

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT** **C**  
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

Constitutional Affairs

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**The Implementation of the  
Charter of Fundamental  
Rights in the EU institutional  
framework**

STUDY FOR THE AFCO COMMITTEE





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND  
CONSTITUTIONAL AFFAIRS**

**COMMITTEE ON CONSTITUTIONAL AFFAIRS**

# **The Implementation of the Charter of Fundamental Rights in the EU institutional framework**

**STUDY**

## **Abstract**

The EU institutions are required take into account the Charter of Fundamental Rights in the design and implementation of legislation or of policies, both within law- and policymaking internal to the Union and in the external relations of the EU. This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Constitutional Affairs of the European Parliament, to examine how they discharge this duty: it looks into the role of the Charter in the legislative process; in the economic governance of the Union; in the work of EU agencies; in the implementation of EU law by EU Member States; and, in the external relations of the Union, both in trade and investment policies and in the Common Foreign and Security Policy. It also analyses certain gaps in the judicial protection of the Charter and identifies measures through which the potential of the Charter could be further realized.

## **ABOUT THE PUBLICATION**

This research paper was requested by the European Parliament's Committee on Constitutional Affairs and commissioned, overseen and published by the Policy Department for Citizens' Rights and Constitutional Affairs.

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## **LINGUISTIC VERSIONS**

Original: EN  
Translation: IT

Manuscript completed in November 2016  
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This document is available on the internet at:  
<http://www.europarl.europa.eu/supporting-analyses>

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## LIST OF ABBREVIATIONS

<b>AFCO</b>	Committee on Constitutional Affairs
<b>AG</b>	Advocate General
<b>AGS</b>	Annual Growth Survey
<b>AMR</b>	Alert Mechanism Report
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>CEAS</b>	Common European Asylum System
<b>CEPOL</b>	European Police College
<b>CFSP</b>	Common Foreign and Security Policy
<b>CLWP</b>	Commission Legislative and Work Programme
<b>COHOM</b>	Working Party on Human Rights
<b>CSR</b>	Country-Specific Recommendation
<b>DG</b>	Directorate General
<b>EASO</b>	European Asylum Support Office
<b>EC</b>	European Community
<b>ECB</b>	European Central Bank
<b>ECHR</b>	European Convention on Human Rights
<b>EEA</b>	European Environmental Agency
<b>EFSA</b>	European Food Safety Authority
<b>EFSF</b>	European Financial Stability Facility
<b>EIGE</b>	European Institute for Gender Equality
<b>EMCDDA</b>	European Monitoring Centre for Drugs and Drug Addiction
<b>EU</b>	European Union
<b>EU-OSHA</b>	European Agency for Safety at Work
<b>EUROFOUND</b>	European Foundation for the Improvement of Living and Working Conditions
<b>EUROPOL</b>	European Police Office
<b>EFSM</b>	European Financial Stabilisation Mechanism
<b>ESM</b>	European Stability Mechanism
<b>FRA</b>	Fundamental Right Agency
<b>FREMP</b>	Council Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons
<b>FRONTEX</b>	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
<b>JHA</b>	Justice and Home Affairs
<b>IA</b>	Impact Assessment
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>IDR</b>	In-Depth Review
<b>IIA</b>	integrated Impact Assessment
<b>ILO</b>	International Labour Organisation
<b>IMF</b>	International Monetary Fund
<b>LIBE</b>	Committee on Civil Liberties, Justice and Home Affairs
<b>MOU</b>	Memoranda of Understanding
<b>SIA</b>	Sustainability Impact Assessment
<b>TEU</b>	Treaty on the European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TSCG</b>	Treaty on Stability, Coordination and Governance within the

