide clear instances of interactions between different types of coherence, and how they may be at tension in work of the Court, especially on an internal/external structural dimension. It appears clear that the structural set up of interaction between the two courts, as also codified in the Charter, influences discursive and substantive policy coherence, which was reported to be strong. Further the Court's role in fostering horizontal as well as vertical coherence should not be underestimated. Yet inter-institutional commitment remains essential to ensure horizontal coherence in this respect. The Court's position as key agent of coherence should be recognised and respected by Member States and other EU bodies, including the European Commission which should act to implement the Court's decision in the *Digital Rights Ireland* case. Whether the Court's protection of its structural internal coherence in Opinion 2/13 is endangering structural human rights coherence

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<sup>479</sup> E.g., Stephanie Reynolds, 'Explaining the Constitutional Drivers behind a Perceived Judicial Preference for Free Movement over Fundamental Rights' [2016], 53 Common Market Law Review.

<sup>480</sup> Sybe De Vries, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon', in Ulf Bernitz and Stephen Weatherhill (eds.) *The Protection of Fundamental Rights in the EU After Lisbon* (Hart 2013).

within the European system of human rights protection more broadly, and the international human rights system as a whole, remains debated. Further it is essential for the Court to strike a proper balance between its historically strong focus on the integration of the internal market and other values of the EU, such as human rights, as enshrined in Art. 2 TEU, to the fullest extent legally possible. In this respect, the *Frente Polisario*<sup>481</sup> case ensuring that human rights impact assessments form a part of the decisions of the Council of the European Union, constitutes an interesting example of how this has recently been done by the Court.

## 6. Recommendations

- Other EU institutions should follow the lead of the Court as an agent of coherence in fundamental rights protection. In particular, the European Commission should act to implement the decision of the CJEU in Digital Rights Ireland regarding data protection.
- The CJEU should ensure that a proper balance is struck between the different fundamental principles governing the EU legal order, including by balancing the focus on the integration of the internal market with other values of the EU, such as human rights, enshrined in Art. 2 TEU, to the fullest extent legally possible.<sup>482</sup>

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<sup>481</sup> Case T-512/12, *Frente Polisario v Council*, (10 December 2015).

<sup>482</sup> Art. 2 TEU.



### III. Member State Policymakers with responsibility for EU policies

#### A. Austria

Two interviews were carried out at the Austrian Federal Ministry for Europe, Integration and Foreign Affairs. The interviewees commented on different issues connected with coherence. Moreover, they assessed some existing EU instruments in their role in fostering coherence. The interviewees pointed out challenges related to coherence, they commented on EU instruments and on member state actions to strengthen human rights coherence. The following section will follow this structure.

#### 1. Challenges related to coherence

According to one interviewee, a first challenge in strengthening human rights coherence is the lack of a definition of coherence and a lacking common understanding of human rights coherence.<sup>483</sup>

Both interviewees stressed the challenge of monitoring human rights in Member States. Human rights monitoring in Member States is important for the credibility of the EU and to strengthen the internal/external dimension of coherence. As such monitoring is outside of the EU's competencies, many Member States resist being monitored by the EU.<sup>484</sup> One interviewee expected a similar resistance, when it comes to an extension of the mandate of the FRA or to the implementation of other internal monitoring instruments. Due to this structural obstacle, the interviewee observed that there was limited possibility to implement effective Fundamental Rights monitoring at the EU level. The existing instruments (Annual Reports of the Parliament and the FRA) cannot supplement a *real and credible human rights monitoring* according to the interviewee.<sup>485</sup>

Both interviewed Austrian experts address migration as a thematic challenge, affecting internal/external coherence.<sup>486</sup> The lack of internal human rights monitoring and the undermining of the EU's credibility in external action that it entails, become evident in the course of the refugee influx currently faced by the EU and how it has dealt with it. The EU's "refugee-crisis" has led to isolation of Member States, rather than increasing their solidarity. Securitization has become an imperative and comes at the expense of human rights aspects of migration. According to both interviewees, this challenge on coherence, that affects the EU's credibility as human rights actor, becomes particularly evident in the *Turkey-deal*.<sup>487</sup>

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<sup>483</sup> Interviewee V1.

<sup>484</sup> Interviewee V1 and V2.

<sup>485</sup> Interviewee V2.

<sup>486</sup> Interviewees V1 and V2.

<sup>487</sup> Interviewees V1 and V2.

An *institutional challenge* is the absence of a single department, which is in charge of human rights in the EU and has the relevant responsibility.<sup>488</sup> One interviewee perceived a clearly regulated institutional responsibility and competence for human rights issues as crucial for coherence. The absence of this mirrors the EU's paternalistic approach to human rights in external relations.<sup>489</sup>

## 2. Comments on EU instruments from a Member State view

The interviewees commented on different EU and Council of Europe Instruments in their role for human rights coherence from the point of view of the Member State. These comments will be briefly outlined in the following sections.

### a) Council Working Groups

One interviewee appreciated that the Dutch Council Presidency and the Council working groups FREMP and COHOM are actively addressing the issue coherence and consistency between internal and external human rights policy. At the same time, this person reported the restricted mandate and resources of FREMP as being problematic.<sup>490</sup> The other interviewed expert was doubtful about the practical impact of these working group meetings, as the debates in the working groups often revolve around very individual small-scale issues, rather than aiming at developing a strategy to strengthen coherence in human rights. The interviewee expressed their preference for an open exchange between Member States on their human rights problems, but acknowledged that this was not realistic.<sup>491</sup>

### b) Strategic Framework and Action Plan on Human Rights

The Strategic Framework and Action Plan<sup>492</sup> on Human Rights was perceived as an instrument to strengthen the EU's human rights coherence.<sup>493</sup> This is because it contributes to a common line between the EC, EEAS and the Council. This was seen as not only favourable from the perspective of a Member State, but it was also perceived as an example of good practice for horizontal coherence between EU institutions.<sup>494</sup> One interviewee highly appreciated the human rights-based approach (HRBA) in development cooperation. He pointed out the readiness of the Member State to support this approach

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<sup>488</sup> Interviewee V2.

<sup>489</sup> Interviewee V1.

<sup>490</sup> Interviewee V1; For more information on the role of the Council of Europe, see section II.B. in this Deliverable.

<sup>491</sup> Interviewee V2.

<sup>492</sup> Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' 11855/12 of 25 June 2012.

<sup>493</sup> Interviewee V1.

<sup>494</sup> Interviewee V1 and V2.

and suggested joint programming. Moreover, he suggested applying the HRBA in the Human Rights Country Strategies, as they are currently updated.<sup>495</sup>

### *c) Ex-ante Impact Assessments*

Interviewees commented on the ex-ante Impact Assessments. According to them, they are difficult to use practically, as they are very long and complex assessments and difficult to understand. This supports the view of the interviewed member of the Impact Assessment Unit.<sup>496</sup>

## **3. Recommendations**

The following recommendations to strengthen coherence in the EU's human rights policies were mentioned by the interviewees – not all of them are perceived as realistic to implement.

- Establish a single department, which is in charge of human rights in the EU;
- Facilitate open exchange between EU Member States on their human rights problems and strategies to overcome them;
- Joint programming of MS and the EU in development cooperation while applying the human rights based approach;
- Applying the human rights based approach also in the Human Rights Country Strategies and implementing this in the negotiations for the current update of the Country Strategies.

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<sup>495</sup> Interviewee V2.

<sup>496</sup> Interviewee V1 and V2.

## B. Ireland

Two officials at the Department of Justice and Equality were interviewed for the purposes of investigating the position of policymakers in Ireland with responsibility for EU policy. During the interviews, the interviewees commented on different issues connected with coherence/incoherence in EU human rights policy and the position of the Member State in relation to some of these.

### 1. Challenges related to coherence

During the Irish presidency the Minister at the time was concerned about regressive developments in a number of Member States and pushed to put the question of the 'rule of law' on the agenda, that includes, in the words of the interviewee

ensuring that public institutions stay within the law ... that the power is [...] vested in institutions and that it's rule bound... it also includes that the focus is on protecting the fundamental rights of our citizens and combating discrimination against Roma for example... these are particular historical issues .<sup>497</sup>

The interviewee reported that one of the reasons for putting this issue which they summarise as 'the rule of law' on the agenda during the presidency was precisely 'the damage to the credibility of the European Union if it... in the person of the EEAS... is saying things to third countries that all EU Member States don't adhere to'.<sup>498</sup> Therefore, they were able to persuade FREMP and the JHA Council to agree Council conclusions in June 2013.<sup>499</sup> Other Member States approached the same issue in a slightly different way and produced a letter to President Barroso. Both of these processes ultimately culminated in the Commission producing its framework document on the Rule of Law.<sup>500</sup> The discussion then shifted from the JHA to the General Affairs Committee, which produced a set of conclusions of how the Council would react to systemic threats against the rule of law.<sup>501</sup> This had weakened the process in the view of the interviewee. In particular they argued

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<sup>497</sup> Interviewee I1.

<sup>498</sup> Interviewee I1.

<sup>499</sup> European Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union, <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/143099.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/143099.pdf)>, accessed 1 July 2016.

<sup>500</sup> Communication from the Commission of 11 March 2014, A new EU Framework to strengthen the Rule of Law, A new EU Framework to strengthen the Rule of Law COM(2014) 158 final, <[http://ec.europa.eu/justice/effective-justice/rule-of-law/index\\_en.htm](http://ec.europa.eu/justice/effective-justice/rule-of-law/index_en.htm)>, accessed 1 July 2016.

<sup>501</sup> Conclusions of the Council of the European Union and the Member States meeting within the Council on ensuring respect for the rule of law, General Affairs Council meeting, Brussels, 16 December 2014, <<http://www.consilium.europa.eu/en/meetings/gac/2014/12/16/>>, accessed 30 July 2016.

The issue is if you wish to bring about genuine reform and change within Member States... can you do that if the discussion is confined merely to COHOM and General Affairs and the diplomatic services of Member States? You don't involve those departments in our systems ministries and others that actually control the levers that make things happen... primarily justice departments, but also social welfare and other departments...<sup>502</sup>

In relation to this, the issue of internal/external incoherence, as well as the tension between human rights and fundamental rights, emerged clearly as a key area of incoherence in the view of the Irish representatives and more generally the presidency at the time. While it may be difficult in their view to define the concepts of rule of law and democracy, it appears clear that the EU is regularly demanding things of third countries that all EU Member States 'don't believe in or don't uphold'.<sup>503</sup> A number of examples were raised in this respect and the mandate of the FRA was particularly prominent among them. In the words of the interviewee:

...its quite clear to see situations in which we are demanding things of third countries that all EU MSs don't believe in or are not doing... having A status NHRIs for example, when not all MSs think that's important, and the FRA's mandate is limited in a way that if it was applied to a NHRI [...] ineligible for A status and possibly for B status at the UN.

The idea of extending the mandate of the FRA was welcomed by the interviewees although they argued it would also be very difficult to 'get through' and would require a very strong commitment from the presidency. In their words:

It makes absolutely no sense to exclude areas of fundamental rights that are within EU competence from the FRA's competence... and it makes absolutely no sense and is wrong in principle that they should not be able to issue their own opinions, that they just have to wait to be asked.<sup>504</sup> Some of the Member States would agree with that but not all... and some Member States would not deal with that issue of principle they would simply say these are not matters for the European Union.<sup>505</sup>

In this context the most sensitive issue remained, in their view, the question of where the boundary lies between EU competence and national competence, and how to have a debate about internal/external incoherence that goes beyond the issue of EU competence. They put forward the view that such dialogue needs to be carried forward in a way that goes beyond the strict limits of EU competence, but done in a way 'that doesn't extend the competence of the institutions, especially in the area of migration but also human rights'.<sup>506</sup> The idea put forward in this respect was for the EEAS to continue to identify issues that take from the EU credibility, 'distil them and hand them over to FREMP'. However there was a strong need to go beyond what was the current practice also in the context of COHOM/FREMP joint meetings (see

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<sup>502</sup> Interviewee I1.

<sup>503</sup> Interviewee I1.

<sup>504</sup> Interviewee I1.

<sup>505</sup> Interviewee I1.

<sup>506</sup> Interviewee I1.

section II.B.4) of drafting discussion points. In the words of the interviewee 'let's not just produce defensive text of defensive debating points but let's see if we can deal with those issues'.<sup>507</sup>

Related to this was the importance of the promotion and protection of fundamental rights within the EU internally, and it was argued that there was often a disconnect between citizens and the EU in this context.<sup>508</sup> While different Member States may have different capacities in terms of protecting the fundamental rights of their citizens, the idea was put forward that it was important to take into account 'direction of travel' and distinguish between 'very slow progress' and 'going backwards'. Further, while protections existed as a 'last resort' under Art.7 TEU, this remained a way of 'punishing bad behaviour'. 'It's not a way of promoting coherence and improving behaviour... there is a big need for a kind of softer political option [...] that's about raising the standard gently and diplomatically'.<sup>509</sup>

Other issues mentioned in this context were the importance of bringing the Council of Europe into the discussions on the coherence of EU human rights policy in general, and on the rule of law within Member States in particular, as well as the importance of having a common understanding of the rights under discussion, and that 'we are trying to be coherent on'. This was particularly found to be pressing in the context of EU negotiations on any given act relating to human rights standards. In the words of one interviewee:

Do you start by clarifying what the rights are first, or do you set a low marker for that?...[...] it's also something that could derail coherence from the start because you could argue about that for the first 100 years. [...] With fundamental rights they are also constantly evolving... and the concerns and issues to be dealt with are evolving. So is it safer to keep a sort of nebulous understanding and try and achieve some kind of coherence on that or do you pin it down into definitions... which may take forever'.<sup>510</sup>

Examples were given in this respect in relation to the EU accessibility act,<sup>511</sup> LGBTI issues, and hate crime.

## 2. Comments on specific EU instruments from a Member State view

The interviewees also reported their work with FRA on a project commenced during Irish presidency on the development of fundamental rights indicators. In this context they emphasised the importance of measuring the fundamental rights performance of different Member States in an objective way, in light

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<sup>507</sup> Interviewee I1.

<sup>508</sup> Interviewee I2.

<sup>509</sup> Interviewee I2.

<sup>510</sup> Interviewee I2.

