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# Tackling Coherence and Consistency in the EU's External Human Rights Policy

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Fostering Human Rights among European Policies

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# Tackling Coherence and Consistency in the EU's External Human Rights Policy

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## 1. Introduction

The current discourse in the field of the external human rights policy of the European Union (EU) is strongly oriented toward the so-called "challenge of (in)coherence"<sup>1</sup>. This is visible in academic as well as in policy-making outputs. In this context, the largest academic project on the EU and Human Rights of the past years, the FP7 Frame project aiming at 'Fostering Human Rights among EU (internal and external) policies', identified coherence as one of three major cross-cutting challenges for the fulfilment of the EU's strong commitment to compliance with, and promotion of human rights standards.<sup>2</sup> It is remarkable that the challenge of (in)coherence has been identified primarily as the result of technical obstacles at the side of the EU's institutional system. Firstly, incoherence occurs because "institutional structures and mandates in the EU are notoriously complicated and do not allow for efficient coordination."<sup>3</sup> The second reason for the incoherence of the EU's human rights policy is supposedly the fact that "frames of reference in different policy fields are also different, and do not all align with the human rights agenda with the same intensity."<sup>4</sup> Finally, the third, non-technical, but political and strategic reason may be that "the Union's many competences result in its obligation to cater to different interests, some of which may consider human rights to be a hindrance."<sup>5</sup>

As stressed above, the academics discovered that incoherence with human rights commitments is primarily the consequence of mistakes in the functioning of institutions and policies, as a simple lack of coordination and then, in the second instance, as a matter of political and strategic choice to prefer other interests over human rights. This way of reasoning has been even anticipated by European policymakers in the high-level policy instrument adopted by the Foreign Affairs Council in July 2015, namely the EU's Action Plan on Human Rights and Democracy 2015–2019 (hereinafter the 'AP').<sup>6</sup> The AP points out the challenge of coherence as one of the primary goals to tackle. Interestingly, coherence is nominally accompanied by the challenge of consistency, creating together one

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1 Lewis Tamara, 'Coherence of human rights policymaking in EU institutions and other EU agencies and bodies' FP7 Frame, Work Package No 8 - Deliverable No 1 (2014) 2 <<http://www.fp7-frame.eu/wp-content/uploads/2016/08/06-Deliverable-8.1.pdf>> accessed 25 May 2017. See also: Maragoni Anne-Claire, Raube Kolja, 'Virtue or Vice? The Coherence of the EU's External Policies' [2014] 36 *Journal of European Integration* 474; Furness Mark, Gänzle Stefan, 'The Security–Development Nexus in European Union Foreign Relations after Lisbon: Policy Coherence at Last? Development Policy Review' (16 October 2016) 3.

2 Frame, 'How to Better Foster Human Rights Policies. FRAME Final Recommendations' (Brussels, 26 April 2017) 8 <[www.fp7-frame.eu/download/outcome](http://www.fp7-frame.eu/download/outcome)> accessed 15 May 2017.

3 *ibidem* 10.

4 *ibidem*.

5 *ibidem*.

6 Council of the European Union, 'Council conclusions on the Action Plan on Human Rights and Democracy 2015-2019' (20 July 2015), ST 10897 2015 INIT.

out of five chapters of the AP, with the title *"Fostering better coherence and consistency."*<sup>7</sup>

The present article adopts a critical position towards the low attention paid to the political and strategic sources of incoherence. Unfortunately, the actual challenge of (in) consistency has in the current debate and, specifically in the 2015-2019 AP, a very low presence. Therefore, the purpose of this article is to rehabilitate the concept of consistency first. This conceptual clarification will be helpful to directly address the political and strategic causes of misalignment of the EU with its human rights commitments. Behind this intention stands also the belief that addressing directly the politically pertinent issues may initiate a meaningful discussion of the concrete challenges for the EU's external human rights policy.

After a conceptual clarification and emphasis on the relevance of the follow-up regarding the inconsistent conduct of the EU in its external human rights policy, the content of the 2015-2019 AP will be analysed. The focus will be restricted to the AP's elaborations of coherence and consistency. In this part, on the one hand, the 'coherence seeking solutions' covering the actions which are supposed to tackle challenges of technical nature, will be introduced and defined, then, on the other hand, the 'consistency seeking solutions' touching upon the politically and strategically motivated challenges will be discussed. The main criticism will be directed toward the AP's poorly calibrated ratio clearly prioritising coherence seeking solutions over those seeking consistency. In its latter stages the present article will try to sketch one illustrative way towards a more direct approach of addressing the challenge of consistency. This illustrative case is based on a more detailed elaboration of the rare 'consistency seeking' solution identified in human rights promotion via trade as a foreign human rights instrument of its kind. The proposed illustration aims to lead to the exposure of the hard choices the policymakers should be not afraid of when facing the political and strategic nature of the consistency challenge. Based on the literature review of current issues regarding the GSP+ instrument, this paper will try to push the outlined AP's consistency seeking solution towards a detailed resolution in which concrete measure will be demonstrated. The final remark of this article will highlight that directly addressing the consistency challenge may bring also direct concrete solutions that go beyond a standard, formal jargon of coherence solutions, asking for better coordination of various policies and instruments at different levels and better orchestration of the relevant actor

As outcome of these efforts, a very practical and subtle path of improvement of policy planning in this particular field will be recommended, as it may have wider validity in respect to the governance concept steering the EU's conduct towards better consistency, and it may also bring higher credibility to the European Union, which is currently the ultimate goal stressed in the 2016 Global Strategy for the EU's Foreign and Security Policy.<sup>8</sup>

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7 Council of the European Union (2015) 21.

8 High Representative of the Union for Foreign Affairs and Security Policy, European External Action Service, 'Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy' (2016) 44 <[https://europa.eu/globalstrategy/sites/globalstrategy/files/about/eugs\\_review\\_web\\_4.pdf](https://europa.eu/globalstrategy/sites/globalstrategy/files/about/eugs_review_web_4.pdf)> accessed 8 November 2016.

## 2. Conceptual distinctiveness of coherence and consistency

There is more than one definition of coherence and consistency in the literature dealing with the EU's foreign policy. Some authors are even almost resigned to distinguishing between two literally different terms.<sup>9</sup> As Elsa Tulmets points out: *"...there is a slight difference between consistency and coherence: while consistency is checked against criteria defined in advance, coherence reflects the overall result of the policy"*.<sup>10</sup>

Practitioners from the European External Action Service (EEAS), working on the drafting of the 2015-2019 AP and the evaluation of its predecessor, in their daily work make no distinction between coherence and consistency, as this is largely deemed as a language issue for them. They use interchangeably<sup>11</sup> both terms to depict the weakness of EU policies in the promotion of human rights via all the channels at its disposal.<sup>12</sup> On the other hand, conceptually, they perceive the distinction can be made in an obvious manner: *"Consistency addresses the criticism that we receive, that we apply double standards. So, we are not in the area of coherence, we are in the area of external relations, so for instance we were very criticized that we are outspoken with human rights in Pakistan, for instance, when we are not in Egypt, that is a question of consistency. How you implement your set of policies in all parts of the world. The coherence is touching the problem how your internal policy is held, or the other areas of your external policy."*<sup>13</sup>

Importantly, their understanding of the two concepts corresponds to the dictionary distinction by which coherence means the quality of the policy *"to hold together, build unified whole"*<sup>14</sup> and consistency describes the quality of being every time and everywhere the same, hold the standpoint irrespective of the place, time and the counterpart.<sup>15</sup>

Academically, the soundest argument is based on qualitative distinction. As Clara Portela and Kolja Raube point out: *"...the most central conceptual problem in the definition of coherence is the delimitation of "coherence" versus "consistency", a distinction which is respected by some scholar and dismissed by others. (...) This conceptual distinction has been elaborated by legal and political science scholars alike, who tend to see consistency as the*

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9 See: Oxford Dictionaries, 'Coherence' and 'Consistency'.

10 Tulmets Elsa, 'The European Neighbourhood Policy: A Flavour of Coherence in the EU's External Relations?' [2008] 3 Hamburg Review of Social Sciences 111.

11 Taufar Patrik, 'The EU and its policy of external promotion of Human rights: The search for Consistency. Conceptual addition to the current debates for EEAS evaluation of the Action Plan on Human Rights and Democracy' (E.MA Thesis, EIUC Venice/UCD Dublin, 2015) 74.

12 For comparison, see: Ginsborg Lisa et al., 'Policymakers' Experiences Regarding Coherence in the European Union Human Rights Context' Frame Deliverable No 8.3 (July 2016) 31 <<http://www.fp7-frame.eu/wp-content/uploads/2016/09/Deliverable-8.3.pdf>> accessed 8 November 2016. These authors limit their scope and investigate solely the problems of vertical and horizontal incoherence. Their elaboration covers the technical problems of intra-/inter- institutional/actor relations and communications, which lack the needed coherence of human rights policy and result in diverse deficits. The perspective undertaken in this actual paper includes also the second concept, namely consistency, which may describe just the final result of incoherent policy-making, the manifestation of being inconsistent (in various situations unjustifiably behaving differently), or also the simple stark fact that inconsistency is a linked but also self-standing concept/problem accompanying the political nature of policy making.