	Economic and Monetary Union
<b>UN</b>	United Nations



## EXECUTIVE SUMMARY

### Background

This study on the implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework was requested to support the work of the Committee on Constitutional Affairs (AFCO) of the European Parliament. It assesses to which extent the EU institutions take into account the Charter in the design and implementation of legislation or of policies, both within law- and policymaking internal to the Union and in the external relations of the EU. It identifies means through which the effectiveness of the Charter in ensuring the protection and promotion of rights, freedoms and principles that it brings together, could be further improved. Since it was initially proclaimed at the Nice Summit in December 2000, and especially since the entry into force of the Treaty of Lisbon on 1 December 2009 that endowed it with a constitutional status, the Charter of Fundamental Rights has been influencing the legislative process, as the institutions of the EU have gradually designed procedures and methodologies to ensure that fundamental rights would be taken into account at the different stages of law-making. In contrast, progress has been much slower, and often unsatisfactory, in other contexts.

The study offers a total of 24 recommendations for consideration, summarized in the final chapter. It builds these recommendations on the detailed examination of six questions, which are summarized below.

### The role of the Charter in the legislative process

The Charter has played an increasingly important role in the legislative process of the Union. The European Commission (Commission) has early on adopted various tools to ensure that the Charter would be fully complied with in the preparation of legislative proposals and of amendments to proposed legislation. The impact assessments accompanying legislative proposals submitted by the Commission now integrate fundamental rights as a transversal concern. The Commission was followed in this regard by the Council of the European Union (Council) and by the European Parliament (Parliament).

Chapter 1 shows that more could be done. The Charter of Fundamental Rights is a partial and provisional codification of the fundamental rights *acquis* of the EU. Other human rights instruments too, however, have been ratified by all EU Member States, and just as they are a source of inspiration in the development of fundamental rights as general principles of Union law, they should be taken into account systematically in compatibility checks and in impact assessments. As regards impact assessments, like the Parliament, the Council could seek inspiration from the practice of the Commission, in order to ensure that any choice to be made between different policy options examined during the legislative process, shall be guided the contributions of each to the fulfilment of the Charter of Fundamental Rights. As regards compatibility checks, the European Agency for Fundamental Rights could be relied upon more systematically in order to ensure an independent assessment, by a body that has a proven expertise in the area of fundamental rights. Finally, the new Interinstitutional Agreement on Better Law Making<sup>1</sup>, which emphasizes the importance of public and stakeholder consultation and feedback, provides an opportunity to rethink the purpose of

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<sup>1</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123 of 12.5.2016.

public consultations, and to make them more meaningful. This could significantly improve the trust of the public in the decision-making process of the EU.

Compatibility checks are always provisional, however. Legislative or policy instruments that have been assessed, at the time of their adoption, to be consistent with the requirements of the Charter of Fundamental Rights, will not necessarily remain so later in time, as the meaning and scope of the Charter's provisions will evolve with the changing jurisprudence of international human rights law. This calls for the establishment of a permanent mechanism to ensure that the Union legislative and policy framework will be constantly adapted to such new developments.

Finally, a commitment to human rights goes beyond accepting a prohibition: it also involves a duty to contribute to the realization of human rights. Article 51(1) of the Charter itself states that the institutions of the Union shall "respect the rights, observe the principles and *promote the application thereof* in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties" (emphasis added). Yet, the system of protection of fundamental rights in the Union still lacks a mechanism that would allow to systematically screen developments in the Union in order to identify the need to take action at EU level in order to protect and fulfil the rights, freedoms and principles of the Charter, where an initiative of the Union institutions may be required to avoid the Charter's values being threatened by the decentralized and uncoordinated action of the EU Member States.

### **The role of the Charter in the economic governance of the Union**

Chapter 2 considers the role of the Charter in the economic governance of the EU. In the new architecture that emerged from the responses given to the sovereign debt crisis which threatened the stability of the eurozone in 2009–2011, the economic governance relies on the European Semester; on a "Fiscal Compact", to maintain public deficits under strict control; on enhanced surveillance mechanisms imposed on EU Member States experiencing financial difficulties or having called on support; and on the establishment of a new, permanent financial support mechanism, the European Stability Mechanism, to avoid the contagion from one country to other countries sharing the Euro currency.