<sup>511</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services. COM/2015/0615 final - 2015/0278 (COD).

of huge differences between them, and not relying only on civil society reports of party political considerations.

Other areas of concern touched upon during the interview were the lack of progress on the anti-discrimination directive; the way economic crisis was handled by EU institutions, which in their view was not balanced in terms of social policy initiatives and very little attention was paid to the protection of rights in the process.<sup>512</sup> Further the slow progress on the Accessibility Act was also raised as an area of concern.

### 3. Recommendations

The main recommendation emerging from the interviews was related to the issue of internal/external coherence and how to address the issue within and outside the EU. In the words of one interviewee:

If you are to bring about real reform you have to involve ministries that control the levers... giving FREMP more of a function... having a regular dialogue that goes beyond more than once a year between the EEAS and COHOM and FREMP which is not about the exchange of information... not about drafting defensive points about how we advance credible arguments [...] but that's about recognising that there is an issue here and can we see how to deal with it.... as a group of Member States and institutions... even if it is not in EU competence.<sup>513</sup>

A number of concrete interrelated recommendations can be distilled from the interviews which include:

- the involvement in the discussions on coherence and fundamental rights of ministries that 'have power', in particular ministries of justice.
- The need to have regular discussions to promote the key issues of concern, which go beyond drafting discussion points
- Either the EU aspires to change its own behaviour internally especially in relation to NHRIs, or it should stop demanding these standards from third countries.

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<sup>512</sup> Interviewee I1.

<sup>513</sup> Interviewee I1.

## IV. Case Study – Coherence in EU Business and Human Rights Policy<sup>514</sup>

### A. Methodology

The methodology employed for researching this section involved a mixture of desk research, qualitative interviews and discussions with policymakers at different events. A number of semi-structured interviews with members of civil society organisations and officials from the European Union were carried out as part of this research. The majority of the interviews were carried out in person with the interviewees, but where this was not possible interviews were carried out over the phone or via video conferencing. Each participant received a document in advance of the interview informing them of the project's research objectives, the nature of their participation in the project and offering information on how the interview data would be used and stored. They were each asked to consent to the collection and use of interview data. The content of each interview has been transcribed and transcripts of each interview are held on record. Documents verifying the consent of each interviewee are also held on file. The interviews were assigned a number based on the order in which they were carried out. The contributions of the interviewees have been completely anonymised for the purposes of this research project. This facilitated open and frank discussions.

The research was also supplemented by discussions with policymakers at the EU multistakeholder forum (MSF) on CSR in February 2015, at the FRAME workshop entitled 'Towards More Effective Engagement between the EU and Non-State Actors on Human Rights' on 3 July 2015 in London at which a panel entitled 'CSR Sprawl – Maintaining Control and Coherency over a Diverse Policy' discussed the problem of coherence in the specific context of the EU's policy on business and human rights.

### B. Introduction

The following sections examine how coherence or incoherence appears in practice in the activities and discourse of EU institutions, the Member States and in their vertical and horizontal interaction on the subject of business and human rights/ corporate social responsibility policy. The key actors in this field and key policy documents underpinning EU actions are identified and contextualised and the subject of coherence is analysed in detail through the comments and views of interviewees, which include members of civil society.

#### 1. The Policy Landscape

The policy landscape for business and human rights is diverse and varied. We can identify sources of policy at the level of business associations, national governments and international organisations. Arguably the most influential documents informing business and human rights practice internationally are the UN

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<sup>514</sup> This section was written by Stuart Wallace.



Guiding Principles on Business and Human Rights (UNGPs),<sup>515</sup> the OECD Guidelines for Multi-National Enterprises,<sup>516</sup> and International Labour Organisation Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.<sup>517</sup> Other documents such as ISO standards and voluntary regulatory regimes are also relevant, but less important in shaping the overall policy on business and human rights. The UNGPs in particular constitute a strong policy thread between the national and supra-national levels and should function as a source of vertical coherence between the MSs and the EU. Many member states within the EU have undertaken to develop national action plans (NAPs) indicating how they are implementing the UN Guiding Principles,<sup>518</sup> which are important statements of policy at the national level. The EU also released a compendium of national public policies on Corporate Social Responsibility in the European Union in 2014<sup>519</sup> and a staff working document on how it is implementing the UNGPs.<sup>520</sup>

We must also recognise that the EU itself has assumed a standard setting role in this policy area. The term corporate social responsibility is still used to describe the EU's actions in the area of business and human rights. The term is divisive as it has been historically associated with purely voluntary endeavours on the part of businesses, rather than obligatory regulation, and naturally connotes larger incorporated companies, creating a sense that it excludes smaller or medium sized enterprises.<sup>521</sup> The current key policy document on business and human rights in the EU is the 2011-2014 communication on CSR.<sup>522</sup> The EU is in the process of updating this policy document, but as yet no update has been produced. To this end the EU carried out a public consultation to inform future policy developments in this field in 2014. The EU has

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<sup>515</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.

<sup>516</sup> OECD, 'OECD Guidelines on Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Environment' (OECD, 25 May 2011) <<http://www.oecd.org/daf/inv/mne/48004323.pdf>> accessed 21 March 2016.

<sup>517</sup> ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (204th Conference Session Geneva November 1977) as amended at (279th Conference Session Geneva November 2000) and (295th Conference Session Geneva March 2006).

<sup>518</sup> Business and Human Rights Resource Centre, 'National Action Plans' <<http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>> accessed 11 April 2016.

<sup>519</sup> Naomi Williamson, Astrid Stampe-Knippel and Tina Weber, *Corporate Social Responsibility National Public Policies in the European Union Compendium 2014* (European Union 2014).

<sup>520</sup> European Commission, 'Implementing the UN Guiding Principles on Business and Human Rights – State of Play' SWD (2015) 144 final.

<sup>521</sup> Jeffrey Kenner, Pierre Schmitt, Katrina Sissins and Stuart Wallace, 'Report on structures and mechanisms to strengthen engagement with non-state actors in the protection and promotion of human rights', *FRAME Deliverable 7.3*, Forthcoming at <[www.fp7-frame.eu/reports](http://www.fp7-frame.eu/reports)>.

<sup>522</sup> European Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' (Communication) COM (2011) 681.

also passed a significant piece of legislation in the Non-Financial Reporting Directive.<sup>523</sup> A Regulation on Conflict Minerals is also under consideration between the EU institutions.<sup>524</sup>

The public consultation mentioned above was designed to feed into the EU's MSF on corporate social responsibility, which was held in early 2015. The forum was meant to bring together government and EU officials, businesses and civil society organisations to discuss policy in the field of business and human rights.<sup>525</sup> The diversity of actors involved in this process, with extremely polarised opinions, carries significant implications for the coherence of policy outcomes. As such the MSF on CSR and its central role in determining policy are crucial to discussion on this topic and will be referred to regularly throughout this section.<sup>526</sup> The EU's legislative actions in the field of business and human rights are also extremely important policy outcomes and the non-financial reporting directive will be referred to throughout this section.

## 2. The Key Actors

The business and human rights policy agenda within the EU engages a huge array of actors. All of the main EU institutions, the European Council, the Commission, Council of Ministers and European Parliament are involved. During the adoption of the non-financial reporting directive, for example, a huge number of different committees within the European Parliament expressed opinions on the draft directive which was put forward by the Commission, including the committees on foreign affairs, development, economic and

<sup>523</sup> 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.

<sup>524</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>525</sup> The coordination committee for the Multistakeholder Forum on CSR consists of a number of representative organisations - EUROCADRES; BUSINESSEUROPE; European Association of Craft and SMEs (UEAPME); EUROCHAMBRES; CSR Europe; Cooperatives Europe; Amnesty International; Social Platform; European Coalition for Corporate Justice; European Sustainable Investment Forum (EUROSIF); European Savings Banks Group; European Academy of Business in Society (EABIS) see 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 11 April 2016.

<sup>526</sup> For a detailed overview see 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 Deliverable 7.2*, 31 March 2015, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/14-Deliverable-7.2.pdf>>, 14 ff.

monetary affairs, employment and social affairs, industry, research and energy, internal market and consumer protection, women's rights and gender equality.<sup>527</sup>

As CSR is a cross-cutting issue, there are a range of institutional actors across the different DGs of the Commission who have responsibility for different aspects of the policy agenda. While overall leadership is supposedly vested in DG GROW, other DGs also have significant roles. DG FISMA, for example, has responsibility for implementing the non-financial reporting directive. Other DGs, such as DG Devco, Trade and EEAS have responsibility for some of the international dimensions of corporate social responsibility, such as funding business and human rights initiatives through development aid, business and human rights provisions incorporated in the sustainability chapters of free trade agreements and negotiations on international treaties with business and human rights dimensions.

Outside of the EU institutional actors, civil society organisations are extremely influential in this field. We already mentioned the role of civil society in the MSF on CSR, but their influence does not end there. Many CSOs assist in the implementation of sustainability chapters in free trade agreements.<sup>528</sup> Some CSOs are recognised social partners in the EU, which gives them a powerful role in defining legislation with social protection dimensions. CSOs also regularly engage in lobbying the different EU institutions and sit on expert groups established by the EU to define certain legislation. A number of civil society actors sat on the Expert Group on Disclosure of Non-Financial information by EU Companies which worked on the non-financial reporting directive.<sup>529</sup> Thus civil society actors have a strong role to play in defining policy in this field. At the national level, different government departments have a significant role in shaping policy while large businesses and trade unions also can have a significant influence.

### 3. Sources of Incoherence

In the previous reports in this work package, the authors noted that incoherence could arise from many different sources. Firstly, from organisational structures, which can result in a lack of co-ordination on policy design and implementation (structural incoherence). Secondly, from policy regimes where competing visions and overlapping responsibilities create incoherence (policy incoherence). Thirdly,

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<sup>527</sup> European Parliament, 'Report on the proposal for a directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups' (COM(2013)0207 – C7-0103/2013 – 2013/0110(COD)).

<sup>528</sup> Jeffrey Kenner, Pierre Schmitt, Katrina Sissins and Stuart Wallace, 'Report on structures and mechanisms to strengthen engagement with non-state actors in the protection and promotion of human rights', *FRAME Deliverable 7.3*, Forthcoming 2016 at <[www.fp7-frame.eu/reports](http://www.fp7-frame.eu/reports)>, Section III C 4 (1).

<sup>529</sup> The group included delegates from the Global Reporting Initiative, the European Coalition on Corporate Justice, European Association of Craft, Small and Medium-Sized Enterprises (UEAPME), CSR Europe and Business Europe – see European Commission, 'Expert Group on Disclosure of Non-Financial information by EU Companies – First Meeting' <[http://ec.europa.eu/finance/accounting/docs/11072011\\_minutes\\_en.pdf](http://ec.europa.eu/finance/accounting/docs/11072011_minutes_en.pdf)> accessed 3 May 2016.

incoherence can arise from divergent interests and policy goals (interest incoherence).<sup>530</sup> Each of these sources of incoherence is reflected to varying degrees in the policy discussion on business and human rights within the EU. However before we begin to examine these topics more closely, we should address the question of whether policy coherence is actually possible in this field?

#### 4. Scope for Coherence

Achieving coherence in the field of business and human rights generally is a difficult task. As one interviewee we spoke to noted ‘coherence problems are inevitable [...] it is typical of the subject [...] the UNGPs reflect this inevitability and Ruggie was quite clear – the UNGPs are not a one size fits all, that statement alone tells you there is going to be incoherence’.<sup>531</sup> It must also be acknowledged that achieving coherence on the policy of business and human rights specifically within the EU is an extremely difficult task. As another interviewee noted,

A certain degree of incoherence is of course inevitable, notably in the field of CSR which is changing very rapidly and in which no two situations are alike, all corporations are different so it’s actually quite difficult to have a crystal clear policy which looks coherent and consistent.<sup>532</sup>

In the previous report, Deliverable 8.1, the authors noted that incoherence is introduced into policymaking when structures are poorly designed, leading to a lack of coordination in policy design or policy implementation and where ‘frameworks have competing visions or overlapping responsibilities’.<sup>533</sup> Our research indicates that both of these issues generate problems for coherence in the context of business and human rights policy within the EU. With regard to the organisational structure, responsibility for this policy area is fragmented across different DGs of the Commission, which generates structural incoherence. As one interviewee put it, ‘the EU is so big, a lot of the time they don’t know what the other hand is doing’,<sup>534</sup> this aspect of incoherence will be discussed further below.

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<sup>530</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, ‘Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies’, FRAME Deliverable 8.1, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 19.

<sup>531</sup> Interviewee B11.

<sup>532</sup> Interviewee B14.

<sup>533</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, ‘Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies’, FRAME Deliverable 8.1, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 19.

<sup>534</sup> Interviewee B1.

We have further identified that the different stakeholders influencing policy direction have very different visions about the direction business and human rights policy should take in the EU. As one interviewee put it, there are 'strong tensions between the Commission, businesses, trade unions and NGOs' at the EU's multistakeholder forum on CSR.<sup>535</sup> The interviewee went on to say that '[The Commission] tried in the past to get us to agree on common statements at conferences and I mean it's impossible, our positions are too far apart'.<sup>536</sup> Another interviewee stated that 'the positions are very polarised'.<sup>537</sup> This was very clearly illustrated when a number of NGOs left the MSF in protest at the Commission setting up a body led by business organisations called the 'European Alliance on CSR' in 2006.<sup>538</sup> However, this view is not replicated across the EU and some see that there is greater harmony and coherence in other areas. The dialogue with social partners at the EU level is a good example of this and one interviewee noted that 'the social dialogue is part of our DNA and [...] is not really contested by neither side [sic] of the social partners. So we normally manage to come in with a relatively coherent approach to issues like or meetings like the social dialogue forum'.<sup>539</sup>

It is also becoming increasingly apparent that the EU institutions themselves have competing visions on the business and human rights agenda. As one of our interviewees pointed out, at the most recent multistakeholder forum on CSR, the Commission representative present at the event stated in the first speech that the EU's policy on CSR would be 'non-regulatory, non-prescriptive, business-driven and should not bring any additional burden',<sup>540</sup> while moments later the representative from the European Parliament, MEP Richard Howitt, gave a keynote address to the forum and stated 'we've built a consensus that a 'smart mix' between [voluntary and mandatory regulatory measures] provides the only constructive basis for action'.<sup>541</sup> The incoherence was plainly evident with the representative of one unit of the organisation, the Commission, publicly stating it opposed any mandatory regulation, while the representative of another policy defining unit, the Parliament, stating that a smart mix of mandatory and voluntary measures was the only way forward. Another interviewee remarked that 'corporate social responsibility is a particularly difficult one. It's a hot potato. No-one wants to touch it [...] the question:

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<sup>535</sup> Interviewee B9.