13 Taufar (2015) 75.

14 'Coherence' in Oxford Dictionaries (Oxford University Press 2015) <<http://www.oxforddictionaries.com/definition/english/coherence>> accessed 28 August 2015.

15 'Consistency' in Oxford Dictionaries (Oxford University Press 2015) <<http://www.oxforddictionaries.com/definition/learner/consistency>> accessed 3 September 2015.

*mere “absence of contradiction”, while the notion of coherence appears to go beyond sheer compatibility to convey the idea of mutual reinforcement of policies, defined as “synergy” or the establishment of “positive connections”. Obviously, this notion sets a higher standard for EU policies and is far more difficult to grasp conceptually than the mere “absence of contradiction”.*<sup>16</sup>

Clearly, consistency is supposed to be the much easier achievable goal than the state of coherence in the EU's foreign policy. Indeed, it would be beneficial to search for consistency primarily, in order to facilitate the problems that are accessible, and then to have free hands for managing the more complex issue of coherence. Certainly, the authors concerned could adopt the opposite logic and try to use the synergic effect provided by fulfilled coherence, thus overcoming also the specific problem of inconsistency. Such a clear distinction between the two concepts may reasonably be criticised. Marise Cremona introduces Christopher Hillion's prescriptive idea that *“consistency must mean more than merely avoiding contradiction and that in demanding synergy and added value between policy domains it is a component of, but not identical to, the concept of coherence.”*<sup>17</sup>

At the end, maybe even the achieved consistency can bring a kind of surplus in the form of “synergy”. But even if not, the subtle, ‘strategic’, more accessible, simplicity of avoiding contradictions is a political virtue that deserves attention on the part of policy-makers. Not just because the public can easily recognise its absence, but also because it is a virtue *per se* — without instrumental projections.

Irrespective of the variety of definitions of coherence and consistency, in this paper we will use Portela and Raube's definition combining two important parameters: clarity and sound distinction of coherence and consistency. Coherence is for us the quality creating the synergy between policy domains and different instruments. It is positive action that pursues the goal of human rights policy as a unified, coherent whole. The consistency is much simpler, maybe politically pertinent, but it is just a retrospective look on the contradictions produced by the EU action. Pursuing better consistency is a highly concrete effort to eliminate contradictions on the following: 1.) The verbal and textual levels; 2.) The concrete policy actions level; and 3.) The effect, and consequence of the actions.

### **3. Empirical significance of the EU's inconsistent conduct**

According to the above-mentioned scholars, the conceptually autonomous consistency has many empirical manifestations in the realm of the EU's external human rights policy. Generally, objections have been pointed to the selectiveness of the EU's crisis interventionism in the name of human rights.

Interestingly, Borja Guiarro-Usobiaga recalls a group of scholars criticizing the EU for its putative behaviour, *“when confronted with human rights abuses in third countries, the*

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<sup>16</sup> Portela Clara, Raube Kolja, ‘Six Authors in Search of a Notion: (In)Coherence in EU Foreign Policy and its Causes’ [2008] 3 Hamburg review of social sciences 3.

<sup>17</sup> Cremona Marise, ‘Introduction’ in Marise Cremona (ed) *Developments in EU External Relations Law* (Oxford University Press 2008) 1.

*EU exercises Realpolitik by punishing only those states to which it can exert leverage, while it remains indulgent towards those where the EU's strategic interests are at stake.*"<sup>18</sup>

A concrete objection, which can be even tested quantitatively as well qualitatively, concerns the inconsistent use of sanctions. As the same author notices, "*Klaus Brummer, for instance, has argued that the EU sanctions policy presents three inconsistencies: first, the selection of target countries appears to be discriminating; second, the factors triggering EU sanctions are unclear; and third, virtually all sanctions include exemptions. Having said this, the author concludes that neo-realist assumptions hold firm in that the EU seems to sanction weak and isolated states and only when the interests of other great powers are not affected.*"<sup>19</sup>

This kind of criticism is based on the uncertainty and disagreement between certain scholars on the logic which drives the EU's behaviour and action, especially in sanctioning the violators of human rights (namely the topic which is in the specific dimension of positively driven GSP+ regime and also mentioned in the 2015-2019 AP;<sup>20</sup> see below). Here the cleavage delineates the idealists/constructivists, on the one side, and the realists, on the other side. The former believes that the EU's conduct is driven by value and norms considerations. If there is a violation of human rights, the EU chooses an appropriate response in order to punish or push the violator to redress. This is done irrespective of the material consequences. Devotion to the virtue and clearly stated norms and values trumps all other considerations. On the other hand, for political realists, the dominant criterion for a decision about intervention, or non-intervention, concerns the economic and strategic calculation. If a violation occurs, then the costs are considered and, if the EU learns that these are too high, then it is preferable not to intervene and not to impose sanctions or any milder measures in order not to jeopardize, and rather keep, our interests and provisions.<sup>21</sup>

Recently, some scholars have realised the imminent urgency to prove which of these two logics drives the EU's behaviour. This should also be a very important question regarding the assessment of the EU as an actor of external human rights promotion, taking into consideration the TEU and in the 2012 Strategic Framework on Human Rights and Democracy heavy burden of ambitiousness and moral obligations. Straightforward proof that the EU is nothing else than a cold calculative realist that is not stuck with its own values and commitments, this revelation would have huge impact on the EU's credibility and, ultimately, also serious consequences for the identity of the EU itself. In sum, it will be impossible to build the EU as a credible partner and normative world power, in alignment with the EU's own intentions enshrined into legal and strategic documents. This is the case if proved that there is a sharp contrast between promised commitments and actual conduct based on the EU's calculations of costs and harm for the EU arising from human rights promotion.

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18 Guiarro-Usobiaga Borja, 'Normative or Negative? Human Rights and the Use of Negative Measures in the EU's External Action' [2013] 1 *White Rose Politics Review* 86.

19 *ibidem* 96.

20 Council of the European Union (2015) 23.

21 Del Biondo Karen, 'Norms or Interests? Explaining Instrumental Variation in EU Democracy Promotion in Africa' [2015] 53 *Journal of Common Market Studies* 239. Guiarro-Usobiaga (2013) 104.

Expressed clearly: *“(t)he rationalization of the use of negative measures is not only necessary to justify their employment, but also for the EU to achieve greater coherence and credibility as an international actor. However, it remains unclear whether the EU effectively follows these guidelines literally. Accusations of double standards in the EU’s use of coercive instruments are common, and different voices have blamed the Union for giving identical violations a different treatment. These accusations notwithstanding, the lack of empirical evidence makes it difficult to come to these conclusions so easily, and eternal discussions always arrive at the same point at the end of the day. Whether the EU acts consistently with the values it preaches or whether it is guided by material interests remains, nonetheless, an unanswered question.”*<sup>22</sup>

Certain scholars, aware of the need to prove or refute these worries, have started to conduct two methodologically distinctive kinds of research. Firstly, some of them follow the qualitative path of the case studies. There most frequently the focus is placed on one single country or a region. But a possible objection to this approach can be that the researcher is focused on the case of failed promises, on the worst possible scenario. For instance, when analysing democracy and human rights promotion in Central Asia, Gordon Crawford stresses the weak adherence to the proclaimed values of democracy and human rights promotion while he follows the engagement of the EU with authoritarian rulers to obtain energy security for Europe.<sup>23</sup>

A very straightforward way to depict the EU’s inconsistent way of human rights promotion by prioritizing realism over idealism, consists in putting side by side symmetrically serious violations of human rights (like on the example of China and Myanmar) with an asymmetrical response to them (stricter towards Myanmar) by the EU as the inconsistent human rights actor.<sup>24</sup>

A different approach towards a qualitative inquiry investigating the true nature of principles driving the EU’s external action is the small ‘n’ comparative study. This is found in Karen del Biondo’s paper. On the one hand, she defines a realistic hypothesis about the reluctance to use sanctions against strategic and economic partners.<sup>25</sup> On the other hand, she defines idealistic hypothesis that interventions are expected in cases of sudden deteriorations of human rights situations, or more likely interventions in unstable countries with lower economic performance, also in countries where the intervention is supported by regional organisation.<sup>26</sup> These hypotheses are tested on the small group of countries that underwent a similar type of ‘treatment’. One can imagine some negative measures from the EU’s side. These measures vary from the most serious economic and political sanctions under the CFSP, over formal and informal suspensions of aid, towards no sanctions.<sup>27</sup> Del Biondo asks whether the variation in applied instruments of different

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22 Guiarro-Usobiaga (2013) 86.

23 Crawford Gordon, ‘EU human rights and democracy promotion in Central Asia: From Lofty principles to Lowly self-interests’ in [2008] 9 Perspectives on European Politics and Society 186.

24 Borreschmidt Nikolaj, ‘The EU’s Human Rights Promotion in China and Myanmar: Trading Rights for Might?’ [2014] 9 EU Policy Papers.

25 Del Biondo (2015) 239.

26 ibidem 241.

27 ibidem 242.



strength, in different countries, can be explained by either a realist or an idealist hypothesis. The conclusion is contrary to the previous case studies. Del Biondo confirms that the EU sticks with its ideas and presents mixed and mainly pro-idealistic outcomes.<sup>28</sup> The realist hypothesis seems to be, in the majority of cases, rejected.