The study describes the consequences of failing to take into account the Charter of Fundamental Rights in the setting up and the implementation of these tools. It recalls that the EU institutions that play a role in the architecture of economic governance remain fully bound by the Charter of Fundamental Rights in the fulfilment of their tasks under the various mechanisms it includes. This applies not only to the Commission and the European Central Bank, but also the Council and the European Council. The EU Member States too, insofar as they are adopting measures required from them under the European Semester framework, or imposed on them in order to avoid serious imbalances threatening the stability of the eurozone or as conditionalities for the provision of loans, should be considered as acting in the scope of application of Union law and thus, as bound by the Charter.

The case of the European Stability Mechanism is more complex, since it is established as a separate international organisation, endowed with its own legal personality. However, in discharging their functions under the ESM Treaty, consistent with their duty under the Charter to "promote" the rights, freedoms and principles thereof (Article 51(1) of the Charter), the Commission and the European Central Bank should endeavour to ensure that the States concerned do not enter into commitments that might result in violations of the social provisions of the Charter. The establishment of the ESM as a separate international

organization, moreover, should not allow the EU Member States to circumvent their obligation to comply with the Charter in the field of application of EU law, in the specific meaning international law gives to the notion of circumvention.

The current situation is deeply unsatisfactory. It breeds suspicion, and even hostility, towards the attempts at improving macroeconomic convergence within the EU and at preventing the risk of imbalances that could threaten the stability of the eurozone. Such risks can only be ignored at the peril of the institutions' legitimacy itself. The study concludes that negotiations of Memoranda of Understanding and macroeconomic reform programmes should be guided by a robust fundamental rights impact assessment, informed by the recent normative developments concerning in particular social rights in international human rights law, and using an appropriate set of indicators broken down by gender, age group, nationality or ethnic origin where appropriate, and region, in order to ensure that sufficient attention is paid to the situation of the members of the weakest groups of society.

### **The role of the Charter in the EU's operational policies: the EU's agencies**

Chapter 3 considers how the EU agencies could take into account the Charter of Fundamental Rights in the fulfilment of their mandates. Two examples are provided: the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the European Asylum Support Office (EASO) are examined in turn, to illustrate both the challenges and the tools that could be used to better mainstream fundamental rights into their work.

The study envisions a future in which, building on the best practices of different agencies engaged in a collective learning process about how best to integrate the Charter in their activities, all EU agencies would consider: (i) adopting a fundamental rights strategy, with time-bound commitments; (ii) including a reference to fundamental rights in a code of conduct that could define the duties of their staff; (iii) setting up mechanisms ensuring that any violation of fundamental rights be detected and reported, and that risks of such violations be swiftly brought to the attention of the main bodies of the agency; (iv) establishing the position of a fundamental rights officer, reporting directly to the management board to ensure a certain degree of independence vis-à-vis other staff, in order to ensure that threats to fundamental rights shall be immediately addressed, and that the fundamental rights policy of the organization shall be constantly upgraded; (v) developing a regular dialogue with civil society organisations and relevant international organizations on fundamental rights issues; and finally, but perhaps most importantly, (vi) ensuring that compliance with fundamental rights becomes a central component of the terms of reference of the collaboration of the agency concerned with external actors, including in particular members of national administrations with whom they interact at operational level.

### **The Charter and measures adopted by the EU Member States**

The role of national authorities in the implementation of the Charter of Fundamental Rights is addressed only tangentially, by asking what the EU institutions could contribute to facilitate the duty of the EU Member States acting in the field of application of EU law to respect, protect and promote the Charter. National jurisdictions in particular could be provided better guidance as to their duty to take the Charter into account in situations that fall under the scope of application of EU law. The study notes, however, that the adoption of the so-called 'opt-out' Protocol (No 30) on the application of the Charter to Poland and the United Kingdom, appended to the Treaty of Lisbon, may contribute to the confusion as regards their role in this regard. Not only domestic courts, however, but also national administrations and parliaments have a role to play in ensuring that the Charter is taken into account in the

implementation at Member State level of EU law: better guidance (more explicit and more systematic) could and perhaps should be provided in this regard.