<sup>536</sup> Interviewee B9.

<sup>537</sup> Interviewee B3.

<sup>538</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 Deliverable 7.2*, 31 March 2015, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/14-Deliverable-7.2.pdf>>, 16 – 17.

<sup>539</sup> Interviewee B2.

<sup>540</sup> Interviewee B9.

<sup>541</sup> Richard Howitt, Member of the European Parliament, 'Opening Address' (Speech at the European Commission Multi-Stakeholder Forum on Corporate Social Responsibility, Brussels, 3 February 2015) <<http://t.co/q6u1OKM0y4>> accessed 5 February 2016.

are you going to push for standards and so on? nobody wants to touch that'.<sup>542</sup> We will return to this aspect of political leadership again below.

In spite of the difficulties in achieving coherence, different stakeholders had a lot of praise for the Commission's efforts to achieve consensus and a coherent policy. One interviewee from a CSO representing business organisations noted that 'the Commission, they did try to find a middle ground between the different positions in the expert group [on the non-financial reporting directive] and the stakeholders in general'.<sup>543</sup> A representative from an NGO observed that 'the EU is good at making people equally unhappy',<sup>544</sup> implying that it was probably finding the right balance in practice. Another interviewee observed that the early initiatives at the MSF, around 2002-2004, 'forced stakeholders to come to a common position and rose awareness'.<sup>545</sup> Thus, it is fair to conclude that the stakeholders we spoke to appreciated the Commission's efforts to find some middle ground in this policy area.

To summate, we must adjust our expectations of coherence in this policy area. As one interviewee put it, the important thing was for the EU to 'iron out the rough edges' of the inevitable incoherence,<sup>546</sup> or as another interviewee put it the aim should be that 'on balance the actions of [the] EU should not be so varied and haphazard as to be self-defeating'.<sup>547</sup>

### C. Achieving Policy Coherence through the 2011 Communication on CSR

There was a clear change in the direction of CSR policy around 2011 with the introduction of the communication on CSR.<sup>548</sup> As one interviewee put it 'there were really very good improvements, a focus on impacts rather than process [...] a smart mix, strongly rooted in this approach, the human rights dimension was more prominent and the external dimension was more prominent'.<sup>549</sup> The biggest change arguably came from the redefinition of CSR at the EU level. The Commission had historically defined CSR as 'a concept whereby companies integrate social and environmental concern in their business operations and in their interaction in [sic] their stakeholders on a voluntary basis'.<sup>550</sup> This has been described as a

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<sup>542</sup> Interviewee B1.

<sup>543</sup> Interviewee B3.

<sup>544</sup> Interviewee B9.

<sup>545</sup> Interviewee B10.

<sup>546</sup> Interviewee B11.

<sup>547</sup> Interviewee B14.

<sup>548</sup> European Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' (Communication) COM (2011) 681 final.

<sup>549</sup> Interviewee B9.

<sup>550</sup> European Commission, 'Green Paper: Promoting a European framework for Corporate Social Responsibility' (Communication) COM(2001) 366 final, 6.

very limited, and business-oriented definition of CSR.<sup>551</sup> However, there was an official shift away from this definition within the Commission and CSR was re-defined in 2011 as ‘the responsibility of enterprises for their impacts on society’.<sup>552</sup>

The interviewees’ perceptions of this move were broadly positive. One interviewee praised the Commission because it had ‘come up with a strategy to promote implementation of the [UN] guiding principles very quickly after they were adopted’.<sup>553</sup> We would argue that this move increased policy coherence between the international, regional and national levels by harmonising the definitions and approach between the UNGPs and the European approach. As one interviewee noted ‘the 2011 re-definition of CSR was very much in line with the UN Guiding Principles on Business and Human Rights and other international standards. It was essential and long overdue’.<sup>554</sup> Another interviewee remarked that ‘it really changed the tone around the debate on CSR [the Commission] were under a lot of pressure [...] from other stakeholders [...] and the European parliament in particular as well’.<sup>555</sup> Although the interviewee was not entirely pleased with the approach stating that ‘it basically always talked about business having to mitigate its negative impacts on society there was nothing in there about the positive role’.<sup>556</sup> Thus, the shift in policy in 2011 arguably increased coherence, even though some of the business groups were unhappy with the change in focus it brought to the agenda.

#### **D. Policy Fragmentation between Different Institutions**

As we noted in the previous paragraphs, at the EU level the policy agenda for business and human rights is fragmented across the different Directorates General of the Commission. This divided organisational structure could therefore serve as a source of incoherence in policy design and implementation. This is to be expected to a certain extent with a diverse policy area such as corporate social responsibility/ business and human rights. While it is a potential source of incoherence, as our interviewees pointed out, it is common and the exact same problem occurs at the national level. As one interviewee put it this ‘is not unusual it’s exactly what’s happening in businesses, it’s happening in governments [and particularly evident in NAPs of states] in some countries it’s one ministry leading development of the NAP, in others it’s multiple ministries’.<sup>557</sup> Another interviewee made a similar point about Germany noting how different ministries were responsible for different things in the business and human rights policy arena ‘in Germany [you have the] foreign ministry dealing with NAP, economic ministry dealing with the OECD [National

<sup>551</sup> Sorcha MacLeod, ‘Corporate Social Responsibility within the European Union Framework’, 23 *Wisconsin International Law Journal* (2005) 541,545.

<sup>552</sup> European Commission, ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’ (Communication) COM (2011) 681 final, 6.

<sup>553</sup> Interviewee B10.

<sup>554</sup> Interviewee B8.

<sup>555</sup> Interviewee B3.

<sup>556</sup> Interviewee B3.

<sup>557</sup> Interviewee B11.

Contact Point],<sup>558</sup> the social ministry dealing with supply chain initiatives etc., it is a standard problem to be completely honest'.<sup>559</sup> Thus policy incoherence arising from a fragmented organisational structure is to be expected in this context.

The EU has tried to ensure some consistency and coherence in business and human rights policy, as one interviewee noted 'business and human rights is slowly being mainstreamed to different Commission services' and there was 'better cross-service collaboration at the staff level' between DG Trade, EEAS, Market etc., 'all sitting together to discuss business and human rights and CSR'.<sup>560</sup> However, the interviewee went on to say that 'in practice, and at the policy level, progress is slow. Policy coherence remains very low'.<sup>561</sup>

Thus, the EU has tried to ensure greater policy coherence by ensuring greater collaboration between different Commission services with DG Grow ostensibly in the lead co-ordinating the policy between different DGs. The success of this strategy is debatable however as one of our interviewees was critical of this cross-service collaborative effort stating

they have these kind of [...] I don't know is it called a steering group, which DG enterprise leads to consult with the other DGs, but that should be one way of ensuring there's some leadership and co-ordination. We don't see it at the moment and my fear is that it will only get worse because now everybody is getting interested in this agenda and there's all sorts of DGs getting involved.<sup>562</sup>

The interviewee also noted that

one of the big problems we have at the moment is that there are so many DGs dealing with it and nobody's really sure who's leading on the CSR agenda [...] the commission needs to be a bit clearer about who's really in the lead and who's dealing with it and consistent as well because each commissioner, each DG, may have their own ideas and approach, but it shouldn't differ from the other DGs.<sup>563</sup>

According to this interviewee at least, this co-ordination effort does not appear to have been particularly successful thus far. In a speech to a FRAME workshop in 2015 on the subject of policy coherence in this area, Nicolas Hachez stated it was notable

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<sup>558</sup> The OECD Guidelines on Multinational Enterprises oblige States to establish National Contact Points, which are meant to 'further the implementation of the Guidelines' - OECD, 'OECD Guidelines on Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Environment' (OECD, 25 May 2011) 34 <<http://www.oecd.org/daf/inv/mne/48004323.pdf>> accessed 28 July 2015.

<sup>559</sup> Interviewee B10.

<sup>560</sup> Interviewee B9.

<sup>561</sup> Interviewee B9.

<sup>562</sup> Interviewee B3.

<sup>563</sup> Interviewee B3.



how little alignment there is between all the actors involved [i.e.] Council, Parliament, Commission even within the Commission, in which you have different DGs involved DG GROW, Employment, EEAS. I was doing interviews [in June 2015] and we were talking to several of these people. It was striking to see how little they are aware of what the others are doing. In the EEAS they don't know what DG GROW is doing or planning to do and they all seem to be sitting around waiting for some sort of sign by one of them, but they don't know who [...] there is really a low level of leadership in this field.<sup>564</sup>

An official interviewed for another FRAME project, Deliverable 7.4, indicated that while there was initial enthusiasm among the different Commission services to collaborate on business and human rights issues, the field is so fragmented that various actors were discouraged and returned to following their own course, with coordination returning to 'minimal levels'.<sup>565</sup> A lack of political leadership has been identified as a potential source for this lack of co-ordination and this issue will be discussed further below. At the same time, the ongoing failure of the Commission to produce a new communication outlining CSR policy post-2014 may be exacerbating the problem. It is difficult to ensure coherent and co-ordinated policy across different institutions when that policy is not openly defined and disseminated to all the EU institutions.

## 1. Labour Rights Protection

The problems arising from policy fragmentation between different Directorates General are clearly evident in the field of labour protection standards, which were highlighted by one of our interviewees in particular. We have already noted in the previous report that there can be a tendency within the EU to divide policymaking into internal and external spheres, which can create a two-tier system undermining the universality and indivisibility of human rights.<sup>566</sup> The protection of labour rights within the EU is very high and a central tenet of the business and human rights agenda. Yet the EU is constantly engaging in trade, diplomacy etc. with other third states with different, often lower standards of labour rights protection. This could clearly give rise to issues in ensuring policy coherence, but the EU tries to ensure that minimum labour rights protection is achieved through all of its activities. As one interviewee put it 'we promote decent work at global level, which is an ILO concept and which comprises social protection and minimal social protection floors. We write all that into association agreements and free trade

<sup>564</sup> Nicolas Hachez, 'Roundtable Discussion' (FRAME Workshop: Towards More Effective Engagement between the EU and Non-State Actors on Human Rights, London, 3 July 2015).

<sup>565</sup> Stephanie Bijlmakers, Mary Footer, Nicolas Hachez, 'Report on tracking CSR responses', *FRAME Deliverable 7.4*, Forthcoming 2016, at <[www.fp7-frame.eu/reports](http://www.fp7-frame.eu/reports)>, section II B 2 (a).

<sup>566</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 81.

agreements'.<sup>567</sup> As a statement of principle this is laudable, however in practice a variety of different institutional actors across the EU engage with this policy objective e.g. DG Employment, DG Trade, EEAS, DG Devco. Thus the scope for incoherence, particularly interest incoherence arising from divergent interests and policy goals, is massively increased.

When negotiating free trade agreements, one interviewee we spoke to from DG Trade indicated that negotiations on different aspects of free trade agreements were delegated to experts from different DGs. Our interviewee stated, for example, that if there were issues related to CSR in free trade agreements DG Grow would negotiate aspects of corporate social responsibility in free trade agreements saying 'the way we negotiate and monitor implementation of our agreements is that we include specialists or experts from [other DGs] who are in the lead [...] in the negotiation the people from DG enterprise are those who negotiate'.<sup>568</sup> Despite delegating these tasks to different DGs, DG Trade tries to ensure coherence in their activities as the interviewee put it

we co-ordinate, but they negotiate under our behalf, our authority, our co-ordination [...] We have a dialogue with the DG, of course, because we know what we want to have in the agreement and what we would like to obtain from the partner. We know the scope of the agreement and we have a global vision. So if a DG, like DG enterprise, is there for one chapter, they are also there for intellectual property for instance, we discuss with them what we want and what they want and we have a common, we manage to do a synthesis.<sup>569</sup>

Another interviewee we spoke to about this process observed that 'it's quite fluid, it works very well, it's always been like that [...] sometimes we have some work to do to reconcile our views, but that's part of the internal work that we do. We always come to a common view and the co-ordinator is DG trade'.<sup>570</sup>

The EU also manages to achieve some policy coherence on the specific issue of labour rights by following the lead of the International Labour Organisation at the international level. When the EU is negotiating a new trade agreement with a third state, for example, commitment to ILO conventions is central. One interviewee remarked that in the context of free trade agreements with third states -

we have undertaken a set of bi-lateral agreements where we include sustainable development chapters and these chapters essentially comprise commitments regarding labour rights, that is to say, for both sides to ratify and implement the basic ILO conventions.<sup>571</sup>

Thus, the ILO's core conventions serve as a thread linking regional policy with international policy and this has a clear impact on EU relations with other states. Utilising international standards, such as multi-lateral

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<sup>567</sup> Interviewee B2.

<sup>568</sup> Interviewee B4.

<sup>569</sup> Interviewee B4.

<sup>570</sup> Interviewee B5.

<sup>571</sup> Interviewee B4.

treaties, that are also open to third parties as a benchmark helps to avoid a disconnect between the EU's internal and external policies. The EU also uses ILO standards when it is implementing the Generalised System of Preferences (GSP) in its trade activities, which is a unilateral mechanism by which a number of developed countries grant developing countries preferential access to their markets against certain commitments in terms of human rights and other public interest objectives.<sup>572</sup> ILO standards again serve as the benchmark and help to ensure coherence at the international level -

It makes a lot of sense, for example, when we provide our general preferences in trade policies, that we use existing standards and look at compliance and non-compliance as a basis for continuing these general preferences or not.<sup>573</sup>

Another interviewee confirmed this statement noting

[Withdrawal of GSP] I think it's based first on a report from the ILO, based first on their view of the situation [...] if it's a GSP country, we can [...] make recommendation [sic] that we remove the GSP or the preferential GSP regime. There were examples where there was an inquiry with the ILO in principle for the labour rights [then] the council has to decide whether we maintain the GSP, particularly the GSP plus regime or not.<sup>574</sup>

When the EU is monitoring whether a State has progressed in ensuring greater protection of labour rights, one interviewee stated -

we rely very heavily on the ILO monitoring system and use that as a basis for our own assessment [...] it doesn't really make sense to devise a completely parallel and new system because I mean as members of the ILO, they are bound to these standards [...] which has the advantage that it's less biased. If we do it ourselves we can be criticised [...] the EU would only withdraw trade preferences for breach of labour standards in cases in which the ILO has unambiguously held that such a breach has not only occurred, but has been persistent and serious.<sup>575</sup>

Thus by taking its cue from the international body, the EU can ensure both consistent standards and provide an impartial arbiter to ensure compliance with labour standards, both within the EU and external states. It is important to note that securing coherent policy implementation works both ways and there needs to be coherence between the internal and external implementation of policy on labour rights protection. One interviewee we spoke to observed that further work was needed to secure coherent labour rights protection across the EU itself saying there was a failure to appreciate 'that it applies equally

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<sup>572</sup> Laura Beke and Nicolas Hachez, 'The EU GSP: A Preference for Human Rights and Good Governance? The case of Myanmar' in Jan Wouters, Axel Marx, Dylan Geraets and Bregt Natens (eds) *Global Governance Through Trade: EU Policies and Approaches* (Elgar Publishing 2015) 185ff.