Indecisive results of the qualitative research could be overcome by the quantitative research design. Intuitively, there is an expectation that the large 'N' analysis will enable a more precise oversight of the landscape of the EU's sanction strategy. There is also a reasonable expectation that this representative research design can provide an answer as to whether the EU is consistent with its values, or rather prefers realist considerations.

Recently, Borja Guiarro-Usobiaga tested the consistency of the EU's standpoints on 422 observed cases<sup>29</sup> of human rights violations. He discovered quite clearly that the EU is consistent with its values and intentions as outlined in Article 21 TEU. In fact, the EU is able to impose negative measures like condemnations, suspensions of aid as well as sanctions on other countries irrespectively of the relationship it has with them. As he says: *"the EU's employment of negative measures is primarily guided by ideas and values, whereas material interests have only a limited impact on the EU's decision to employ tough foreign policy instruments. Institutions, on the other hand, are important when determining whether to respond or not to abuses of human rights, yet they do not influence the EU's choice between soft and tough instruments... there is some empirical evidence that might allow speaking of a "normative" power Europe. EU action seems to be highly consistent with the norms and ideas described in Article 21 of the Treaty of the EU. Thus, in the cases where the EU decides to go beyond the symbolic act of shaming, it seems to make a consistent and responsible use of negative measures."*<sup>30</sup> It is worth pointing out that this conclusion is not unique, and other recent studies of other authors can confirm them.<sup>31</sup>

Until this point, the normatively oriented EU has been presented with ambitious strategies and robust and far-reaching instruments as almost unproblematic. Quantitative research trying to confirm or reject the criticisms saying that the EU is inconsistent, or uses double standards, has concluded rather on consistency of the EU with its ambitious intentions. But there is one huge question mark. The EU is consistent with its values and persistent in the use of its instruments, just when it decides to act. As Guiarro-Usobiaga points out at the end of his paper, the predominant majority of all the violations of human rights (around 75%) are left unnoticed by the EU.<sup>32</sup> The material core of all the disputes and criticisms based on the idea of inconsistency should be positioned exactly there.

For some reason, the solid majority of the violations do not receive any reaction from the side of the EU as an external human rights promoter. The silence in the 75% of the cases of violation of human rights is a justified concern, that there is gross inconsistency between the EU's standpoints (intentions) and practical (in)action in majority of the cas-

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28 *ibidem* 248.

29 Guiarro-Usobiaga (2013) 26.

30 *ibidem* 36.

31 See: Kreutz Joakim, 'Human Rights, Geostrategy, and EU Foreign Policy, 1989–2008' in [2015] 69 *Global Organisation* 195.

32 Guiarro-Usobiaga (2013) 31.

es, especially in the light of the remaining situations where the EU takes the appropriate actions.

Ultimately, the inconsistency expressed by silence over the human rights violations is emphasised on a daily basis by the various NGOs concerned. These organisations are then sharply critical towards the EU's lax attitudes in cases of oppression or disappearances of human rights defenders. Rising awareness as to inconsistent conduct is made mainly through the statements pointing out the EU's commitments to speak up in favour of the oppressed,<sup>33</sup> in contrast to the EU's inactivity/silence in certain countries, where negative phenomena evidently occur.<sup>34</sup> Other more direct ways undertaken by these NGOs concern open letters<sup>35</sup> directed to high EU officials (especially to the High Representative for Foreign Affairs and Security Policy) and are aimed to call for the EU's consistency with principles and values which the EU's external action is based on. This activism is supposed to result in the improvement of the EU's conduct. In conclusion, the current activities of the various NGOs supervising the situation of human rights defenders and the EU's diplomatic activity in support of defenders show that (in)consistency is a very serious and "up to date" issue of today's EU external action.

#### **4. The issue of coherence and consistency in the Action Plans on Human Rights and Democracy**

In 2012, the EU revived its effort to consolidate its external human rights and democracy policy.<sup>36</sup> For the first time, the two comprehensive high-level documents, namely, the 2012 Strategic Framework and the 2012-2014 Action Plan on Human Rights and Democracy were drafted and adopted. This is considered as a stocktaking activity by the European institutions themselves. Yet, the structure and content of these documents is novel.<sup>37</sup>

Because the 2012 Strategic Framework has stayed untouched after the evaluation process and adoption of the second 2015-2019 AP, the direct and close formal link between the two high-level policy documents disappeared.<sup>38</sup> The second AP was designed more as a reaction to the challenges, which evolved over time.

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33 Human Rights Watch, 'EU: Seek Release of Gulf Activists' (22 May 2015) <<http://www.hrw.org/news/2015/05/22/eu-seek-release-gulf-activists>> accessed 25 June 2015.

34 Human Rights Watch, 'Kyrgyzstan: European Leaders Should Raise Rights Concerns' (22 March 2015) <<http://www.hrw.org/news/2015/03/22/kyrgyzstaneuropean-leaders-should-raise-rights-concerns>> accessed 25 June 2015.

35 Human Rights Watch, 'Letter to Mr. José Manuel Barroso, President of the European Commission Re: Forthcoming Visit of Chinese President Xi Jinoing' (27 March 2014) <<http://www.hrw.org/news/2014/03/27/letter-mr-jose-manuel-barrosopresident-european-commission-re-forthcoming-visit-chi>> accessed 26 June 2015; FIDH, 'Bahrain: Joint NGO Letter - FIDH' (11 April 2013) <[https://www.fidh.org/IMG/pdf/bahrain\\_ngo\\_letter\\_april\\_11\\_final.pdf](https://www.fidh.org/IMG/pdf/bahrain_ngo_letter_april_11_final.pdf)> accessed 26 June 2015.

36 After more than ten years passed since the Communication of the Commission to the Council and European Parliament "The European Union's role in promoting human rights and democratisation in third countries" was issued in 2001, and whose character was less strategic and more informative.

37 See: Table 1.

38 Paragraphs in the Strategic Framework do not overlap with the structure of the 2015-2019 AP anymore.

The main difference<sup>39</sup> and novelty brought by the 2015-2019 AP is the strategic focus on the challenges.<sup>40</sup> Its predecessor mainly described the basic building blocks of the EU's approach, which included human rights mainstreaming, the international law principle of universality of human rights, the quality of having coherent objectives and the existence of bilateral and multilateral platforms and channels for human rights promotion. Instead, the 2015-2019 AP steers the attention to the discovered challenges. As the policymakers eloquently state: *"The new Action Plan should not endeavour to cover exhaustively all aspects of the Union's Human Rights/Democracy support policies. It should rather be strategic and focus on priorities where additional political momentum and enhanced commitment is needed."*<sup>41</sup>

The second AP underwent a change of its nature by strategically focusing on the challenges to human rights and democracy promotion as well as including the recipes to overcome them. The 2015-2019 AP addresses a whole variety of problematic topics that need *"additional political momentum and enhanced commitment"*. The "challenges" under review in this article will be especially sensitive and pertinent. In particular, the 2015-2019 AP addresses the symptomatic structural weakness of European policy-making: the incoherence and inconsistency of the human rights promotion policy. Accordingly, the main question arises as to how these challenges are addressed in the APs.

Looking first at the 2012-2014 AP, its third chapter is the only place where the concept of coherence is explicitly mentioned. This chapter is entitled *"Pursuing coherent policy objectives"* and plans to fulfil them through a few *ad hoc* actions.

In particular, this chapter mentions actions dedicated to the enhancement of the plans of actions for the pilot countries (Objectives 6.a-c), stressing especially the lessons learned from previous consolidated plans which can, in theory, boost the coherence of the policy. Another essential point, referred to under the 'actions ensuring coherence' in democracy promotion, is the intention to systematise the follow-up use of EU Election Observation Missions and their reports (Objective 6.d). In this case, it is possible to imagine that the coherent conduct will be achieved through the enhanced systematisation of the EOM's follow up, which is a purely technical improvement falling under coherence seeking efforts.

Apart from democratisation actions, there are also institutional improvements supposed to serve better coherence. These are eloquently expressed by the call for *"Establishing a Brussels formation of COHOM"* (Objective 7.a) and the imperative to develop burden sharing between institutions and Member States with the aim to maximise capabilities and expertise in the human rights policy (Objective 7.b). The true cornerstone of the actions insisting on coherence directly addresses the "greater policy coherence" which

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39 As indicated in the Table 1.

40 Abrisketa Joana et al., 'Human rights priorities in the European Union's external and internal policies: an assessment of consistency with a special focus on vulnerable groups' FRAME Deliverable No 12.2 (30 July 2015) <<http://www.fp7-frame.eu/frame-reps-12-2/>> accessed 15 October 2015.

41 European Commission, High Representative of the European Union for Foreign Affairs and Security policy, Joint Communication to the European Parliament and the Council. Action Plan on Human Rights and Democracy (2015-2019) "Keeping human rights at the heart of the EU agenda" Join (2015) 16 (Brussels, 2015) 5.

should be achieved by an intensified “*cooperation between the Council working parties on fundamental rights (FREMP) and human rights (COHOM) to address issues of coherence and consistency between the EU’s external and internal human rights policy*” (Objective 8.a), and further by periodic meetings of Member States sharing best practices in implementation of the human rights treaties (Objective 8.b). Coherence will be strengthened also when all the EU’s policy documents will “*contain appropriate references to relevant UN and Council of Europe human rights instruments, as well as the EU Charter of Fundamental Rights*” (Objective 8.c). Finally, the section on coherence in the 2012-2014 AP entails also a call for addressing the importance of the social and economic rights, by the EU (Objective 9.a-b).