### **The Charter and the external relations of the Union**

Chapter 5 considers how the Charter of Fundamental Rights influences the external relations of the EU, in the areas of trade and investment and in the conduct of the Common Foreign and Security Policy (CFSP). Article 21(1) TEU imposes on the EU to be guided, in its action on the international scene, by the principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the United Nations Charter and international law. In the *Front Polisario* case moreover, in a judgment it delivered on 10 December 2015, the General Court has confirmed that the Union institutions cannot ignore the requirements of the Charter of Fundamental Rights when they take action in the area of external policies. This was already the assumption underlying the adoption in 2015 by the Commission of the *Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives*.

The operational implications of these duties, however, remain unclear. In the negotiation of trade and investment agreements, it remains debated, in particular, whether the incorporation of fundamental rights considerations in integrated impact assessments, without treating fundamental rights separately and without relying on a separate methodology to that effect, shall be sufficient to meet the expectations both of civil society and of the European Ombudsman as regards the preparation of human rights impact assessment prior to the conclusion of negotiations.

In the conduct of the CFSP, the chief concern today is how to improve the consistency and coherence between the internal and external policies in the area of fundamental rights. The study suggests some options to give these requirements concrete meaning, and thus to further enhance the credibility of the Union's promotion of its values – human rights, democracy and the rule of law – on the international stage. Three recommendations in particular are made in this regard: (i) in the design and implementation of the Union's internal policies and legislation, to refer on a more systematic basis to international human rights standards; (ii) to encourage the Council Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP) to review the recommendations addressed to the EU Member States following the examination of a EU Member State by the UN Human Rights Council's Universal Periodic Review which have been accepted, in order to examine how the State concerned can be supported by the EU and by other EU Member States in fulfilling its commitments before the next review cycle; and (iii) to encourage the EU institutions to agree on a Fundamental Rights Strategy, to be regularly updated, to ensure that the gaps in the protection of fundamental rights are identified and, once identified, are closed.

### **The role of judicial remedies in enforcing the Charter**

Chapter 6 looks into remedies. It discusses two issues in detail. First, it considers the much debated question of the possibility for private applicants (individual or legal persons) to challenge acts adopted by EU institutions by filing direct actions for annulment.

Under Article 263(4) TFEU, private applicants may file such actions not only against individual decisions addressed to them, but also against acts of general applicability, *provided such acts directly affect their situation without requiring further implementing measures*. This enlarges broaden the *locus standi* of private applicants in comparison to the former Article 230(4) of the EC Treaty. However, the TFEU still only allows direct actions to be filed in such circumstances against "regulatory acts", as opposed to "legislative acts" adopted following the ordinary legislative procedure. A gap in the judicial protection of the individual may result, since there shall be no remedies for the private applicant against a regulation that is

"legislative" in nature, even though such a regulation may directly concern that applicant and potentially infringe his or her fundamental rights.

The study suggests that, as a requirement both under Article 47 of the Charter of Fundamental Rights (right to an effective judicial remedy) and of Article 19(1) TEU (which provides that Member States "shall provide remedies sufficient to ensure effective judicial protection in the fields covered by European Union law"), the EU Member States should establish within their domestic system of judicial remedies a procedure allowing an individual applicant to *preventatively* apply for judicial protection, without having to adopt a form of unlawful conduct that could give rise to that individual's liability, in order to obtain from the domestic courts an assessment as to the compatibility with fundamental rights of any measure enforcing the regulation vis-à-vis the applicant concerned.