<sup>573</sup> Interviewee B2.

<sup>574</sup> Interviewee B4.

<sup>575</sup> Interviewee B2.

to us, because [...] in a crisis situation, [...] elements pertaining to the core level standards are put into question in European countries – [...] we open ourselves up to the same criticism we try to normally apply to other third countries'.<sup>576</sup> On the subject of monitoring compliance, the interviewee pointed out that there were significant internal protection issues noting 'the example of Portugal or Greece where you could argue, and some have argued, that we have not only been in breach with some fundamentals, in terms of social dialogue, but also in terms of ILO or Council of Europe obligations'.<sup>577</sup> So while international standards are important for ensuring coherent policy, perhaps the more important issue is to ensure that they are also implemented in a coherent manner both internally and externally.

The EU also aims to achieve policy coherence by trying to ensure that third states approximate the EU's legal standards on labour protection. This is typically achieved through Association Agreements,<sup>578</sup> this is particularly true in the case of accession countries and neighbourhood countries, as one interviewee stated -

we have undertaken a set of bi-lateral agreements where we include sustainable development chapters and these chapters essentially comprise commitments regarding labour rights, that is to say, for both sides to ratify and implement the basic ILO conventions.<sup>579</sup>

Another interviewee elaborated further on this point stating -

We look [...] at issues like health and safety in the workplace [...] because this is also an area where we have a strong legal framework within the EU. The idea basically is that with these association agreements also to have what we call legal approximation in the countries. I mean for enlargement countries very evident because if they want to join the union, they have to fulfil the body of EU law. They have to have matching national legislation, but the idea is also there in terms of EU perspective, EU integration perspective, to have a similar perhaps lighter process with the neighbourhood countries. Does [the involvement of other DGs] hamper [our activity in this field]? Yes it does, because what we see is that there is not always the same willingness in our neighbour DGs, our sister DGs, to take up these issues.<sup>580</sup>

We can see from comments like this that the different sources of incoherence identified in D8.1 feed into one another. In this instance, the organisational structure triggers divergent interests and policy goals among different DGs with the interviewee alluding to confronting the unwillingness of other DGs to engage on the issue of labour rights protection in the context of their work. The interviewee reported

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<sup>576</sup> Interviewee B2.

<sup>577</sup> Interviewee B2.

<sup>578</sup> Association Agreements are international agreements that the European Union has concluded with third countries with the aim of setting up an all-embracing framework to conduct bilateral relations. These agreements normally provide for the progressive liberalisation of trade. See European External Action Service, 'Association Agreements' <<http://eeas.europa.eu/association/>> accessed 4 May 2016.

<sup>579</sup> Interviewee B4.

<sup>580</sup> Interviewee B2.

particular difficulties when trying to co-ordinate policy objectives and ensure policy coherence on labour protection with DG Devco. The interviewee described conversations they had with officials at the other DGs on the subject in the following terms -

[when I speak to them I say] look we need to see, for example, that health and safety concerns are taken up in your [development] programmes. Then they say “no, no because we are interested in job creation and the quality of the jobs doesn’t really interest us” and then we say “but wait a minute, we have some sort of *acquis* here this is really based on some fundamentals that we have to promote, so you cannot make this distinction between jobs and quality jobs”. We promote quality jobs, full stop, end of the line. So there, yes of course you find it more difficult.<sup>581</sup>

It is possible to identify a clear disconnect between the aims of the different DGs here, a very clear instance of interest incoherence. While it is unrealistic to expect each DG to pay the same level of attention to each policy goal, it is nonetheless disappointing to see that labour standards, a hallmark of the EU’s system, are not receiving adequate attention. The interviewee went on to describe the methods used to counteract the problems they encounter with achieving policy coherence, particularly the resource constraints they face and how this impedes their activity. The interviewee stated -

we cannot run programmes in all countries of the neighbourhood and the enlargement field, that is simply not possible in terms of resources. So we have to work through the other DGs [...] we work with [DG Devco] in horizontal units in charge of social protection, employment, social inclusion. We also try to do the same for DG trade, so we try to work, for example, now on trainings for managers, policy officers in the delegations so that they get a feeling for the issues of core labour standards, labour rights in the countries.<sup>582</sup>

It is interesting to see how the interviewee attempted to address and counteract the interest incoherence they encountered in their role. A number of approaches are evident, from establishing horizontal units between different DGs, to activities aimed at raising awareness of labour rights issues and policies within the EU itself. Perhaps the most interesting aspect is cross-training of officials from different DGs in policy issues that impact upon other DGs. This kind of cross-training could be a very useful tool in counteracting problems with coherency and consistency between different DGs.

## **E. Political Leadership on Business and Human Rights**

In the previous section, one interviewee highlighted how the fragmentation of responsibility for business and human rights policy across different services of the Commission led to a lack of clarity over who was

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<sup>581</sup> Interviewee B2.

<sup>582</sup> Interviewee B2.

leading the policy area.<sup>583</sup> The importance of clear political leadership in achieving policy coherence has previously been discussed in the context of the EEAS in another report in this work package.<sup>584</sup> This is clearly an issue of structural incoherence as the absence of political leadership can lead to a lack of clear co-ordination on policy design and implementation.

The political leadership of the business and human rights policy agenda in the EU has been discussed in another FRAME report.<sup>585</sup> That report noted that this policy area has historically received a great deal of political support and leadership from various commissioners over the years, but that this support appeared to be waning. The report observed that, in break with previous practice, none of the Commissioners with a policy brief related to business and human rights had attended or addressed the most recent multi-stakeholder forum on CSR, which was held in 2015.<sup>586</sup> The Commission's apparent reticence and the break with previous practice seems to correspond with the observation of one interviewee, mentioned above, that CSR is a hot potato that no one wants to deal with at the moment.<sup>587</sup>

As this political patronage was such common practice in the past, the absence of high-level political engagement did not go unnoticed. One member of the co-ordination committee for the multistakeholder forum on CSR, stated that: 'one has to seriously question the political commitment in Europe about the role of CSR in developing a competitive and at the same time responsible EU economy'.<sup>588</sup> A representative from the European Coalition for Corporate Justice (ECCJ), whose organisation is also on the co-ordination committee for the multistakeholder forum on CSR, 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>589</sup> One of our interviewees stated he did not 'feel that there will be a real drive on this issue in the commission [...] DG Enterprise or DG Justice, which could be bringing this impetus, they don't and we don't see any champion'.<sup>590</sup> Another one of the interviewees we spoke to noted that business and human rights policy was 'kind of hidden away at a political level' and in their view 'the commissioner needs to be

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<sup>583</sup> See section IV.D. above.

<sup>584</sup> Tamara Lewis, Wolfgang Benedek, Adina Raducanu, Daniela Amann and Anna Müller-Funk, 'Report on coherence of human rights policymaking in EU Institutions and other EU agencies and bodies', *FRAME Deliverable 8.1*, 30 September 2014, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/06-Deliverable-8.1.pdf>>, 55-56.

<sup>585</sup> Jeffrey Kenner, Pierre Schmitt, Katrina Sissins and Stuart Wallace, 'Report on structures and mechanisms to strengthen engagement with non-state actors in the protection and promotion of human rights' (FRAME 7.3) Section 3 B IV.

<sup>586</sup> Ibid.

<sup>587</sup> See Interviewee B1 in section IV.B.4. above.

<sup>588</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>589</sup> Jerome Chaplier, 'CSR Sprawl – Maintaining Control and Coherency over a Diverse Policy' (FRAME WP7 Workshop, London, 3 July 2015).

<sup>590</sup> Interviewee B9.

a bit more forceful in terms of having one approach across the commission on this'.<sup>591</sup> At the FRAME workshop in 2015 a contributor addressing this subject stated the

lack of political will is very apparent in the context of business and human rights [look at the] soul searching to move beyond voluntary and mandatory debate [and the] reluctance to take steps to produce meaningful guidance documents – there is definitely a lack of political will in that sense.<sup>592</sup>

Thus the actors, both in civil society and within the EU, that are in charge of co-ordinating and developing business and human rights policy are clearly feeling the impact of this absent political leadership within the EU. It seems fair to conclude that this is a source of structural incoherence within the EU.

The report speculates on reasons for the absence of political leadership. Firstly, it is suggested that legislative developments, particularly the passing of the non-financial reporting directive, have exhausted political capital within the EU,<sup>593</sup> so no one has taken leadership to push the policy agenda forward. This view was supported by one interviewee who stated he had the impression that 'now you have CSR regulations let's pause, give it time to transpose [the directive] and see if it needs further regulation'.<sup>594</sup> This comment suggests that interest incoherence, namely divergent interests and policy goals, are impacting on the leadership of the business and human rights policy agenda and in turn giving rise to the structural incoherence noted above. Secondly, the report speculated that the changes to the Commission's structure, particularly the merging of DG Enterprise and Industry with the DG responsible for the Internal Market,<sup>595</sup> may have had a bearing. Finally, the report suggests that 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. This seems to be supported by one of the interviewees we spoke to who said 'the commissioner in charge of [DG GROW] is in charge of so many different issues, god knows where CSR has a place in that'.<sup>596</sup> Overall, the lack of political leadership seems to be exacerbating the lack of coherence in this policy area. The fragmentation of responsibility for different elements of the policy between different DGs is clearly a contributing factor and it is unclear who should be taking the lead on this policy issue.

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<sup>591</sup> Interviewee B3.

<sup>592</sup> Nicolas Hachez, 'Roundtable Discussion' (FRAME Workshop: Towards More Effective Engagement between the EU and Non-State Actors on Human Rights, London, 3 July 2015).

<sup>593</sup> Jeffrey Kenner, Pierre Schmitt, Katrina Sissins and Stuart Wallace, 'Report on structures and mechanisms to strengthen engagement with non-state actors in the protection and promotion of human rights', *FRAME Deliverable 7.3*, Forthcoming 2016 at <[www.fp7-frame.eu/reports](http://www.fp7-frame.eu/reports)>, Section 3 B IV.

<sup>594</sup> Interviewee B9.

<sup>595</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>596</sup> Interviewee B3.

## F. Vertical Coherence between EU and Member States

We already noted above that the EU has attempted to use external frameworks, such as the ILO system, as a means of achieving coherence between internal and external policies on business and human rights, specifically labour protection. It could be argued that the EU has attempted to do the same in the broader business and human rights policy area through the UNGPs. The EU's Strategic Framework and Action Plan on Human Rights and Democracy stated that 'the EU will encourage and contribute to implementation of the UN Guiding Principles on Business and Human Rights'.<sup>597</sup> This plan also contained a commitment for member states to develop national action plans on business and human rights,<sup>598</sup> which are described as evolving policy strategy documents developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights.<sup>599</sup> The Strategic Framework and Action Plan also required the Commission to publish a report on EU priorities for the effective implementation of the UN Guiding Principles.<sup>600</sup> The subsequent Action Plan on Human Rights and Democracy (2015-2019) contained commitments to develop capacity and knowledge on the implementation of the UNGPs and other tools and initiatives that contribute to their implementation. It also contained an objective of raising awareness of the UNGPs in external action and policy dialogue and a renewed commitment to develop and implement NAPs.<sup>601</sup> Thus we see a commitment to use the UNGPs to shape policy within member states and at the supra-national EU level. While commitment to the UNGPs at both national and supra-national levels is laudable, the EU has simultaneously encouraged member states to work on corporate social responsibility. This has actually encouraged policy incoherence in the field of business and human rights, as member states have been encouraged to adopt both an action plan on CSR and a NAP on business and human rights, which is confusing and arguably superfluous as business and human rights is part of the EU's conception of CSR.<sup>602</sup> This approach of adopting two plans with overlapping objectives is clearly an unnecessary source of incoherence emanating from the EU and in practice member states have only erratically abided by this double requirement.

<sup>597</sup> European Council, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' (Luxembourg, 25 June 2012) 11855/12 <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/131181.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf)> accessed 11 May 2016.

<sup>598</sup> Ibid, Action 25.

<sup>599</sup> UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights' (UN Human Rights Council, 1 December 2014) 2 <[http://www.ohchr.org/Documents/Issues/Business/UNWG\\_%20NAPGuidance.pdf](http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf)> accessed 11 May 2016.

<sup>600</sup> Ibid, Action 25.

<sup>601</sup> European Commission, 'Action Plan on Human Rights and Democracy (2015-2019) "Keeping human rights at the heart of the EU agenda" JOIN(2015) 16 final, Action 17(b).

<sup>602</sup> See European Commission, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' (Communication) COM (2011) 681 final 13-14 and commentary on this development in Stephanie Bijlmakers, Mary Footer, Nicolas Hachez, 'Report on tracking CSR responses', *FRAME Deliverable 7.4*, Forthcoming 2016, at <[www.fp7-frame.eu/reports](http://www.fp7-frame.eu/reports)>, section II B 2 (b).