Overall, the 2012-2014 AP relies on the idea that coherence is supposed to be achieved thanks to strengthened coordination and communication of diverse actors coming from different levels of the multi-level governance system. Created synergies will secure the policy coherence, in complete accordance with the conceptual outline of “coherence” as outlined earlier.

Looking carefully to the structure of the 2012-2014 AP, we can find few quite important indirect notes, and in particular that EU policymakers targets the topic of coherence, but also consistency, from different angles in other topical chapters of the AP. Important in this sense is Objective 11.c which aims at ensuring “*that EU investment policy takes into account the principles and objectives of the Union’s external action, including on human rights.*” The intention to have a unified policy, in the conceptual sense the coherent whole, is expressed also in Objective 13.b: “*Ensure that human rights issues are raised in all forms of counter-terrorism dialogues with third countries.*”

The closing objectives of the 2012-2014 AP serve qualitatively higher demands on the human rights policy. They go beyond coordination and communication solutions seeking coherent policy. Call for essential actions replaces the bare claim for mainstreaming and coherent inclusion of human rights remarks into the documents and the everyday exercise of diverse instruments. This essentialism is evident in Objectives 31.c, 33.a and 33.b. The first one does not claim only human rights coverage, but also improvement of the current practice: “*Systematise follow-up of the ENP progress reports, including on human rights and democracy, so as to ensure that the “more for more” principle is applied in a consistent fashion across the ENP region.*” The other two objectives numbered 33 bring very important structural input to the policy discussion dealing with coherence and consistency. They aim to improve the current practice and stretch the message of the first AP significantly beyond the standard appeal for reliably coherent mainstreaming of human rights: Objective 33.a aims to “*Further develop working methods to ensure the best articulation between dialogue, targeted support, incentives and restrictive measures*”; and - Objective 33.b aims to “*Develop criteria for application of the human rights clause*”.

In conclusion, the 2012-2014 AP addresses the topic of coherence for the main part in a direct way, through the appeal on human rights mainstreaming and the coordination and improved communication between the participating actors. Indirectly, to a much lesser extent, the topic resembling the concept of consistency is stressed as well. It is achieved via a few remarks demanding further technical improvements of the policy

practice aiming at consistent conduct by the EU.

The 2015-2019 AP allows for one significant step forward. It speaks openly about the challenges of coherence and consistency. This is a clear evolution in comparison with the previous document addressing just coherence and mentioning consistency once or twice in particular actions. A new dimension of the strategically focused new AP lays also in its changed discourse, which is based on the open acknowledgement that the EU has some problems with coherence and consistency and this must be improved. The wording of the fourth chapter ("*Fostering better coherence and consistency*")<sup>42</sup> confirms this new mind-set.

The AP's fourth chapter intends to fulfil its aims through a certain method, and in a settled pattern as to how to tackle the challenge of coherence. The lack of presence of a human rights theme in the migration/trafficking/asylum policies will be solved through the efforts to: "*enhance human rights safeguards in all migration and mobility dialogues... with third countries...*"; as Objective 24.a states. In the trade and investment policy we can identify the imperative towards the Member States to include the equivalent of essential element clause into all their new and revised bilateral investment treaties (Objective 25.c). Moreover, Objective 26.a copies the best practice and offers to foster coherence and consistency via ensuring "*that human rights and rule of law are fully respected in the implementation of the EU's comprehensive action against terrorism in line with the 2005 EU Counter-Terrorism Strategy and are at the centre of all programmes, legislation, policies and mechanisms...*". Furthermore, the quintessence of the dominant style of addressing coherence and consistency is the one stressing the importance of the rights-based approach to development; in fact, Objective 27.a states the following: "*Implement the EU commitment to move towards the rights based approach to development cooperation, encompassing all human rights by pursuing its full concrete integration into all EU development instruments...*".

The principal formula appears straightforward. In case of problems with coherence/consistency, or simply with the way of addressing human rights in a specific policy segment, the solution seems to be: "Do not forget to include human rights oriented remark in every single policy area!" The AP's nature, but also its driving logic, does not allow for overstepping this concise, simplified method as to how to tackle the challenge. Depth in outlining solutions and addressing the issue of consistency, is even scarcer.

However, the 2015-2019 AP brings some promising essential actions that can boost qualitative improvements and inputs for future debate as well. A way of thinking out of the common scheme is enshrined in Objective 25.a covering the Trade/Investment policy. This Objective has clearly an essential content and tangible goal. Thanks to Objective 25.a the AP deserves being characterised as a strategically oriented high level policy document. This is because of the following imperative: "*Provide support for and strengthen effective implementation, enforcement and monitoring of GSP+ beneficiaries commitments...*". In the same way, the consecutive objective has also an essential content, as it aims to develop a "*robust and methodologically sound approach to the analysis of*

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42 Council of the European Union (2015) 21.

*human rights impacts of trade and investment agreements...*"<sup>43</sup>

Therefore, factual objectives (like 25.a) in the 2015-2019 AP try to defeat arbitrary practice – the archenemy of consistency, when calling for the development of some objective rules and measures. Unfortunately, the rest of the actions identified in the coherence and consistency chapter sound like normative imperatives. They state what will be the ideal outcome – the state of functioning policy based on policy coherence, but without substantive outlining as to how this should be precisely achieved.

## **5. The 2015-2019 Action Plan: prevalence of coherence seeking solutions over consistency seeking ones**

The central thesis of this article argues that the 2015-2019 AP is not well calibrated. It points out the two concepts of coherence and consistency as the challenges to be tackled. But substantively very few objectives in the 2015-2015 AP are directly oriented on combating the inconsistency of the EU's conduct. When saying this, we bear in mind that the coherence and consistency are linked, but ultimately distinctive concepts. Consistency is more a simple absence of contradictions, and coherence is a complex state - which trumps the "*idea of mutual reinforcement of policies, defined as "synergy" or the establishment of "positive connections."*"<sup>44</sup> As mentioned, the main differences are the positive nature of synergy seeking coherence solutions versus the negative retrospective and corrective nature of consistency solutions.

Coherence and consistency create formally the content of one of the AP's chapters. This paper argues that, predominantly, the solutions contained in this chapter are seeking to tackle directly the challenge of coherence. Just the minority of the objectives faces empirically acute inconsistency of the EU's policy, like the example of Objective 25.<sup>45</sup> This may be perceived as a worrying misleading tendency, which rejects the general intention to fulfil highly ambitious human rights goals the EU has in general, and to tackle the challenge of inconsistency and meet its own promises in particular. Examples of disproportional attention paid to the challenge of coherence may be identified in the AP and confirmed by stressing some of the formulations.

In migration/trafficking/asylum policies the following formulations establishing specific coherence solution can be identified: "*enhance human rights safeguards in all migration and mobility dialogues and co-operation frameworks with third countries including mobility dialogues...*"<sup>46</sup>. The logic of this solution is very simple and instructive, relying on the synergic effect created when all dialogues will be reinforcing each other, which will be possible just after persistent human rights mainstreaming – when all the instruments will include the human rights references. Policymakers believe that the coherence will be fostered by the inclusion of the human rights topic into all kinds of dialogues. Coherence will be fulfilled if the practitioners will "*not forget*" to mention human rights in dialogues

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43 *ibid* 23.

44 Portela Raube (2008) 3.

45 For an overview and comparisons see: Table 2.

46 Council of the European Union (2015) 21.

with third countries. In this post 2015-2019 AP setting, the EU plans to have a coherent, unified human rights policy. This policy will be comprehensive and will include also the migration/trafficking/asylum dimension. Latterly these policies will cohere with the general human rights line of the EU.

In the migration/trafficking/asylum dimension, further solutions are observable that seek greater coherence. The call to *“fully integrate human rights, ‘refugees’ rights and victim protection into discussions on Trafficking in Human Beings (THB) in political, migration and mobility, security and human rights dialogues with priority countries...”*<sup>47</sup> is another example of a coherency solution. The policy-planners call for the inclusion of remarks regarding some vulnerable group, aiming for the establishment of a coherent, unified whole of EU diplomatic dialogues with its partners. If this is accomplished, all the dialogues will build up the body of policy instruments, which stick together through the means of fulfilling a general, human rights mainstreaming formula.

Another coherence- seeking solution is enshrined in the formulation striving for the inclusion of remarks regarding *“human rights issues associated with people smuggling through political, human rights and other dialogues with partner countries...”*<sup>48</sup> Also in this coherence seeking solution, it is expected that, after the inclusion of remarks dedicated to human rights into the existing diplomatic dialogues, the desired state of coherence will evolve. There is a belief that, after putting human rights at their ‘natural’ place in respective EU policy instrument in the consequence, the EU will gain a coherent external human rights policy.

Coherence-seeking solutions are further available also in the trade and investment policy. They are identifiable in the formulation: *“Aim at systematically including in EU trade and investment agreements the respect of internationally recognised principles and guidelines on Corporate Social Responsibility”*<sup>49</sup> Even here the pattern calling for the inclusion of human rights remarks into the existing foreign policy instrument (with the aim to create a coherent unified whole of external human rights policy) is observable.