Next, the study considers the specific challenges that arise concerning judicial protection in the domain of the CFSP. The restrictions to the jurisdiction of the Court of Justice of the European Union (Court of Justice) in this area are such that, should the Council or the European Council decide on actions that might result in fundamental rights violations, the individuals concerned could find themselves without access to proper judicial remedies: unless such actions are considered "restrictive measures" (such as sanctions imposed on organisations or individuals suspected of supporting terrorism), the Court of Justice will not be competent to review the decision concerned, despite the impacts it may have at the operational level of their implementation. The study recommends therefore that the EU Member States contributing to the implementation of the action decided by the Council make a formal declaration by which they accept full responsibility for the potential impacts of such action on fundamental rights, thus allowing domestic courts to hear claims seeking compensation for any damages caused as a result of the implementing measures taken by the national agents concerned. Under the rules on attribution in the law of international responsibility, the measures in question would have been attributed to the European Union, rather than individually to the EU Member State concerned: the declaration as envisaged would justify the domestic courts hearing claims filed by victims in setting aside those rules of attribution.

## GENERAL INTRODUCTION

This study on the implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework was requested with a view to supporting the work of the Committee on Constitutional Affairs (AFCO) of the Parliament. It assesses to which extent the EU institutions take into account the Charter in the design and implementation of legislation or of policies, both within law- and policymaking internal to the Union and in the external relations of the EU. Consistent with the mandate of the AFCO Committee, the study shall address the role of the Charter in guiding the implementation of Union law by the EU Member States only tangentially, to the extent that such implementation may be supported by initiatives taken by the EU institutions.

The Charter of Fundamental Rights was initially proclaimed at the Nice European Council of December 2000.<sup>2</sup> At the time, it was a political document published in the "C" section of the *Official Journal*: although endowed with a strong legitimacy since it was seen as a codification of the *acquis* of the European Union in the area of fundamental rights, the Charter was not, as such, legally binding. This changed with the entry into force of the Treaty of Lisbon, on 1 December 2009.<sup>3</sup> Article 6(1) TEU now refers to the EU Charter of Fundamental Rights in the revised form it has been proclaimed on 12 December 2007.<sup>4</sup> It states that "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

This study examines to which extent the institutions, bodies and organs of the European Union take the Charter into account and whether the implementation of the Charter could be further improved. It is divided in six chapters, followed by a chapter containing the conclusions and recommendations. Chapter 1 examines the role of the Charter in the EU legislative process. It explores how the Commission, the Council and the Parliament, have endeavoured to take into account the Charter in the design of legislative proposals and in the presentation of legislative amendments. Chapter 2 considers the role of the Charter in the economic governance of the EU. Chapter 3 considers how the EU agencies could take into account the Charter of Fundamental Rights in the fulfilment of their mandates, taking Frontex and the European Asylum Support Office (EASO) as examples to illustrate both the challenges and the tools that could be used to better mainstream fundamental rights into the work of EU agencies. Chapter 4 examines the role of national authorities in the implementation of the Charter of Fundamental Rights, highlighting the need for more and better guidance in this regard. Chapter 5 considers how the Charter of Fundamental Rights influences the external relations of the EU, in the areas of trade and investment and in the conduct of the CFSP. Chapter 6, finally, considers gaps in judicial protection in two areas: in the regime of actions for annulment filed by private applicants under Article 263(4) TFEU; and in the area of CFSP, where the jurisdiction of the Court of Justice is severely restricted. The conclusions and recommendations are summarized in chapter 7.

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<sup>2</sup> OJ C 364 of 18.12.2000, p. 1.

<sup>3</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, of 17 December 2007, p. 1).

<sup>4</sup> OJ C 303 of 14.12.2007, p. 1.