A key feature of the UNGPs is the smart mix of mandatory and voluntary, international and national measures. The EU stressed the importance of this approach in its communication on CSR.<sup>603</sup> This approach to regulation clearly demands vertical coherence and co-ordination between the national and supra-national in order to be successful. The non-financial reporting directive arguably reflects the shift toward utilising a smart mix policy approach, as the EU introduced mandatory non-financial reporting rules for companies which reflect ‘a shift from pure voluntarism to tacit acknowledgement of some roles for regulation’.<sup>604</sup> The interviewees we spoke to were quick to praise the coherence between the policy commitment the EU had made to a smart mix and its practical manifestation in the non-financial reporting directive. As one interviewee put it they saw a ‘smart mix on paper and smart mix in practice with non-financial reporting’.<sup>605</sup> Another praised the EU’s speed in implementing this policy approach noting at the EU multistakeholder forum between 2002-2004, ‘the term due diligence was never mentioned [...] and now not even ten years later you have it in the non-financial reporting, how quickly the development was [sic], it’s amazing for an inter-governmental organisation’.<sup>606</sup>

However, significant vertical coherence issues remain between the EU and the member states on the implementation of the UNGPs. In another report on this area in the FRAME project, Deliverable 7.4, the authors argue that the EU has shied away from taking the lead on this issue referring to the staff working document on the EU’s implementation of the UNGPs. In that document the EU refers to the breadth of policy areas engaged by business and human rights

“Business and human rights” is not a stand-alone issue; it touches upon a wide range of different legal and political areas, including but not limited to human rights law, labour law, environmental law, anti-discrimination law, international humanitarian law, investment and trade law, consumer protection law, civil law, and commercial law, corporate or penal law. The EU’s regulatory competence, and hence the Commission’s ability to act, varies according to the scope of competence awarded to the EU in respect of each of those areas.<sup>607</sup>

Deliverable D7.4 notes that the Commission wants to avoid any misunderstanding by making it clear that for most of the UNGPs, Member States are in the frontline, the EU’s competence extends to encouraging them to implement the UNGPs.<sup>608</sup> Thus the EU cites a lack of competence as the reason for not leading on UNGP implementation. However, there was a sense among the interviewees that we spoke to that the EU could be doing a lot more to assist in the implementation of the UNGPs within its existing fields of

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<sup>603</sup> European Commission, ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’ (Communication) COM (2011) 681 final, 5.

<sup>604</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>605</sup> Interviewee B9.

<sup>606</sup> Interviewee B10.

<sup>607</sup> European Commission, ‘Implementing the UN Guiding Principles on Business and Human Rights – State of Play’ SWD (2015) 144 final, 4.

<sup>608</sup> Stephanie Bijlmakers, Mary Footer, Nicolas Hachez, ‘Report on tracking CSR responses’, *FRAME Deliverable 7.4*, Forthcoming 2016, at <[www.fp7-frame.eu/reports](http://www.fp7-frame.eu/reports)>, section II B 2 (a).

competence. One interviewee noted that the content of the NAPs produced by member states was ‘quite weak’ and that the EU could ‘push states to address neglected issues’ giving the example of access to remedies for business and human rights violations.<sup>609</sup> This is widely regarded as the weakest pillar of the UNGPs and represents an area on which there are widely divergent policies across the different EU member states.<sup>610</sup> It is also an area where the EU clearly has competence to act.<sup>611</sup> Under Art. 81 of the TFEU it has the power to introduce measures aimed at ensuring effective access to justice, especially where there this is necessary for the proper functioning of the internal market, and both of these conditions are arguably satisfied by the need to provide effective remedies for human rights abuses perpetrated by businesses.

Another area where the EU has clear competence to act to implement the UNGPs is in the field of external action. Art. 21 of the Treaty on European Union clearly confers competence on the EU to advance human rights and ‘to promote multilateral solutions to common problems, in particular in the framework of the United Nations’. Promoting the UNGPs clearly fits this profile and this has been recognised by the Commission itself.<sup>612</sup> However, this is an area in which policy incoherence endures. At the workshop in 2015, Nicolas Hachez, suggested that the source of this incoherence was a ‘low level of ambition’ within the EU on CSR, which makes it ‘pretty hard for the EU to be ambitious and to be promoting an ambitious agenda abroad’.<sup>613</sup> In the keynote speech to the same workshop, John Morrison, Executive Director of the Institute for Human Rights and Business, spoke of the absence of coherence between EU external policy and member state external policy on business and human rights issues, using the example of EU engagement with China on business and human rights. He stated that CSR is ‘is generally seen as a competitive issue between member states’ with states focusing on how CSR differentiates their companies from other EU member states -

I have seen an EU-member state issuing its CSR guidance to its own companies incorporating the UN Guiding Principles on Business and Human Rights. But the framing has been competitive in tone, focusing on how to help our national companies promote their business abroad. Take the case of Sweden, being the only EU member to have a CSR memorandum with China. This all sounds fine, until you talk to the EU’s external action service in China about

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<sup>609</sup> Interviewee B9.

<sup>610</sup> See generally Gwynne Skinner, Robert Mccorquodale, Olivier De Schutter And Andie Lambe, ‘The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business’ (2013) ICAR, ECCJ, CORE, 7 <<http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf>> accessed 7 May 2016, which compares practice in this area across a number of different major EU jurisdictions including France, Germany, the Netherlands and the United Kingdom.

<sup>611</sup> Indeed the EU has already taken action to align standards on in commercial law – see Council Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1.

<sup>612</sup> European Commission, ‘Implementing the UN Guiding Principles on Business and Human Rights – State of Play’ SWD (2015) 144 final, 4-5.

<sup>613</sup> Nicolas Hachez, ‘Roundtable Discussion’ (FRAME Workshop: Towards More Effective Engagement between the EU and Non-State Actors on Human Rights, London, 3 July 2015).

the EU's strategic approach on business and human rights in China or even which CSR activities individual member states are undertaking.<sup>614</sup>

Morrison argued that business and human rights should not be a factor that member states compete on and that this was leading to policy incoherence because currently third states, like China, are faced with 'a multitude of EU embassies sending different messages and issuing their own sometimes inconsistent guidance on human rights due diligence'.<sup>615</sup> Hachez echoed these comments stating

There is no-co-ordination between the EU and member states in implementing a clear and coherent CSR or business and human rights strategy, to the point that different member states were implementing action plans and this was becoming a competitive issue whereas creating a level playing field is the whole point of the EU.<sup>616</sup>

Morrison called for a more a 'strategically aligned approach' and for the EU to adopt its own business and human rights action plan, similar to the NAPs adopted by member states arguing that in the context of third states, there needed to be -

active leadership to help EU-based companies navigate fundamental challenges such as adequate knowledge about negative human rights impacts, extent of mitigation, how much transparency is required and what effective remedies look like in practice.<sup>617</sup>

He also illustrated some of the problems generated by the incoherence between EU and member states external policies in this field saying it would lead to 'a set of perverse national incentives that will push government policy, and with it stakeholder engagement, to the national level and increasingly into the competitive space'.<sup>618</sup> He further argued that human rights should not be 'a competitive issue between

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<sup>614</sup> John Morrison, 'More Effective Engagement between the European Union and Non-State Actors on Human Rights' (FRAME Workshop: Towards More Effective Engagement between the EU and Non-State Actors on Human Rights, London, 3 July 2015) 6 <<http://www.ihrb.org/news/speeches/more-effective-engagement-between-eu-and-non-state-actors.html>> accessed 15 May 2016.

<sup>615</sup> John Morrison, 'More Effective Engagement between the European Union and Non-State Actors on Human Rights' (FRAME Workshop: Towards More Effective Engagement between the EU and Non-State Actors on Human Rights, London, 3 July 2015) 6-7 <<http://www.ihrb.org/news/speeches/more-effective-engagement-between-eu-and-non-state-actors.html>> accessed 15 May 2016.

<sup>616</sup> Nicolas Hachez, 'Roundtable Discussion' (FRAME Workshop: Towards More Effective Engagement between the EU and Non-State Actors on Human Rights, London, 3 July 2015).

<sup>617</sup> John Morrison, 'More Effective Engagement between the European Union and Non-State Actors on Human Rights' (FRAME Workshop: Towards More Effective Engagement between the EU and Non-State Actors on Human Rights, London, 3 July 2015) 8 <<http://www.ihrb.org/news/speeches/more-effective-engagement-between-eu-and-non-state-actors.html>> accessed 15 May 2016.

<sup>618</sup> John Morrison, 'More Effective Engagement between the European Union and Non-State Actors on Human Rights' (FRAME Workshop: Towards More Effective Engagement between the EU and Non-State Actors on Human Rights, London, 3 July 2015) 6 <<http://www.ihrb.org/news/speeches/more-effective-engagement-between-eu-and-non-state-actors.html>> accessed 15 May 2016.

member states in human rights-sensitive countries such as China' as it would be damaging to human rights protection overall.<sup>619</sup>

Of course this is not simply a one way street. The member states must also shoulder some of the responsibility for incoherence. In many cases, the EU cannot act without the support of the EU's member states. One of our interviewees remarked, again in the context of labour standards this time in the Qatar, that

it doesn't really matter if we say something at a DG level or a commission level [...] we need to get the support of the MSs [...] we need together the member states behind us so that we get some sort of council wording on a specific issue before we can address it at the international level. So at the [ILO] we managed to get a council conclusion, a council statement on Qatar through here in Brussels, which enabled us then to have a statement on Qatar and the labour conditions, the working conditions, delivered by the EU and by the presidency on behalf of the EU and its MSs at the governing body in Geneva.<sup>620</sup>

Indeed it seems that in many instances member states are being quite creative with their business and human rights agendas domestically and that this is not translating to similar innovations or leadership on the supra-national level at the EU. John Morrison noted in his speech that

the most active leadership for the UN Guiding Principles Reporting Framework or the development of Human Rights Benchmarks for ranking company performance comes from individual member states, such as Sweden, the Netherlands and the UK, and not from the European Commission.<sup>621</sup>

Another interviewee we spoke to echoed this point citing policy innovations at the national level such as the modern slavery bill in the UK and due diligence legislation in France stating 'there is a sense that the EU is not steering the policy but is instead watching the debates and lagging behind'.<sup>622</sup> In sum our interviewees and contributors identified a lack of vertical coherence between the external policies of member states and the EU on the subject of business and human rights. There is a low level of ambition in the EU's actions in this field and this is due, at least in part, to the member states who are clearly pushing innovative measures domestically, but who don't appear to be pushing for similar initiatives at the supra-national level within the EU.

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<sup>619</sup> John Morrison, 'More Effective Engagement between the European Union and Non-State Actors on Human Rights' (FRAME Workshop: Towards More Effective Engagement between the EU and Non-State Actors on Human Rights, London, 3 July 2015) 6 <<http://www.ihrb.org/news/speeches/more-effective-engagement-between-eu-and-non-state-actors.html>> accessed 15 May 2016.

<sup>620</sup> Interviewee B3.

<sup>621</sup> John Morrison, 'More Effective Engagement between the European Union and Non-State Actors on Human Rights' (FRAME Workshop: Towards More Effective Engagement between the EU and Non-State Actors on Human Rights, London, 3 July 2015) 8 <<http://www.ihrb.org/news/speeches/more-effective-engagement-between-eu-and-non-state-actors.html>> accessed 15 May 2016.

<sup>622</sup> Interviewee B9.

## G. Conclusion

Our interviews with policymakers and analysis clearly illustrate instances of structural, policy and interest incoherence in the context of business and human rights policy. We identified, for example, that structural incoherence was arising from the fragmentation of the policy across different DGs of the Commission and that interest incoherence was arising from the different interests and policy goals of different DGs involved, for example, in negotiating free trade agreements. Indeed many of our interviewees questioned whether coherence was realistically achievable either at the national level or the supra-national level in the context of a policy area like business and human rights, which is characterised by variability and the absence of a 'one size fits all' approach. At the same time, the research reflected the benefits that greater coherence could provide as the current absence of leadership on policy appears to be harming the policy agenda overall. In the external field, for example, the interviewees noted that the absence of coherence in external policies between member states and the EU was damaging human rights protection in China. Furthermore, our interviewees called for a sufficient level of coherence to ensure that policy activities were not self-defeating.

Perhaps the most interesting finding of the research was the interaction between the different forms of incoherence identified in Deliverable 8.1. The research observed that the different forms of incoherence feed off one another and arguably give rise to one another. Thus, for example, the established organisational structure of the Commission triggers divergent interests and policy goals among different DGs, which in turn gave rise to interest incoherence, which was particularly evident in the protection of labour rights in the context of internal and external policy actions. The research also identified that different policy interests and goals could be contributing to a lack of leadership in the policy agenda and generating a lack of co-ordination on policy design and implementation.

The research identified some of the tactics used by policymakers themselves to counteract incoherence, noting that cross-training of officials in different DGs in different policy issues could provide an interesting tool to combat incoherence.

The research also identified that utilising external standards and frameworks, such as the ILO conventions and the UNGPs, offered clear advantages to the EU in achieving coherence between its internal and external business and human rights policies and the EU should continue to utilise such frameworks wherever possible in its internal and external relations activities.

## H. Recommendations

- Policy leadership on business and human rights is weak. The EU has attempted to improve coherence by creating a cross-service group between different arms of the Commission to counteract this, but it appears to have failed to achieve co-ordination or to drive policy forward. The EU should designate a single policy leader for the business and human rights policy agenda across the EU. At present the DG

GROW is ostensibly in charge, but has produced very little guidance over the past two years and there is very little interest at the political level in the policy agenda. The policy area needs leadership and a clear leader is the starting point for this.

- The EU should encourage greater cross-training of officials in different institutions on different human rights issues related to their work, this could provide an interesting tool to combat policy incoherence on human rights.
- The EU should utilise external frameworks on human rights, such as the UNGPs, as a means of achieving coherence between its internal and external policies on human rights. As international multi-lateral treaties are accessible to all parties they can provide a common ground. These standards should provide a baseline, but not inhibit the EU from pursuing more advanced protection.

## V. Conclusions and policy recommendations

The main body of this report has conducted an investigation into the role of EU institutions as agents of coherence. Through the views of interviewees directly working in this context it has highlighted where the main strengths and weaknesses lie in relation to the different types of coherence identified in the context of this work package, namely structural incoherence, policy framework incoherence and interest-based incoherence. The main cross-cutting themes emerging from such an analysis in terms of the different sources of incoherence this report set out to investigate are discussed in detail in the introduction (see section I.D). The following conclusions focus specifically on the findings concerning different EU bodies and actors as ‘agents of coherence’ and the main findings emerging from the investigations into each institution. It also includes a brief analysis of inter-institutional issues arising from such analysis and a brief overview of the main sources of incoherence discussed by interviewees. The findings emerging from interviews with Member States, although limited by the interviews carried out for this report, nonetheless provide an insight into different positions and views on the coherence of EU human rights policy from their perspective, which is likely to differ largely depending on the Member State interviewed. Finally, the case study on business and human rights has provided a more in depth focus on a specific cross-cutting theme, highlighting where the coherence gaps emerge and providing a different and broader inter-institutional perspective.