The counter-terrorism policy shows also a similar pattern of inclination to the coherence seeking solutions. This is shown in the following formulation: *“Ensure that human rights and rule of law are fully respected in the implementation of the EU’s comprehensive action against terrorism (...)”*<sup>50</sup>, where the goal rests in effort to create anti-terrorist strategy complementing also the general human rights strategy of EU external policy.

A very symptomatic coherence seeking solution may be identified in Objective 27 *“Pursuing a Rights Based Approach (RBA) to Development”*. The essence of coherence-seeking solutions, which rely on the inclusion of human rights remarks into all the respective instruments in order to create a synergy, is expressed in the 2015-2019 AP in the following way: *“(...) to move towards a rights based approach to development cooperation, encompassing all human rights by pursuing its full concrete integration into all EU develop-*

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47 *ibidem* 22.

48 *ibidem*.

49 *ibidem* 23.

50 *ibidem* 24.

*ment instruments and activities (...)*.<sup>51</sup> It is worth emphasizing the expressions ‘*all human rights*’, ‘*full integration*’, ‘*into all instruments*’, which demonstrates the intention to fulfil the coherence of a particular instrument with the general external human rights policy by integrating/mainstreaming human rights into another policy/instrument.

The last chapter of the 2015-2019 AP is not directly dedicated to the challenges under review, but rather to the effectiveness of the human rights and democracy support policy.<sup>52</sup> In particular, Objective 29, action b, states the following: “*Ensure that human rights and democracy considerations are factored in to the different sectorial dialogues with a partner country and as such form part of the overall bilateral strategy.*”<sup>53</sup> Thus, the same pattern is identifiable. The policymakers try to make a more effective policy, but at the same time it is the quintessence of coherence solutions highlighted in the present paper.

The AP raises also the question of the internal-external dimension of the coherence. It calls for ensuring “*(...) internal-external coordination in the context of human rights dialogues (...)*”.<sup>54</sup> A straightforwardly formulated coherence solution is also available in Objective 30 dealing with human rights country strategies (HRCS), stating the following: “*Integrate the HRCS priorities and democracy analysis in political dialogues, reporting and high level visits*” and “*Ensure that EU and Member State assistance programmes take into account and facilitate the implementation of the HRCS priorities.*”<sup>55</sup>

It is worth noting the motive of simple inclusion of human rights remarks into the policy instruments and actions in order to achieve a coherent human rights policy. This is because policymakers look towards the ideal endpoint where the coherent whole has to create the desired synergic effect. For this to be achieved one factor is needed, according to the current dominant perception: to rigorously follow the imperative of human rights mainstreaming and to include references to human rights at all the appropriate junctures.

On the other hand, the consistency issue is seriously underrepresented in the 2015-2019 AP. Only a few actions are formulated retrospectively as a concrete repair of the inconsistent effectual outcome of the EU's actions.

Exclusive attention to inconsistency is found in Objective 25, action a., which states: “*provide support for and strengthen effective implementation, enforcement and monitoring of GSP+ beneficiaries commitments (relevant HR treaties and ILO conventions), including through projects with key international bodies and civil society, including social partners.*”<sup>56</sup>

Objective 25.a is an example of consistency seeking solution. It goes beyond the scope of human rights mainstreaming and specific coherence solutions, which stress the im-

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51 *ibidem* 25.

52 *ibidem* 26.

53 *ibidem*.

54 *ibidem*.

55 *ibidem*.

56 *ibidem* 23.



portance of a symmetric incorporation of human rights into all the single instruments. Namely, action 25.a steers attention towards fundamental questions, which should be the primary concern of the whole AP. As crucial points of every policy intention are “*implementation, enforcement and monitoring*”,<sup>57</sup> the AP opens the real debate about what should be substantively done in the domain of the EU’s external human rights policy, reflecting seriously, for example, very common and empirically grounded ‘double standards’ objections. In comparison with previous solutions, this one looks back to the existing practice of GSP+ regime and calls for a better-conducted implementation and, especially, better enforcement. The 2015-2019 AP, quite uniquely, acknowledges the problem the EU has with the enforcement of GSP+ beneficiary commitments. Since this formulation is positioned in the AP chapter dealing with coherence and consistency, we can conclude that there are justified reasons to think that this is a very shy, but promising way of addressing the issue of inconsistency. The mentioned Objective 25.a is a rare example of consistency seeking solution reacting to inconsistent, arbitrary, case-to-case enforcement of beneficiary, third country commitments.

## 6. A critique of the dominance of coherence over consistency solutions

The dominant focus of the 2015-2019 AP is on the challenge of (in)coherence. The vast majority of objectives linked to this issue are of a very simplistic nature and directed towards the idea of building a unified whole of human rights policy. This is provided thanks to better coordination and communication of human rights concerns, through persistent mainstreaming and generally through omnipresent efforts to include human right remarks into all instruments and practices. These are in fact steps towards building the mutual reinforcement of policies – the synergic momentum.

The case of the (in)consistency is completely the opposite. From a definitional point of view, it is a simple absence of contradictions. But dealing with contradictions often means political conflict is behind the discord, which cannot be tackled by the simple reminder of implementations or need for coordination and mainstreaming, but rather by the detailed retrospective focus on the reasons of inconsistent action and reparation works aiming at consistent conduct.

This article critically addresses the disproportionately smaller attention paid to coherence seeking solutions over consistency seeking solutions. And that is the case despite the fact of serious inconsistency issues that are empirically relevant.

As regards the solid interpretation of inconsistency, marginalization by the policy planners is provided by Wouters and Ramopoulos, who argue that “*constitutional design of EU external action shows that it is an imperfect compromise reached by the drafters of the Lisbon Treaty. Conflicting interests, priorities and preferences among players in EU external relations had to be accommodated. The attempt at integration failed to overcome sovereignty concerns.*”<sup>58</sup>

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57 Council of the European Union (2015) 23.

58 Wouters Jan, Ramopoulos Thomas, ‘Revisiting the Lisbon Treaty’s constitutional design of EU external relations’ Leuven Centre for Global Governance Studies Working paper No 119 (September 2013)14.

Because of the mixture of constitutional weakness of the foreign dimension of the EU and unresolved conflicting interests and surviving primacy of national sovereignty, we are witnessing the practical difficulties of pursuing the objectives that are clearly declared in the high-level policy documents. The mentioned authors can confirm, from their more general perspective, even our specific observations regarding the AP's instrumental focus on securing coherence: *"...the presence and function of the HR/VP and the EEAS both at the level of policy development and policy implementation is instrumental in order to induce coherence in EU external action."*<sup>59</sup>

Taken into due consideration, this practice may be dangerous especially for the level of human rights as the part of the so-called (constitutional) triad of human rights, democracy and rule of law. The inconsistent implementation and enforcement of particular measures may in consequence call into question the whole legitimacy of EU's conduct in third countries,<sup>60</sup> as a political body whose action is based on these constitutional principles and values.

On the other hand, the positive aspect is that the 2015-2019 AP presents one pilot example of a consistency seeking solution. The deeply embedded call for improvement of *"effective implementation, enforcement and monitoring of GSP+ beneficiaries commitments"* (25.a)<sup>61</sup> brings a qualitatively different contribution to the debate, going beyond the repetitive reminders typical for the human rights mainstreaming approach framed here as a coherence seeking solution.

The next part of the present paper aims to show that this commitment is a possible first step towards addressing, at the level of policy documents, currently underdeveloped issues. This is visible in comparison with the state of art of the contemporary research on inconsistency of the EU's conduct as based on previous papers and studies. These already contain a very detailed and informed critique of the politically pertinent issue of enforcement of human rights commitments via trade instruments.

Thus far Objective 25 (as for consistency seeking solutions) asks for actions regarding impact assessments and the role of Member States in the whole process of external human rights promotion through trade instruments. Namely, in the actions 'b' and 'c', it speaks in favour of the following: *"Continue to develop a robust and methodological sound approach to the analysis of human rights impacts of trade and investment agreements, in ex-ante impact assessments and ex-post evaluations..."*<sup>62</sup>

But this is still not enough, because, as illustrated earlier, qualitative and quantitative policy research can profoundly describe concrete examples of human rights policy sphere where the EU does not act consistently. The 2015-2019 AP should, without any hesitation, have mentioned even very concrete actions. Unfortunately, this is not the case,

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59 *ibidem*.

60 Franczek, Susanne et al, 'Mapping, analysing and implementing foreign policy instruments in human rights promotion' Frame Deliverable No 6.1 (31 December 2014) <<http://www.fp7-frame.eu/wp-content/uploads/2016/08/11-Deliverable-6.1.pdf>> accessed 1 November 2016.

61 Council of the European Union (2015) 23.

62 *ibidem*.

and the most progressive and promising formulation of the document is the analysed Objective 25.<sup>63</sup>

Our interpretation is that the wording as well as the intention of this AP is focused especially on the mantra of human rights mainstreaming. This means that its focus lays on the part of coherence – in the meaning of “*the quality of forming unified whole*”<sup>64</sup>, orchestrating all the actors and all the tools. However, the AP does not dedicate appropriate and desirably detailed care to substantive actions to foster better consistency. This is also the problem of consistency as an obstacle to self-interested political strategies. As far as definitions are concerned, consistency is the quality of behaving always in the same way, over some time-period, or, according to Portela and Raube, is the avoidance of policy contradictions. It is reasonable to think that inconsistency as behaviour of an actor or an institution cannot be, in most cases, unintentional. This is especially the case when very important priorities (such as the constitutional value of human rights promotion) are concerned.

Bearing in mind the previously mentioned observations by Wouters and Ramopoulos, we assert that the challenge of consistency is not overlooked by mistake, but because it essentially represents a real ‘hard case’, especially politically. However, this can be narrowed even from inside of the existing system. Using the appropriate “*community method*”, the dimension of the EU’s external relations<sup>65</sup> does not request more political competencies for supranational institutions and discretion via revision of primary law. In fact, a lot may be done in the sphere of community based decision making, which should be just more expert, exact and less vulnerable to *ad hoc* inconsistencies created by political considerations.

## 7. The ‘political problem’ of the EU’s trade and investment policy

The 2015-2019 AP identifies a specific consistency seeking solution reacting to the confessed inconsistent action of the EU. This consistency seeking solution is linked with the trade and investment policy and particularly with the enforcement of the beneficiary commitments. In this paragraph, the nature of this specific policy issue will be investigated closer in order to show that academic literature is quite developed in this field and the wording of the AP should have been even more specific. This argument is based on the state of art of the knowledge and is claimed in order to give further guidance to the researchers, encouraging their further deliveries.

The 2012 Strategic Framework, which sets a general approach to the external human rights promotion by the EU, provides in a few cases quite specific guidance. Within the scope of bilateral activities, even two specific trade/investment policy instruments are identified, namely human rights clauses and a general system of preferences hidden un-

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63 *ibidem*.

64 Oxford Dictionaries, ‘Coherence’ accessed 31 August 2015.

65 Keukeleire Stephan, Delreux Tom, ‘The Foreign Policy of the European Union’ (London/New York: Palgrave Macmillan, 2014) 62.

der the banner of policy *"more for more"*.<sup>66</sup>

In more concrete terms, the 2012 Strategic Framework describes prescriptively the future in this way: *"...when faced with violations of human rights, the EU will make use of the full range of instruments at its disposal, including sanctions and condemnation. The EU will step up its effort to make best use of the human rights clause in political framework agreements with third countries."*<sup>67</sup> And also: *"...the EU has firmly committed itself to supporting a comprehensive agenda of locally-led political reform, with democracy and human rights at its centre, including through the policy of "more for more."*<sup>68</sup>

The 2015-2019 AP specifies these prescriptions and claims a quest for improvements of the conditionality-based regimes of current general system of preference entailing good governance and human rights implications (GSP+). Concretely, these attempts can be found in, at the least, two sections of the 2015-2019 AP.<sup>69</sup>

However, the same AP fulfils the claims of the Strategic Framework rather vaguely where its Objective 25.a quite obliquely obliges the EU to *"provide support for and strengthen effective implementation, enforcement and monitoring of GSP+ beneficiaries commitments (relevant HR treaties and ILO conventions), including through projects with key international bodies and civil society, including social partners."*<sup>70</sup>

Furthermore, the AP aims at fulfilling the promises made in the Strategic Framework through the search for a reasonable, rearticulated position of essential element clauses - namely the tool which (among others) contains the restrictive measure, the measure that complements the proactive, in a true sense of the collocation of 'human rights promotion measures' (like dialogue, targeted support and incentives). In its full wording, the 2015-2019 AP articulates Objective 33, action c., in the following way: *"Further develop working methods to ensure the best articulation between dialogue, targeted support, incentives and restrictive measures."*<sup>71</sup>

Enforcement tools such as restrictive measures suffer from their very reluctant presence and almost invisible positioning embedded somewhere deep inside the structure of the 2015-2019 AP. Their soft, vague and loose (in fact missing) outline of future development contrasts with their positive, coherence seeking, counterparts. But the most striking fact is the contrast of an underdeveloped, unspecified and vague call for *'strengthened effectiveness of enforcement'* on one side, with elaborated and very concrete critique already provided by scholars dealing with pitfalls of positive and negative conditionality regimes like GSP+ and existence of essential elements clauses in EU's bilateral agreements. We will refer to those specific critiques, as they are also parts of the row of the cited FP7 Frame studies and working papers, as will be reviewed below.

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66 Council of the European Union (2012) 3.

67 *ibidem*.

68 *ibidem*.

69 Council of the European Union (2015) 23.

70 *ibidem* 23.

71 *ibidem* 29.

The present critique as to the vagueness of the AP's responses on the calls for improvements in the field of trade/investment policy, as well as the inconsistency issue, may be enriched from the considerations laid down in a recent contribution by Nicolas Hachez and his colleagues.

In particular, Hachez's two papers deal with the practical functioning of GSP+ regime and with the applicability of essential elements clauses in the EU's Free Trade Agreements or other bilateral agreements.

In elaborating on the details of the functioning of GSP+ regimes, Laura Beke and Nicolas Hachez speak about the so-called "reasonable doubt" of the European Commission: "*that the GSP+ conditions are no longer fulfilled by a beneficiary, it may 'initiate the procedure for the temporary withdrawal', which might result in a withdrawal of the GSP+ preferences.*"<sup>72</sup> In reviewing the wide array of criticism falling on the GSP+ regimes, they conclude that learning what is a reasonable doubt remains very difficult. They highlight that conditionality has been very rarely enforced empirically. Withdrawal of benefits happened just three times in history, in case of Myanmar, Belarus and Sri Lanka.<sup>73</sup>

The most pessimistic voices claim that the situation of GSP regimes is "*parallel with the inexistent enforcement of so-called 'essential element clauses' in EU FTAs.*"<sup>74</sup> The authors correctly mention the consensus that the withdrawal of the GSP+ must be the "solution of last reason", because alone it can create more harm than the governments violating the rights.<sup>75</sup>

However, Beke and Hachez's paper bears one dominant message: the doubts are especially concerned with the alleged double standards in treatment of different countries and opacity and lack of transparency in the assessment of single examples of violation. They speak about the lack of transparency and legal certainty in the suspension process.<sup>76</sup>

A critical remark points directly at the European Commission, which "*retains ample discretion in deciding to launch an investigation and withdraw preferences...*"<sup>77</sup> Temporary withdrawal from the GSP and GSP+ must have solid, justified reasons. Briefly, it may be based on the European Commission's "reasonable doubts" concerning the beneficiary countries' respect to its binding undertakings.<sup>78</sup> Moreover, withdrawal can occur also when there are "*serious and systematic violations' of core human and labour rights listed in Annex VIII.*"<sup>79</sup> However, this Annex does not provide the decision makers, namely the European Commission, with more specific guidance, but rather with the overview of

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72 Beke Laura and Nicolas Hachez, 'THE EU GSP: A Preference for Human Rights and Good Governance? The Case of Myanmar' 10 <[http://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp151-160/wp155-beke-hachez.pdf](http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp151-160/wp155-beke-hachez.pdf)> accessed 17 November 2015.

73 *ibidem* 11.

74 *ibidem*.

75 *ibidem*.

76 *ibidem* 13.

77 *ibidem*.

78 *ibidem* 16.

79 *ibidem* 16.

binding United Nations human rights treaties and ILO conventions.<sup>80</sup> The case study of the withdrawal of preference granted to Myanmar easily shows how it comes to the decision of last resort, but what is missing is the explanation about why comparable cases did not followed the same development.<sup>81</sup>

As is eloquently pointed out: *“As expected, we therefore can sense that the conditions for temporary withdrawal that are enumerated in the GSP regulation are never applied without a good dose of geo-strategic or economic calculation drawing on the CFSP or on self-interest rather than on the desire to realize the trade-development-human rights nexus.”*<sup>82</sup>

A very similar criticism is faced by the essential elements clauses as a tool of human rights promotion. Respectively, criticism is directed towards the monitoring and application of these clauses in order to enforce the respect for human rights commitments by activating the measure of last resort, when serious, unacceptable violations occur. Hachez emphasises the critique *“that the EU does not activate conditionality often enough, and regularly leaves human rights violations by partner countries unpunished.”*<sup>83</sup> The same author mentions the classical objections to the EU's conduct: *“that there is a threat of using a clause just selectively and with this a problem of double standards is also connected.”*<sup>84</sup>

The remark regarding the distinction between the EU and US's essential elements clauses is of crucial importance. Where the EU's *“clauses seem to be considered as chiefly as a ‘political’ clauses by the Council, and many observers have pointed out that, in comparison with the US approach, which takes a binding approach towards a small and clearly defined number of standards, the EU's essential policies clauses are ‘aspirational’ and aimed at fostering dialogue.”*<sup>85</sup>

Finally, Hachez concludes with a very political-realist remark: *“... the effectiveness, legitimacy and credibility issues we have outlined above confirm that the EU is fundamentally, in the words of Meunier and Nicolaidis, a ‘conflicting trade power’. It wants to do the right thing and robustly link trade and human rights, but other considerations stand in the way.”*<sup>86</sup> This must be deemed the common reality of policy making, but also a serious challenge to the EU's credibility, especially when the ambitious term (the normative power of the European Union) was used once again in this context.<sup>87</sup>

Based on the conclusions by Hachez and Beke, it is possible to affirm that both tools, namely the GSP+ as well as the essential elements clauses, ultimately have the same weakness. When it comes to the serious violations of human rights by the partner country (i.e. the signatory of bilateral treaty entailing an essential element clause, or the country included in the GSP+ scheme), the ultimate effort to enforce the compliance with human rights commitments is vulnerable to arbitrariness, and a very wide margin of ap-

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80 European Commission (2011) 70.