Overall, the report has found that different types of incoherence emerge in the work of all EU institutions and bodies. Each EU institution has a role as an ‘agent of coherence’ in EU human rights policy, while at the same time at risk of facing different types of incoherence in its work. The same is true for Member States and more generally for policymakers involved in the development of EU human rights policy. However, while all EU institutions play a role in the coherence of EU human rights policy, some institutions are clearly more central than others in this respect. Some are institutionally better placed to act as ‘agents of coherence’ in EU human rights policy, starting most obviously with the FRA, although within the limits of its current mandate, and the Parliament, which is often considered the most ‘outspoken’ of the EU bodies. On the other hand, a number of institutions are also central in terms of upholding the legality of EU action in relation to human rights, starting with the CJEU, but including also the legal service of the Council as well as the European Ombudsman. A wide variety of views emerges from the interviews about which institutional actors are best placed to promote the coherence in the human rights policy areas with which each interviewee is concerned. These vary from the main institutions themselves, to working groups, DGs, specific mechanisms (e.g. impact assessments or human rights dialogues), meetings, structures or individual policymakers themselves. While some institutions have a stronger role to play as ‘agents of coherence’, due to their structural role in the EU architecture and their composition, all EU institutions show good practices and potential avenues to aid coherence. In this regard, the report has highlighted best practices as well as limitations and sources of incoherence.

Each institution was also found to report potential limitations and shortcomings in the context of the coherence of its human rights work, some of which were found to be more irresolvable than others. In fact, much of the incoherence discussed by the interview subjects was found to arise from practical

difficulties or limited resources. Further, different EU institutions show very different levels and sources of incoherence, whether structural, policy or interest-based. Most institutions show a mixed and fragmented picture of more or less human rights policy coherence, with different interests conflicting on a regular basis and human rights policymakers at times operating in silos. A number of concrete recommendations have been put forward on each institution in this respect, and are listed in the final section of this report. Most recommendations emerge directly from the views of the interviewees, while others were developed through further analysis by the authors.

The findings of the current report point in the direction of policymakers being aware of and concerned about the incoherence arising within and between their institutions. The issue of coherence does appear to be on policymakers' mind, partly due to the interviewees selected for this study, but partly there appears to be growing consideration for such concerns. At the same time the complexities of researching coherence show that often the notion needs to be broken down into more manageable areas of work reflecting coherence within specific areas of human rights policy. The key area of internal/external incoherence in EU human rights policy is that which receives the most attention by the institutional actors, as well as by Member States. Overall this report has found, in line with our previous research on the topic, that the most unifying response to incoherence challenges comes from international human rights law itself and the conceptual coherence of the idea of human rights, with the obligations for implementation it imposes on both the EU and its institutions and on the Member States. While avenues of structural incoherence, in which different actors or structures may in turn be protecting different interests or pursuing different policy frameworks, may actually lead to useful debates through democratic processes - especially in certain institutions such as the Parliament or the Council - the different sources of incoherence must never be used as an excuse for violating human rights in any area of EU policy.

The main conclusions emerging from the different institutions are summarised below. The final section includes a compilation of main recommendations which have emerged from policymakers' views as informed by our own analysis.

## **A. European Commission**

The Commission has a clear role to play as an 'agent of coherence' in EU human rights policy, yet its fragmented structures are also at risk of giving rise to areas of incoherence, starting from a certain degree of structural incoherence and stretching to different policy frameworks and interests. In fact, in a number of contexts the established organisational structure of the Commission was found to trigger divergent interests and policy goals among different DGs, which in turn gave rise to interest-based incoherence.

Overall, given the diverse composition of the commission, findings and recommendations were very much guided by the areas in which interviewees worked. Self-evidently, the work of each EU human rights actor is limited by the field of his or her competencies and this entails obstacles in the coordination of tasks and the cooperation of actors. Many different actors, dealing with human rights issues in different fields and policy areas are involved in the work of the Commission. The challenges for achieving coherence as



identified by the interviewees are mainly due to the limitations of instruments and policies as well as to structural issues, like lack of leadership, lack of resources or the limited scopes of mandates. A number of concrete policy areas were discussed by interviewees in terms of coherence. These included the use of impact assessments, which were seen as a key tool to strengthen human rights coherence; the need for greater coordination of Commission services as well as inter-institutional cooperation, in particular with the EEAS; and the lack of resources in particular in the context of DG Near. Further sources of policy and interest-based incoherence were discussed in the context of Trade and Neighbourhood policies. Interviewees discussed various instruments to strengthen coherent policy frameworks, including the Action Plan on Human Rights and Democracy. Furthermore, the relations between human rights (as a cross-sectional matter) and other policy areas were addressed by interviewees, including the difficulties of matching trade policy goals and human rights issues and the application of double standards in neighbourhood policies.

Policymakers put forward a number of concrete recommendations in the context of strengthening structural coherence, the coherence of policy frameworks, and reducing interest-based incoherence. These are listed below and included the need to make impact assessments more comprehensive and to be constantly updated, the need to increase the human rights capacities of DGs, as well as the need to reduce and simplify policy documents and consolidate them in the internal and external framework.

## **B. Council of the European Union**

In its role in coordinating the positions of Member States, by definition the Council faces the task of harmonising their divergent policy positions, including in the field of human rights, and may be seen as one of the crucial bodies tasked with ensuring vertical coherence.<sup>623</sup> As such it represents a key agent of vertical human rights coherence, while working with all other institutions in promoting horizontal coherence. Further, interest-based incoherence, which goes hand in hand with policy creation in political environments, may underlie much of the Council's approach to policymaking including in the areas of human and fundamental rights. Such interest-based incoherence may be further exacerbated by the division into different configurations and working parties, which also present as certain degree of structural incoherence. Further, horizontal coherence in the law-making processes as well as coordination with other institutions may present their own challenges in the work of the Council.

Given the multiplicity of interests at play, the internal processes in the Council remain one of the most difficult avenues in which to foster coherence in policymaking. Yet it also has a huge potential to foster coherence through its pronouncements as demonstrated by the Action Plan. Given the complexity of the institutional structures, a number of best practices in terms of fostering structural coherence were reported to be present by interviewees. The challenge of the myriad of policymaking fora within and

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<sup>623</sup> Tamara Lewis, Adina Portaru (Raducanu), Ricki Schoen, Karen Murphy, TJ McIntyre, and Graham Finlay, 'EU and Member State competences in human rights', *FRAME Deliverable 8.2*, 31 October 2015, available at <<http://www.fp7-frame.eu/wp-content/materiale/reports/23-Deliverable-8.2.pdf>>.

between Member States is perhaps there to stay, as is more or less interest-based incoherence in different policy areas.

The FREMP/COHOM collaboration was found to be one such avenue of fostering coherence. Another was found to be the human rights work of the legal service. A number of recommendations were put forward by policymakers in this context to foster greater coherence, always bearing in mind the political sensitivities and multiplicity of interests which underlie the structures of the Council. These included the importance of the Council not by-passing traditional law-making processes including the role of the Commission and its impact assessments, and the importance of mainstreaming the legal and human rights work in all Council formations and working parties. Further, greater awareness and understanding of human rights issues was found to be essential to ensure human rights considerations are taken into account in the earlier stages of the legislative process before it reaches COREPER. The idea of a more structured internal policy cycle on fundamental rights with a five-year outlook was put forward as a way to aid forward planning and also to provide greater coherence to human rights policy. This includes the cooperation between COHOM and FREMP, which was seen as important and should continue, although it should address more concrete issues.

### C. European Parliament

The responsibility of different committees for human rights issues in the EP was seen by interviewees as a challenge to the development and implementation of coherent human rights policies. In particular the separation of DROI and LIBE was perceived critically, as many fundamental rights issues, such as migration or counter-terrorism, cannot be pinned down only to the internal or external area, but require a coordinated strategy. Within the EU institutions, the EP has the role of the 'critical and outspoken institution' when it comes to EU human rights coherence. Unlike the executive institutions of the EU, the EP is a representative actor, whose members are elected and advocate for a stronger role for human rights in the EU's internal and external policies. Various examples were brought by interviewees of the necessity of better integrating human rights in policymaking, as well as areas of incoherence between policy commitments and concrete action by the EU.

The interviewees' recommendations for greater human rights coherence in the EU's actions were related mainly to the areas of coordination, cooperation and exchanging information between EU institutions. They refrained from suggesting greater harmonising of the EU's approach to human rights issues in order to strengthen inter-institutional coherence, as a levelling-down is expected from such a strategy. Still strengthening the inter- and intra-institutional dialogue on human rights, exchanging information on human rights issues and raising awareness of human rights issues among the members of the EP were all highlighted as key avenues in terms of strengthening EU human rights coherence. Further a coordinated cooperation and exchange of information between the EP and other EU institutions and greater coordination at the Parliament when it comes to implementing human rights, including at the EP

Secretariat level to avoid having the Parliament's own formal positions change from week to week, were all seen as ways to foster greater coherence in the human rights work of the EP.

## **D. European External Action Service**

Overall officials interviewed in the context of the EEAS appeared very aware of and open to discussing issues of incoherence in EU human rights policy, especially structural incoherence and that deriving from the internal/external tension which often affected and undermined their work. The findings of the research appear to indicate that although some of the sources of incoherence may be more difficult to address and may require more long-term political solutions, starting from the issue of EU competences and how it affects the human rights/fundamental rights divide, the policymakers interviewed are thinking about creative solutions in their human rights work, including in their working methods and communication strategies.

Further, the importance of appropriate working methods, critical staff, networks and communication strategies were addressed in detail by interviewees, and the idea that 'coherence requires knowledge' emerges clearly from the experts at the EEAS. A number of concrete recommendations from policymakers have been put forward to improve structures, working methods, networks and communication strategies. These should be complemented by 'leadership towards working together', by better communication to get people on board and create an *esprit de corps*, including intellectual leadership to overcome the mindset of the false dichotomy between interests and human rights, and by adopting a more long term constructive approach. Further, the importance of Member States' 'buy in' was also essential to this solution. While these may seem abstract and in part utopian answers to achieve human rights coherence, a number of very concrete recommendations have also emerged from the views of policymakers and are listed below. These included: increased cooperation with the Commission services and regular involvement of the Service in impact assessments; better information flow between EU delegations and EEAS; compulsory human rights training and counteracting staff mobility policy through retention of expertise in specific human rights policy areas; establishing a senior expert position on human rights; and improving mainstreaming, while retaining an expert human rights structure, and in particular overcoming geographic/thematic division, also through concrete realistic recommendations that are 'actually usable' in human rights dialogues.

## **E. Fundamental Rights Agency**

As discussed in Deliverable 8.1, the FRA has a key role to play as an agent of coherence in EU human rights policy. However, according to an interviewed member of the FRA, the concept of coherence is not used very frequently by the FRA, because it is considered too abstract for certain contexts. Thus, the FRA encounters issues of coherence only through its work on specific thematic areas of fundamental rights.

Consequently, the FRA does not promote coherence as such, it rather contributes to ensuring that the EU's policies respect fundamental rights.<sup>624</sup>

While interviewees were not in favour of extending the FRA's mandate with monitoring tasks, they put forward a number of concrete recommendations in terms of extending the mandate to include all human rights issues as contained in the Charter of Fundamental Rights and the thematic issue of judicial and police cooperation. They also suggested establishing a Human Rights Information System on the fundamental rights performance of Member States, as well as training and capacity building on fundamental rights among all EU institutions.

## **F. European Ombudsman**

Based on her mandate, the European Ombudsman makes recommendations to EU institutions, bodies or agencies to correct an instance of maladministration. As such, the institution has a key role to play in ensuring the coherence of human rights policy in a number of ways which are related most closely to the right to good administration as well as the right of access to documents of the institutions, bodies, offices and agencies of the Union. The Ombudsman can also decide to open a strategic inquiry in relation to a specific matter if she believes that there is a systemic problem in the institution or policy concerned. If the act or omission resulting in maladministration can be led back to incoherent policy measures, especially if it causes systematic violations, the Ombudsman's recommendation aims to improve the policy itself – beyond overcoming the violation.

The inquiries discussed in the report relate in one or the other way to incoherence in EU policies and policymaking or at least make it possible to investigate further whether the given policy or procedure is coherent enough. In particular, the Frontex case discovered structural problems in Frontex procedures and the Ombudsman's recommendations and Frontex's action on them contribute to better promotion of the fundamental rights of migrants. The investigations into the transparency of Trilogues showed the importance of transparency as a prerequisite to discover policy and/or structural incoherence in EU policymaking. This is one of the chief areas where the Ombudsman is obliged to operate and make sure that law making is as transparent as possible. Further, the Ombudsman's work in relation to lobbying transparency draws our attention to interest-based incoherence that occurs in EU policymaking. On the whole, an accountable, transparent, ethical, and ultimately effective administration provides a key source of coherence in EU human rights policy.

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<sup>624</sup> Interviewee F2.

## G. Court of Justice of the European Union

The institutional structure of the EU provides the Court with a key role in ensuring structural coherence with respect to fundamental rights. As such the Court's role as an agent of structural human rights coherence, historically, and even more so since the Charter of Fundamental Rights became legally binding, shows great potential to foster structural, horizontal and vertical human rights coherence in the EU more broadly. In its use of the Charter as a constitutional threshold to test the legality of EU legislative acts, as well as through its recent case law in new areas of fundamental rights adjudication, the Court is acting as a prime agent of structural vertical coherence, while at the same time fostering greater horizontal human rights coherence among EU institutions. Nonetheless significant avenues for human rights incoherence remain, partly resulting from the Court's focus on autonomy and (market) integration.

The EU policymakers' views expressed in the context of the current research reflected such a key role of the Court in ensuring structural and discursive coherence. Their views provide clear instances of interactions between different types of coherence, and how they may be at tension in the work of the Court, especially on an internal/external structural dimension. It appears clear that the structural set up of interaction between the CJEU and the ECtHR, as also codified in the Charter, influences discursive and substantive policy coherence, which was reported to be strong. Further the Court's role in fostering horizontal as well as vertical coherence should not be underestimated. Yet inter-institutional commitment remains essential to ensure horizontal coherence in this respect. The Court's position as key agent of coherence should be recognised and respected by Member States and other EU bodies, including the European Commission, which should act to implement the Court's decision in the *Digital Rights Ireland* case. Whether the Court's protection of its role in maintaining structural coherence within the EU in Opinion 2/13 is endangering structural human rights coherence within the European system of human rights protection more broadly, and the international human rights system as a whole, remains debated. Further, it is essential for the Court to strike a proper balance between its historically strong focus on the integration of the internal market and other values of the EU, such as human rights, as enshrined in Art. 2 TEU, to the fullest extent legally possible.

## H. Member States

Interviews carried out with Member State policymakers with responsibility for EU policies offered a more fragmented picture of the different EU structures and policy areas in which they were involved most directly and which they chose to discuss. This is not surprising given the fact that Member States must interact with all the different EU policy areas and institutions with the resulting structural, policy and interest-based fragmentation which often emerges as a result. Further the limited number of policymakers interviewed and the complexity of a real analysis of any Member State position *vis a vis* EU policymaking, also reflecting domestic concerns, inevitably makes the findings of this section limited.

Nonetheless a number of interesting trends may be observed and comments on different existing EU instruments and interesting recommendations were put forward.

Interestingly, the interviewees from Member States appeared to be the most vocal policymakers about the challenge of monitoring human rights/fundamental rights protection in Member States themselves. While concerns about the lack of EU competences was raised frequently by policymakers working in the different EU institutions as a perhaps insurmountable barrier, and Member States of course had a key role to play in this situation, the Member States policymakers interviewed in this context raised the issue more forcefully than policymakers from the institutions themselves. Of course such a position is likely to vary strongly from one Member State to another, but the interviewees in this context were unanimous about the importance of human rights monitoring in Member States for the credibility of the EU and to strengthen the internal/external dimension of coherence.

Member States appeared to show a somewhat 'self-critical approach' in this respect, emphasising that a lot of the problems relating to the lack of credibility of the EU deriving from the internal/external dimension of incoherence were to be attributed to the Member States themselves. Further the internal/external dimension of incoherence emerged clearly here too as the most commonly discussed dimension of incoherence and the one seen as generating most concern for EU policymakers. In this context, the FREMP/COHOM collaboration was raised by interviewees in both Member States, both in their view of the limited impact of the discussions to date, and in the need to strengthen such mechanisms. Recommendations put forward in this respect included the involvement in the discussions on coherence and fundamental rights of the ministries that 'have power' in these areas, in particular ministries of justice, giving FREMP more of a role and promoting key issues of concern beyond just 'drafting discussion points'.

Another common theme emerging from the interviews was related to the extension of the mandate of the FRA, for which there appeared to be consensus that the political will was currently lacking. Further migration and the EU refugee crisis, the HRBA to development, NHRIs, the role of the rule of law dialogues, the EU accessibility act, LGBTI issues, austerity policies and hate crime were among the diverse issues discussed by interviewees. A number of concrete recommendations were put forward and are listed below.

## **I. Inter-Institutional issues**

Lack of inter-institutional cooperation and structural incoherence arising out of the fragmented thematic responsibilities among EU institutions were identified by many interviewees as key avenues of incoherence which permeated the structures, policy-frameworks and thematic interests across the whole EU architecture. Further, different dimensions of incoherence, starting most prominently from the internal/external dimension of incoherence in EU human rights policymaking, were often reflected in the institutional set-up itself. By way of example the EEAS is responsible for the external area only, the FRA is responsible for the internal area only. Further, such horizontal inter-institutional incoherence, which was

already widely documented in Deliverable 8.1, is, in the views of the interviewees, complemented by vertical incoherence arising from the division of competences between EU institutions and Member States, both of which, at the same time, share responsibility for human rights issues. Interviewees perceived this complex situation to be one of the main structural obstacles towards achieving greater human rights coherence.

Such incoherence deriving from inter-institutional design or (lack of) cooperation was raised frequently by interviewees, yet a full picture of this dimension is inevitably lost in the approach of this report, which focuses on different EU institutions as 'agents of coherence' and relied on the views of interviewees about sources of incoherence emerging within the institutions in which they worked. Nonetheless, a number of trends may be noted in this respect that reflect more generally on the importance of inter-institutional collaboration in human rights policy. Prominent examples include: the lack of full involvement of the EEAS in the Commission's work on impact assessments; the Parliament's role as the 'critical and outspoken institution' on human rights issues which are at times instrumentalised by EU executive institutions; the need for the Commission to implement decisions by the CJEU starting with the example of *Digital Rights Ireland*. Many others can be found throughout the report. Further, the role of each EU institution in the policy cycle as an agent of human rights coherence should be given careful consideration in light of the findings emerging from each individual institution or mechanism. By way of example, the extent to which different institutional actors as agents of coherence are able to fully take into account human rights considerations in EU human rights policy is a multi-stage process, starting in the Commission and ending in the CJEU, with a broad range of actors and mechanisms taking more or less part in the process depending on different policy areas, interests and broader political considerations. Whether impact assessments in the Commission, the legal advice in the Council or the threat of the CJEU annulling EU acts, human rights coherence stretches across all level of EU policymaking. Throughout the policy cycle gaps and strengths remain in the different institutions to promote coherence. The current report has aimed to show this starting from the micro-picture. Although the macro-picture of where the gaps lie between institutions could be investigated more in depth, it appears clear that greater cooperation, information sharing and collaboration along the key internal/external divide are central ingredients to pushing forward horizontal coherence between EU institutions. Further, it is clear that coherence in EU human rights policy requires knowledge of key human rights issues and processes across institutions.

The report has found that Member States have a key role to play in maintaining inter-institutional coherence in EU human rights policy. Not only do inter-institutional sources of incoherence in EU human rights policy at times mirror structural incoherence at the national level, but Member States' role in all stages of the policy-cycle should not be underestimated. Finally, a number of policy fields emerge from the interviews, which seem to suffer from particular coherence issues and appear in the discussions of interviewees in most EU institutions. These include migration, trade and development, and more generally the internal/external dimension of incoherence. How these issues are dealt with by all institutional actors both separately, but also in their interaction with each other, deserves careful attention and would require further in depth case studies, along the lines of section IV on business and human rights.

## J. Policymakers' views on sources of incoherence in EU human rights policy

As already discussed in depth in section I.D, all sources of incoherence emerged from the interviews conducted for this report. Structural incoherence was the area of incoherence which received by far the most attention from interviewees. The complexities of the institutional set up of EU human rights policymaking clearly emerges and provides a perhaps worrying picture of competing processes, structures and mandates overwhelming the policymakers themselves. On one hand, there appear to be too many processes taking place at the same time, with some overlap. On the other hand, the resources to follow all such processes as well as carrying out the necessary human rights related work were regularly reported to be limited and insufficient. Further, interviewees often reported to be working in a context of 'information overload' in which keeping on top of all relevant knowledge was a challenge in itself. At the same time communication barriers within and between institutions made it impossible to attain full knowledge of all competing processes. The importance of sharing information and changing the working culture were regularly reported in this context by interviewees within the different EU institutions. In this context, the theme clearly emerged from a number of interviews conducted that coherence in EU human rights policy is a complex and time-consuming issue, which requires time and in depth knowledge of numerous competing processes and standards within and outside the EU.

Both horizontal and vertical incoherence were discussed by interviewees in the context of structural incoherence. While many of the problems outlined above related to intra- and inter-institutional sources of incoherence in EU human rights policy, some sources of policy incoherence were found to mirror structural incoherence at the national level. Examples of lack of coordination domestically, for instance between different ministries, indicate that some of the structural incoherence in EU human rights policy is grounded in structural incoherence within Member States, making a comprehensive study of sources of incoherence even more challenging. Further, different sources of incoherence interact with each other, and often cause or influence each other directly. The most prominent example of this, which emerged from the majority of areas of investigation, related to the ways in which structural incoherence gave rise to policy or interest-based incoherence. Many examples emerge in the report - both within institutions (e.g. between DGs, working parties or branches of government) and between institutions - in which structural incoherence is also reflective of interest-based or policy incoherence.

The issue of policy incoherence, in terms of competing concepts and visions or policy regimes, received some attention from the interview subjects. The most prominent example reported by many interviewees was the fundamental rights/human rights divide, which resulted from the internal/external aspect of incoherence in EU human rights policy. This theme was also related to the role of international human rights instruments and standards, on one hand receiving insufficient attention from EU policymakers and institutional actors, on the other providing a useful avenue to avoid the internal/external disconnect in EU human rights policy. Policy coherence in relation to normative instruments acquired a particular meaning in the context of the work of the CJEU and also in the interaction between the Charter and other international and regional human rights instruments. In this and in other contexts, the notion of



coherence in EU human rights policy and that of legality and fundamental rights compliance overlap more than in others.

The notion of policy coherence in the context of policy pronouncements, framework documents and action plans, was discussed in particular in relation to the Action Plan on Human Rights and Democracy, which was highlighted by many actors as a best practice in fostering policy coherence in EU human rights policy and in guiding the action of the relevant actors involved. Similarly, other policy pronouncements were highlighted as best practices of coherence such as the redefinition of CSR at the EU level in the context of the case study on business and human rights, which was reported to increase coherence in that context. In contrast, the absence of relevant policy pronouncements or action plans may also constitute a source of incoherence in EU human rights policy.

The issue of interest-based incoherence received less attention from interviewees. Interest-based incoherence by definition requires more in depth thematic studies than was possible through the interviews conducted for this report. The case study presented in section IV on business and human rights presents a useful example of the type of research necessary to fully investigate issues of interest-based incoherence. Here the role of a wide multiplicity of actors investigated in relation to one cross cutting theme, including how they relate to the different policy frameworks, and how they relate to each other in relation to a specific theme and push forward the debate, issues and ultimately human rights policy. Further, a much broader picture emerges here by taking into account a broader range of actors, including civil society and businesses and their competing interests.

## **K. Business and human rights**

The interviews with policymakers and analysis emerging from this case study clearly illustrate instances of structural, policy and interest incoherence in the context of business and human rights policy. We identified, for example, that structural incoherence was arising from the fragmentation of the policy across different DGs of the Commission and that interest incoherence was arising from the different interests and policy goals of different DGs involved, for example, in negotiating free trade agreements. Indeed many of our interviewees questioned whether coherence was realistically achievable either at the national level or the supra-national level in the context of a policy area like business and human rights, which is characterised by variability and the absence of a 'one size fits all' approach. At the same time, the research reflected the benefits that greater coherence could provide, as the current absence of leadership on policy appears to be harming the policy agenda overall. In the external field, for example, the interviewees noted that the absence of coherence in external policies between member states and the EU was damaging human rights protection in China. Furthermore, our interviewees called for a sufficient level of coherence to ensure that policy activities were not self-defeating.

Perhaps the most interesting finding of the research was the interaction between the different forms of incoherence identified in Deliverable 8.1. The research observed that the different forms of incoherence feed off one another and arguably give rise to one another. Thus, for example, the established

organisational structure of the Commission triggers divergent interests and policy goals among different DGs, which in turn gave rise to interest incoherence, which was particularly evident in the protection of labour rights in the context of internal and external policy actions. The research also identified that different policy interests and goals could be contributing to a lack of leadership in the policy agenda and generating a lack of co-ordination on policy design and implementation.

The research identified some of the tactics used by policymakers themselves to counteract incoherence, noting that cross-training of officials in different DGs in different policy issues could provide an interesting tool to combat incoherence. The case study also identified that utilising external standards and frameworks, such as the ILO conventions and the UNGPs, offered clear advantages to the EU in achieving coherence between its internal and external business and human rights policies and the EU should continue to utilise such frameworks wherever possible in its internal and external relations activities.

The case study concluded that policy leadership on business and human rights is weak. The EU has attempted to improve coherence by creating a cross-service group between different arms of the Commission to counteract this, but it appears to have failed to achieve co-ordination or to drive policy forward. The need for the EU to designate a single policy leader for the business and human rights policy agenda across the EU was emphasized in this context. At present the DG GROW is ostensibly in charge, but has produced very little guidance over the past two years and there is very little interest at the political level in the policy agenda. Further the case study recommended that the EU should encourage greater cross-training of officials in different institutions on different human rights issues related to their work, which could provide an interesting tool to combat policy incoherence on human rights. Finally the case study concluded that the EU should utilise external frameworks on human rights, such as the UNGPs, as a means of achieving coherence between its internal and external policies on human rights. These standards were seen as providing a potential common ground and a baseline, while not inhibiting the EU from pursuing more advanced protection.

## **L. Recommendations**

### **1. European Commission**

- Make the impact assessments more comprehensive;
- Intensify the dialogues with stakeholders on the impact of trade policies;
- Raise awareness among the different DG services about the usefulness and the need for impact assessments;
- Constantly update the impact assessment tools – perceive them as living documents;
- More coordination and cooperation of different EU institutions when it comes to impact assessments;
- Increasing the capacities of DGs to address human rights issues: either by hiring additional staff or by training the existing staff on human rights issues;

- Training the delegations on human rights issues;
- Reduce and simplify policy documents and consolidate them in the internal and external framework;
- Link human rights issues to the Agenda 2030 and to the Sustainable Development Goals. This would harmonise the specialised focuses of some DGs on certain human rights issues;
- Fully implement the HRBA in planning and programming of development cooperation, also in the evaluation of policies;
- Provide those, who implement the HRBA at country level with more practical tools (make use of the tools, which MS apply in development cooperation);
- More cooperation between the EU and MS in terms of sharing information, instruments and tools (e.g. in trade policies);
- A better coordination of the EU and MS actions, tools and trade agendas in third countries.