81 Beke Hachez 20.

82 *ibidem* 21.

83 *ibidem* 17.

84 *ibidem* 18.

85 *ibidem* 21.

86 *ibidem* 23.

87 *ibidem*.

preciation is kept by the European Commission. The dilemma about whether to activate the essential element clause and suspend temporarily the agreement because of the violation of its essential element, or the decision to withdraw the preference, is ultimately facilitated by political decisions, after conducting political considerations and counting a wide variety of possible implications.

It would appear that activation of conditionality has many politically and strategically motivated drivers pushing us to the preliminary conclusion that they work as barely predictable black boxes. Very often the reality advances the non-activation solution and, in fact, the intention to speak up and act (consistently) in favour of human rights is very often put into question. This political (and not fully transparent) decision-making process seems to be for the observers an arbitrary and insecure outlet of an otherwise very profoundly and in detail elaborated toolkit of external human rights promotional matrix presented in the 2012 Strategic Framework and 2015-2019 AP on Human Rights and Democracy.

The EU's trade and investment policy is ultimately suffering a kind of 'political problem'; undermining its credibility as accurately outlined policy, governed by transparent, predictable rule, which secures the consistent conduct of the EU. As such, this should be the starting point that has to be directly addressed in the current AP under the chapter outlining consistency seeking solutions.

## **8. Limitations to the 'political principle' in the EU's external human rights promotion**

It is worthy highlighting that the most provocative critiques of the EU's trade and investment policy have been formulated, highlighting the 'political problem' that founds the EU's conduct in geopolitical considerations.<sup>88</sup> The EU acts inconsistently with its own principles in various occasions, when other considerations, like economic or security concerns, outweigh the importance of human rights, or when it is strategically decided to act formally inconsistently but inherently in line with the ultimate strategic intention to fulfil its human rights commitment.

In the interview with the EEAS officials working on the drafting of the 2015-2019 AP, the following very interesting statement was made: *"...at the same time, to be realistic, when you engage in dialogue with China, and you realize that there are no major improvements, no major changes in the behaviour of the Chinese authorities, I am mentioning China as the country where there are the human rights issues and serious problems, and then you can come to the conclusion that the dialogue didn't work. I think this is a very hasty conclusion. In number of cases it is politically important to have a dialogue and it is important to engage, even if the dialogue may not be productive in terms of results in the short term. This is something to be taken in account, and not to expect major results, although we can improve the process for sure."*<sup>89</sup>

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88 Hachez Nicolas, 'Essential Elements' Clauses in EU Trade Agreements: Making Trade Work in a Way That Helps Human Rights?' [2015] 53 Cuadernos Europeos de Deusto. 81.

89 Taufar (2015) 74.

It is argued that, within the scope of this excerpt of interview, one might discover a transcending principled logic. This is called a logic of 'political principle' and the working theory is that it can serve as a logic of functioning, or, in other words, as an ethics of the EU's external human rights promotion. The characteristics of this political principle are the emphasis on the continuation of dialogue, the long-term nature of all activities and the patience in confrontation with the difficulties concerning the implementation of human rights goals.

This 'political principle' persistently keeps the doors open for a variety of future solutions and for a never-ending human rights promotion. It is very much suitable as a logic driving the political and human rights dialogues. This essential 'political principle' unfortunately misses its own limitation and proliferates into the domains where its presence is undesirable. This is the case if it steers (freezes in fact) also the activation of essential element clauses or justifiable withdrawal of GSP+ preferences.

Here it is not evaluated whether the justification of this 'political principle' is only a sophisticated cynical hypocrisy, or rather a good intention sometimes ending in bad and inconsistent results. What is proposed here is just a simple explanatory logic. This logic can describe the missing limitations of the 'political principle', which spill over into the other policy areas. If it makes sense, exercising/implementing freely the political principle in the diplomatic instruments like human rights dialogues, it makes less sense in the instruments that were originally determined by a strict legalistic delineation. In the framework of instruments driven by some exact legal prescriptions there must be also restrictions transparently defining the limitation of the 'political principle' opposing permanently opened door for human rights promotion.

## **9. Conclusive remarks: a call for the EU's self-limitation**

This paper has attempted to renew the interest in the concept of consistency, which is not only distinctive from the interlinked concept of coherence, but which has also its pressing manifestations in the empiric reality of the EU's external human rights policy. Unfortunately, the analysis shows that the 2015-2019 AP tackles dominantly and substantively the coherence, relying mostly on the stressed importance of human rights mainstreaming and better coordination of relevant policy actors, with the very ambitious aim to create more synergies in the EU's external human rights policy. Secondly, the analysis shows that not enough space is dedicated to the politically very pertinent challenge of inconsistency, which by definition covers very specific past actions of plain contradictions. Consistency seeking solutions occur infrequently in the 2015-2019 AP, despite the empiric relevance of the EU's inconsistent conduct. These scarce remarks are articulated for the functioning of trade instruments, their better implementation and follow up. In particular, they represent a first very positive step forward in seeking better art of consistency, but the academic literature is already quite ahead before vague formulations of the AP. A follow up of the current academic literature may lead to more detailed elaborations of the high-level policy documents concerned. These in turn may help to steer researchers interests towards further elaborations on politically feasible and generally desirable conclusions.



A further question to be answered is: what to do next? The AP's rare consistency seeking solution calls for effective implementation, enforcement and monitoring of GSP+ beneficiaries commitments, or the development of methodologically sound impact assessments of the effects of trade on human rights. The Global Strategy for the EU's Foreign and Security Policy adopted in 2016 stresses something very similar, but more specified, namely the importance of the "...needs to find effective ways to manage tensions that may arise between trade and non-trade objectives. And within non-trade objectives, a distinction needs to be made between the general pursuit of fundamental freedoms and specific human rights issues which are tied to trade as such."<sup>90</sup>

These wishful formulations aiming for better consistency and improvements in the field of human rights promotion via trade/business instruments must be translated into subtle and concrete solutions. These, in fact, would limit the political nature of decision-making, which is by definition arbitrary, and from a procedural perspective, inappropriate to the characteristic of the European Commission's delegated acts, which should be rather non-political and expert-based "*non-legislative acts of general application*".<sup>91</sup> These delegated acts by the Commission might then specifically decide about the enforcement of compliance with GSP+ standards in the procedure of temporary withdrawal of GSP+ tariff preferences for third country.<sup>92</sup>

Contradictory interests between securing political leverage in the third country, keeping its own political/economic self-interest at place, create a deadlock. Moreover, the concerns about negative externalities as consequence of the temporal withdrawal<sup>93</sup> on the one hand, and the care of consistency of external human rights promotion as well as of general credibility of the EU on the other hand, serve as a huge dilemma for policymakers. A good starting point from the outlined deadlock may be the effort to set some elementary standards of mutual cooperation, which may be never violated. Such a threshold may serve as essential element establishing mutual relationship, but this time it should be mentioned literally and enforced consistently. This essential element should be specified either in the relevant Council regulation establishing GSP+ regime, or in a detailed document (such as "*Commission delegated regulation establishing rules related to the procedure to the withdrawal of tariff preferences (...)*"<sup>94</sup>), where such a specification is missing.

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90 High Representative of the Union for Foreign Affairs and Security Policy, European External Action Service, 'European Union Global Strategy. Humanitarian Aid and Economic Prosperity' <<https://europa.eu/globalstrategy/en/humanitarian-aid-economic-prosperity>> accessed 8 November 2016.

91 Lenaerts Koen, Van Nuffel Piet, 'European Union Law, London: Thomson Reuters' (2011) 694. For illustration see also specific example of delegated act, like for example the case of reintroduction of the preference to Sri Lanka: European Commission, 'Commission Delegated Regulation of 11. 1. 2017 C(2016) 8996 final' (Brussels 2017) <<https://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/C-2016-8996-F1-EN-MAIN-PART-1.PDF>> accessed 25 May 2017.

92 European Commission (2011) 17, Article 15, para 9.

93 See: Velutti Samantha, 'Human Rights conditionality in the EU GSP scheme: 'a focus on those in need or need to refocus?' in Nuno Ferreira, Dora Kostakopoulou (eds), *The Human Face of the European Union. Are EU Law and Policy Human Enough?* (Cambridge: Cambridge University Press 2016) 360.

94 European Commission, 'Regulations establishing rules related to the procedure to the withdrawal of tariff preferences and adoption of general safeguard measures under Regulation (EU) No 978/2012 of the European Parliament and the Council applying a scheme of generalised tariff preferences', Commission delegated regulation (EU) No 1083/2013 (Brussels, 28 August 2013).

Developing absolute minimal standards of compliance should be defined as *realistic*, which means targeting the elimination of the worst cases of misconduct, and as *feasible* in the sense of developing some “*fast-track procedure*” of withdrawal of preference. This would aim at securing the consistency and credibility of the European Commission’s conduct in the human rights field, manifesting the simple rule of behaving always in the same way in the comparable situations, or at least in the most serious set of situations.