## 2. Council of the European Union

- The Council should not by-pass traditional EU law-making processes, including impact assessments;
- FREMP/COHOM collaboration should continue although addressing more concrete issues and grounding in action plan on human rights and democracy;
- A more structured internal policy cycle on fundamental rights with a five-year outlook should be put in place as a way to aid forward planning and also provide greater coherence to human rights policy including in the cooperation between COHOM and FREMP;
- Constant attention to human rights mainstreaming in the work of the Council to better link the legal and human rights work with the work in all Council formations and working parties, including relevant geographic groups;
- Fostering greater awareness and understanding of human rights issues and ensuing legal constraints in more specialised working parties, to ensure they take into account human rights considerations at earlier stages in the legislative process before it reaches COREPER;
- Peer reviews among Member States on specific subjects, perhaps limited to Member States that are willing to work on this.

## 3. European Parliament

- A coordinated cooperation and exchange of information between the EP and other EU institutions;
- More coordination at the Parliament when it comes to implementing human rights;
- More coordination at the EP Secretariat level was highlighted as a key issue to avoid that the Parliament's own formal positions change from week to week;

- Measures to raise awareness on human rights issues among the members of the EP.

#### **4. European External Action Service**

- Compulsory human rights training for everyone, for instance within five years of joining the Service, or as part of the induction process;
- Better information flow between EU delegations and EEAS, including making the Service more functional and less personal, for example by means of automatic distribution lists of reports per function;
- Counteracting staff mobility policy through retention of expertise in specific human rights policy areas;
- Increased cooperation with the Commission services and regular involvement of the Service in impact assessments;
- Human rights units to provide geographic teams with concrete realistic recommendations that are 'actually usable' in human rights dialogues;
- Improve mainstreaming, while retaining an expert human rights structure, and in particular overcoming geographic/thematic division;
- Establish a senior expert position on human rights within the EEAS.

#### **5. Fundamental Rights Agency**

- Extend the mandate of the FRA to cover
  - all human rights issues as pointed out in the Charter of Fundamental Rights;
  - the thematic issue of judicial and police cooperation;
- Establish a Human Rights Information System on the fundamental rights performance of MS, rather than mandating the FRA with the task of fundamental rights monitoring;
- Training and capacity building on fundamental rights among all EU institutions.

#### **6. European Ombudsman**

- EU institutions should continue to follow the recommendations put forward by the Ombudsman including in the context of FRONTEX; lobbying transparency; and TTIP.

## 7. Court of Justice of the European Union

- Other EU institutions should follow the lead of the Court as an agent of coherence in fundamental rights protection. In particular, the European Commission should act to implement the decision of the CJEU in *Digital Rights Ireland* regarding data protection;
- The CJEU should ensure that a proper balance is struck between the different fundamental principles governing the EU legal order, including by balancing the focus on the integration of the internal market with other values of the EU, such as human rights, enshrined in Art. 2 TEU, to the fullest extent legally possible.<sup>625</sup>

## 8. Recommendations put forward by policymakers in Member States

- Establish a single department, which is in charge of human rights in the EU;
- Facilitate open exchange between EU Member States on their human rights problems and strategies to overcome them;
- Joint programming of Member States and the EU in development cooperation while applying the human rights based approach;
- Applying the human rights based approach also in the Human Rights Country Strategies and implementing this in the negotiations for the current update of the Country Strategies;
- Involvement in the discussions on coherence and fundamental rights of ministries that 'have power', in particular ministries of justice;
- Have regular discussions to promote the key issues of concern, which go beyond drafting discussion points;
- Either the EU aspires to change its own behaviour internally especially in relation to NHRIs, or it should stop demanding these standards from third countries.

## 9. Business and Human Rights

- The EU should designate a single policy leader for the business and human rights policy agenda across the EU. The policy area needs leadership and a clear leader is the starting point for this.
- The EU should encourage greater cross-training of officials in different institutions on different human rights issues related to their work, this could provide an interesting tool to combat policy incoherence on human rights.
- The EU should utilise external frameworks on human rights, such as the UNGPs, as a means of achieving coherence between its internal and external policies on human rights. As international multi-lateral treaties are accessible to all parties they can provide a common ground. These

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<sup>625</sup> Art. 2 TEU.

standards should provide a baseline, but not inhibit the EU from pursuing more advanced protection.

## VI. Annex 1: Model questionnaire/discussion points

### Introduction to policy area/mandate/responsibilities

This set of questions aims to identify the role of interviewee, his/her responsibilities in relation to the broader EU structure and his/her possible human rights role or involvement. Points for discussion:

- Position of interviewee, mandate and responsibilities
- Areas of work
- Priorities and goals of their work
- Human rights aspects of their work
- Priorities in terms of human rights policy areas and goals

### Interaction with other actors

This set of questions aims to analyse structures and relationships of each actor/institution and how these may affect human rights. Discussion points include:

- Which actors they interact with, including human rights actors
- EU institutions/agencies with which interviewee has most interaction
  - Description of the type of interaction
  - Degree of participation in policymaking
- Ways in which responsibilities are shared/consensus is reached in policymaking when collaborating with other agencies/bodies/institutions
  - human rights policies or issues impacting human rights
  - who takes the lead, whether human rights impact is specifically addressed with other actors
- Examples of coordination, cooperation or lesson-sharing across departments, agencies concerning human rights policies or proposals impacting human rights
- Interaction with other key stakeholders including state-representatives/agencies and/or civil society, NGOs, etc.

### Coherence/incoherence - general experience

This set of questions aims to find out what forms of coherence or incoherence the actors may have encountered in their work. It aims to find areas of incoherence we may have overlooked - before later explaining our own approach to coherence/incoherence in the next section, and testing which forms have been encountered by each actor. Points for discussion include:

- Experiences of coherence in EU HRs policy in their mandate
- Whether any dialogues, debates or discussions take place in their work, regarding coherence of human rights policies
- Experiences of incoherence in EU HRs policy in their mandate

- Broader views on coherence/incoherence in EU HRs policy
- Experience of coherence/incoherence in EU HRs policy beyond their mandate, in interaction with other actors
- Reasons for incoherence

### **Experiences of structural coherence/incoherence**

This set of questions sets to test experiences of structural coherence and /or incoherence. Structural incoherence is related to the way in which an institution or body is designed, hierarchy of decision-making, power sharing or, in the case of the EU, competence, mandate and responsibilities. Points for discussion include:

- Examples/experiences of structural coherence/incoherence
- Role of fundamental rights agency
- Use of impact assessments
- Awareness of Action Plan on Human Rights and/or Stockholm Programme
- Experiences in which structures are ill-designed leading to a lack of coordination in policy design or policy implementation

### **Policy incoherence:**

The EU fundamental and human rights policies are enumerated in framework instruments and action plans. These documents communicate the vision of the EU in this policy area. Sometimes, frameworks and instruments introduce competing visions or objectives, making it difficult to distinguish the direction of the organisation as a whole. This set of questions aims to measure the interviewee's experience of policy incoherence, conflicting legal frameworks and how this has affected their work. Points for discussion include:

- Experiences/examples of policy coherence/ incoherence
- Tensions between conceptions of fundamental rights and human rights
- Concept of human rights as a source of coherence (indivisibility/universality etc.)
- Human rights standards and conceptual unity of human rights in policymaking and in the thinking of policymakers
- Principle of proportionality
- Principle of sincere cooperation and its implications
- Experiences/examples in which frameworks have competing visions or overlapping responsibilities;

### **Interest-based incoherence**

As a powerful actor in global markets and international fora, the EU is subject to external influence and interest pressure groups. Within its ranks, there are also diverging interests and schools of political and economic thought that seek to influence and shape policymaking. When opposing interests are identified in policymaking, it can also introduce additional incoherence. This set of questions aims to understand



areas in which competing interests have led to incoherence in policymaking, in particular vis a vis human rights and/or fundamental rights standards. Points for discussion include:

- Differing political or economic viewpoints
- Conflicting political or economic interests
- Coherence/incoherence in specific policy areas depending on area of expertise/mandate of interviewee
- Concrete examples to be discussed from following areas:
  - foreign and security affairs, trade, development, energy,
  - maybe also include judicial cooperation, counter-terrorism and/or asylum/migration
- Examples of experiences in which interests diverge or conflict regarding policy goals

### **Possible findings and recommendations**

This section aims to generate suggestions and recommendations on how coherence can be improved/ how incoherence can be avoided/overcome. This set of questions aims to identify suggestions by the interviewee, before testing out our own recommendations and findings below.

- How can instances of incoherence be remedied/ how can coherence be improved?
- Depending on who interviewee is, ask them to put forward institutional proposals/ideas and/or policy recommendations
- Which ‘agents of coherence’ do they believe are best placed to promote coherence in the policy areas with which they are concerned?
- How can coherence be better institutionalized?
- Which best practices can be extended to other areas?

### **Testing our recommendations (to be tested also depending on expertise and policy area of interviewee)**

This set of questions aims to test some - or all - of our recommendations for improvements with regard to coherence in EU human rights policy. Depending on the actor interviewed different recommendations may be tested and discussed, or we may choose a set of key recommendations that we want to test with all actors. Below is a list of recommendations from 8.1 and 8.2 divided in relation to areas of incoherence:

#### Structural:

- Develop mandates with clear references to legal bases and policy area (AFSJ, CSDP, development, etc.)
- Create institutional awareness of both fundamental rights and human rights policymaking by establishing on directorate-general solely responsible for coordination and cooperation within the Stockholm Programme and Strategic Framework environments.
- Give a broader mandate and more independence to FRA, enhancing its ability to monitor and report on violations of fundamental rights, including in the area of police and judicial cooperation and permit the agency to have a presence in human rights dialogues.

- Continue training and other awareness-raising activities in all Commission services and among other institutional staff so that fundamental and human rights impact are assessed early and throughout (informally and formally) all policymaking processes.
- Use impact assessments in both internal policymaking and external action to determine the effects of all proposals on fundamental and human rights.
- A detailed analysis which measured the human rights implications of budgetary decisions and policymaking would be a useful step in devising tools for EU institutions and EU Member States to identify weaknesses in protection and methods to respect, protect and fulfil rights obligations.

#### Policy incoherence and conflicting legal frameworks

- Adopt a definition of coherence to be consistently used by EU institutions when developing policy.
- The CJEU should develop a clear understanding of the principles of proportionality and sincere cooperation and their relation to each other and their application in cases involving fundamental and human rights.
- The discursive commitments of the EU institutions should reflect the wider discourse of human rights, developed by other courts and regional systems and in international fora.
- This human rights discourse should be the language in which political conflicts between the EU institutions and the Member States and between Member States regarding EU internal and external policies involving fundamental and human rights are resolved.

Interest (more specific questions may be asked or recommendations tested depending on who policymaker is):

- Member states and EU institutions should affirm in rhetoric and structure the positive duties that States have 'to fulfil economic and social rights, as well as obligations to respect them (by refraining from deliberate infringement of those rights) and to protect rights against abuses by corporate and other private actors' - regardless of EU-led economic and financial policies - and the duty to fulfil which requires 'actively putting in place the conditions and systems necessary for all members of the population to be able to fully exercise and progressively realize their rights.
- All of the EU institutions should live up to their commitments to protect and promote fundamental and human rights, even in the face of resistance from the Member States based on divergent political interests. In particular, the European Commission should act to implement the decision of the ECJ in Digital Rights Ireland regarding data protection.
- Other recommendations based on our smaller case studies in 8.1?

## VII. Annex 2: Table of Interviewees

Date	Location/Mode	Affiliation of interviewee	Identification of interviewee
<b>Interviews conducted with policymakers from different institutions</b>			
28 January 2016	Brussels, Belgium	European Ombudsman	
25 February 2016	Vienna, Austria	Fundamental Rights Agency	F1
14 March 2016	Graz, Austria	Austrian Federal Department for Europe, Integration and Foreign Affairs	V2
5 April 2016	Via telephone	European Commission, DG TRADE	A2
5 April 2016	Via telephone	European External Action Service	C6
6 April 2016	Via telephone	European Commission, Secretary General	A3
6 April 2016	Via telephone	European Commission, DG NEAR	A4
13 April 2016	Dublin, Ireland	Department of Justice and Equality	I1
13 April 2016	Dublin, Ireland	Department of Justice and Equality	I2
14 April 2016	Vienna, Austria	Austrian Federal Department for Europe, Integration and Foreign Affairs	V1
18 April 2016	Brussels, Belgium	European External Action Service	C2
18 April 2016	Brussels, Belgium	European External Action Service	C3

18 April 2016	Brussels, Belgium	European External Action Service	C4
19 April 2016	Brussels, Belgium	Council of the European Union	C12
19 April 2016	Brussels, Belgium	Council of the European Union	C8
19 April 2016	Brussels Belgium	Council of the European Union	C9
19 April 2016	Brussels Belgium	Council of the European Union	C10
20 April 2016	Luxembourg, Luxembourg	Court of Justice of the European Union	J1
20 April 2016	Luxembourg, Luxembourg	Court of Justice of the European Union	J2
20 April 2016	Luxembourg, Luxembourg	Court of Justice of the European Union	J3
21 April 2016	Luxembourg, Luxembourg	Court of Justice of the European Union	J4
21 April 2016	Via telephone	European Commission, DG DEVCO	A1
22 April 2016	Via telephone	NGO Representative	N1
26 April 2016	Vienna, Austria	Fundamental Rights Agency	F2
2 May 2016	Via telephone	European Parliament, DROI	P1
25 May 2016	Via telephone	European Parliament, DROI	P2
25 May 2016	Via telephone	Netherlands Ministry of Foreign Affairs	C11
30 May 2016	Graz, Austria	European External Action Service	C5

6 June 2016	Brussels, Belgium	European Parliament	P4
13 June 2016	Brussels, Belgium	Green Party Advisor at DROI	P3
<b>Interviews conducted for case study on Business and Human Rights</b>			
20 November 2014	London, England	NGO Representative	B1
1 December 2014	Brussels, Belgium	European Commission	B2
1 December 2014	Brussels, Belgium	Business CSO	B3
2 December 2014	Brussels, Belgium	European Commission	B4
2 December 2014	Brussels, Belgium	European Commission	B5
10 December 2014	Nottingham, England	NGO Representative	B6
18 December 2014	Nottingham, England	Business CSO	B7
3 July 2015	London, England	NGO Representative	B8
3 July 2015	London, England	NGO Representative	B9
3 July 2015	London, England	Employers Representative	B10
3 July 2015	London, England	UN Official	B11
3 July 2015	London, England	NGO Representative	B12
3 July 2015	London, England	Legal Expert	B13

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3 July 2015	London, England	Legal Expert	B14
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