The realism of this measure must take into account that in the past a comparatively limited number of reasons led to investigations by the European Commission. In detail, in total four out of six cases covered the category of violations of labour rights.<sup>95</sup> On top of that, in the Sri Lanka case, the temporal withdrawal of GSP+ preference (one of three cases) was based on violations of civil and political rights.<sup>96</sup>

From a realistic perspective, it is not justified to expect significant larger numbers of withdrawal procedures based on the variety of twenty-seven core international treaties including human rights, good governance and environmental international agreements. Indeed, the act of withdrawal is a solution of very last resort linked especially with serious violations. The aspirational nature of the GSP+ regime may have its advantages and should be generally retained. However, for the purpose of securing some very basic qualities such as consistency, also very basic and most important criterions must be met. According to this logic, just the most serious violations must be picked up from the broad body of international human rights law commitments, with the intention to define minimal standards of compliance with the inspiring construction of universal, compulsory and semi-automatic ‘fast-track procedure’ leading to investigation and possible temporal withdrawal of the preference, which will be ideally imposed in the shortest possible time. In other words, opening discussion about appropriate design of this ‘fast track procedure’ must involve the search of an absolute minimum standard of compliance with agreed international human rights standards, establishing a red line that cannot be crossed. This effort must lead to the definition of worst atrocities that, if reliably proven, will disable any deliberation about continuation of preferences during the implementation dialogues with the third countries. ‘Fast track procedure’ means here the rehabilitation of our ability to understand what is the most important substantive core of the efforts to protect human rights and to invent quick, and consistently the same response for the most serious issues. This ‘fast track procedure’ may serve as the additional tool specifying minimal standards in the tailor-made checklists prepared for each GSP+ beneficiary country - the so called ‘GSP+ scorecards’ intended for structured monitoring of beneficiaries compliance.<sup>97</sup>

The feasibility of the ‘fast track procedure’ may therefore lie in the fostered and focused monitoring of compliance with the standards found at the intersection of the ILO provisions with high human rights standards. This “*fast-track procedure*” may tackle two very important issues: the already established sensitivity towards violations of ILO

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95 Beke Hachez (2015)12.

96 *ibid.*

97 European Commission, ‘European Union’s GSP+ Scheme’ (January 2017) 2 <[http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc\\_155235.pdf](http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155235.pdf)> accessed 24 May 2017.

standards in the frame of the GSP+ regime, and, additionally, the intuitive importance of specific human rights provisions banning most severe violations concerning life, health, dignity, physical, mental and social integrity, which are covered by the CAT, ICCPR, ICE-SCR.<sup>98</sup> This overlap should create then a very basic common ground of relations between the EU and a third country, based on tighter standards that may be easily, transparently and more regularly checked and invoked.<sup>99</sup>

For the sake of completeness, we must point out that political self-limitation, in the sense of specification of the GSP+ rules, is not the only way to solve the problems with inconsistency. There are also opposite lines of argumentation pleading to foster the political nature of the decision-making capacity of the European Union. As Chris J. Bickerton argues, the obstacle for being the normative power is the *“lack of concrete political order”*.<sup>100</sup> For example, in order to be a consistent human rights promoter, one needs to have strong political leverage. In other words, the solid capacity to prioritise the normative objectives over very attractive material objectives fulfilling the self-interest of the EU and its Member States rests on the capacity to meet the so-called “political decisions”. For that purpose, there is for the EU a need of more executive powers. We will not develop this line of argumentation further because it goes beyond the policy oriented solutions towards the deep constitutional matters of the EU and towards the reconfiguration of constitutional matrix of the European Union and its Member States.

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98 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966).

99 Concrete recommendations may be go beyond the reliance on the periodic reports of respective treaty bodies, towards a regular follow up of the substance of individual complaints submitted to these bodies and, in the case of serious violations, the European Commission should decide on the basis of valid, cross-checked data taken from more independent sources.

100 Bickerton Chris J., ‘Legitimacy Through Norms: The Political Limits to Europe’s Normative Power’ in Richard G. Whitman (ed), *Normative Power Europe. Empirical and Theoretical Perspectives* (Basingstoke: Palgrave 2011) 26.

## Tables

Table 1: Comparison of the two AP's Chapters

Action Plan 2012		Action Plan 2015
I.	Human rights and democracy throughout EU policy	Boosting ownership of local actors
II.	Promoting the universality of human rights	Addressing human rights challenges
III.	Pursuing coherent policy objectives	Ensuring a comprehensive human rights approach to conflicts and crises
IV.	Human rights in all EU external policies	Fostering better coherence and consistency
V.	Implementing EU priorities on human rights	A more effective EU human rights and democracy support policy
VI.	Working with bilateral partners	
VII.	Working through multilateral institutions	

Table 2: Coherence and consistency in the 2015-2019 AP (not exhaustive list; emphasis added)

Challenge	Coherence	Consistency
Solutions driving logic	Synergies seeking; establishing unified whole of the human rights policy in the multi-level, multi-faceted system of governance and decision making	Elimination of contradictions; substantive measures targeting inconsistency prone areas
Manifestation in the AP 2015	1.a "...strengthen the involvement of such NHRIs in consultation processes at country level..."	9.a "Step-up consistent support to HRDs by: raising cases of at risk HRDs including during high-level visits, dialogues and missions ..."
	1.c "Facilitate cooperation between NHRIs in EU Member States and NHRIs in partner countries."	10.a "Promote and support legislation, policies and mechanisms designed to protect HRDs..."

Challenge	Coherence	Consistency
	3.b “Include a parliamentary dimension into EU and EU Member States good governance programmes...”	21.c “ Develop and implement a due diligence policy to ensure that EU support to security forces, in particular... CSDP missions...is in compliance with...the EU human rights policy...”
	6.a “Strengthen human rights and democracy aspects in EU cooperation with the UN and regional organisations and mechanisms, in particular by pursuing synergies and common initiatives on key thematic issues and at important multilateral events.”	24.g “Identify countries of origin where human rights violations act as key push factor, and better target political and other dialogues and programmes so as to address these violations.”
	6.b “Promote dialogue and capacity initiatives between regional human rights and democracy mechanisms.”	25.a “...strengthen effective implementation, enforcement and monitoring of GSP+ ‘beneficiaries’ commitments...”
	11.b “Ensure that the respect for freedom of opinion and expression are integrated in the development of policies...relating to counter terrorism...”	25.b “Continue to develop a robust and methodologically sound approach to the analysis of human rights impacts of trade and investment agreements...”
	12.a “Ensure that freedom of religion or belief remains high on the agenda of relations with third countries...”	33.c “Further develop working methods to ensure the best articulation between dialogue, targeted support, incentives and restrictive measures.”
	13.b “Elaborate a coherent approach addressing the links between death penalty, torture and cruel...treatment”	33.e “Improve coherence (sic) in the application of human rights clauses...in all new EU international agreements.”

Challenge	Coherence	Consistency
	14.b “In the context of EU external action and development cooperation, prioritise actions targeting...integrity of women and girls...”	
	16.a “Develop an EU Toolkit on Anti-discrimination...”	
	16.b “Promote the exchange of best practices...to combat racism...”	
	16.c “Support partner countries efforts and relevant initiatives by the UN... aimed at protecting...rights of persons belonging to minorities...”	
	17.b “...ensure that all relevant EU and Member State staff are informed of the international treaties related to economic...rights...”	
	18.b “Ensure a strong focus on business and human rights in the overall EU strategy on CSR...”	
	18.c “...integrate the UN Guiding Principles in national CSR..”	
	19.b “Ensure greater coherence in the fields of human rights reporting and early warning/crisis analysis...”	
	20.a “Enhance cooperation with...UN Special Adviser on the Prevention of Genocide...”	
	23.a “Develop operational guidance for staff in CSDP missions working with the police...to provide practical orientation on mainstreaming of human rights...law...”	
	24.a “...enhance human rights safeguards in all migration and mobility dialogues...with third countries...”	
	24.b “...fully integrate human rights, ‘refugees’ rights...in THB in political, migration...and human rights dialogues...”	

Challenge	Coherence	Consistency
	24.f “Engage with the diaspora communities...to promote awareness in their countries...”	
	25.d “Aim at systematically including in EU trade and investment agreements the respect of internationally recognised principles...”	
	26.a “Ensure that human rights...are fully respected in the implementation of the EU’s comprehensive action against terrorism...and are at the centre of all programmes...”	
	27.a “Implement the EU commitment to move towards a rights based approach to development cooperation, encompassing all human rights by pursuing its full concrete integration into all EU developmental instruments...”	
	28.c “Ensure policy coherence between the analysis of human rights impacts undertaken in impact Assessments and other human rights instruments...”	
	29.b “Ensure that human rights...are factored in to the different sectorial dialogues...”	
	29.c “Ensure internal-external coordination in the context of human rights dialogues...”	
	29.d “Continue mainstreaming co-operation at the UN and other bilateral human rights fora...”	
	33.a “Increase coherence and complementarity of existing EU tools, financing instruments and reporting mechanisms...”	
	33.d “Increase coherence between human rights objectives...in the AP and human rights country strategies...”	

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