# 1. THE ROLE OF THE CHARTER OF FUNDAMENTAL RIGHTS IN THE EU LEGISLATIVE PROCESS

## KEY FINDINGS

- Significant progress has been made to ensure that the Charter is fully complied with in the drafting and discussion of legislative proposals in the Union. The Commission has been leading in this regard. The Council and the Parliament have been following suit.
- More could be done to ensure that, beyond the Charter, relevant international human rights instruments are taken into account in compatibility checks and in impacts assessments as part of the legislative procedure; to strengthen the role of participation in impact assessments; and to ensure a permanent, rather than a one-time, assessment of fundamental rights compatibility of EU legislation.
- A significant gain would be achieved by the establishment of a mechanism to systematically screen developments in the Union in order to identify the need to take action at EU level in order to protect and fulfil the rights, freedoms and principles of the Charter.

## 1.1. Introduction

Since the entry into force of the Treaty of Lisbon, the Treaty on the European Union requires that EU institutions, bodies and agencies should fully comply with the EU Charter of Fundamental Rights (Art. 6(1) TEU). This is not a new requirement. The duty to comply with fundamental rights that are recognized within the legal order of the European Union has been affirmed since the early 1970s, and the institutions of the Union did not wait until the entry into force of the Treaty of Lisbon to take various measures to ensure that the Charter of Fundamental Rights would be complied with in the law- and policy-making processes of the EU. This section examines the initiatives that have been taken by the different institutions and some agencies whose work is most sensitive from the point of view of fundamental rights, before providing an assessment.

The chapter explores how the Commission, the Council and the Parliament, have endeavoured to take into account the Charter in the design of legislative proposals and in the presentation of legislative amendments. Section 1.2., which examines the practice of the Commission, highlights the different functions of fundamental rights compatibility checks on the one hand, and of impact assessments including a fundamental rights dimension on the other hand. This distinction shall gradually be of relevance also to the co-legislators of the Union. Until recently, the Council and the Parliament were chiefly concerned with ensuring that any amendments they consider adopting to the Commission's legislative proposals (or indeed, as regards the Member States acting in the field of judicial cooperation in criminal matters or police cooperation, any legislative proposal they may wish to propose) would be checked for their compatibility with the requirements of fundamental rights. The new Interinstitutional Agreement on Better Law Making now commits them to go further, by preparing in certain cases an impact assessment, which would presumably include considerations related to fundamental rights.<sup>5</sup>

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<sup>5</sup> See Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123 of 12.5.2016, at para. 15: "The European Parliament and the Council will, when they consider this to be appropriate and necessary for the legislative process, carry out impact assessments in relation to their substantial amendments to the Commission's proposal".

## 1.2. The European Commission

Within the Union institutions, the Commission has been the most proactive in seeking to integrate the requirements of fundamental rights in its work. It relies on two tools in this regard. The first tool consists in examining whether the legislative proposals prepared by the Commission comply with the requirements of the Charter: this is referred to here as *compatibility checks*. Already in 2001, shortly after the Charter of Fundamental Rights was proclaimed, the Commission pledged to systematically verify the compatibility of its legislative proposals with the Charter at an early stage.<sup>6</sup> Later, in 2005, it clarified the methodology it would use in order to assess the compatibility with the Charter of Fundamental Rights of its legislative proposals.<sup>7</sup> In 2009, it published a Report containing an appraisal of this methodology and announcing a range of improvements.<sup>8</sup>

The approach of the Commission could be further strengthened in a number of ways,<sup>9</sup> but it already may serve to reassure the Court of Justice that all precautions have been taken to ensure an adequate assessment of the compatibility of legislative proposals with the requirements of the Charter of Fundamental Rights, so that the Court may content itself with a relatively low level of scrutiny.<sup>10</sup>

*Impact assessments* are the second tool used by the Commission to ensure the integration of fundamental rights in the law- and policy-making of the EU. Impact assessments, including the assessment of impacts on fundamental rights, should be treated as logically distinct from compatibility checks. Although impact assessments including a fundamental rights dimension could potentially contribute to ensuring that legislative and policy measures are fully compatible with the requirements of the Charter, they fulfil a different role in that they should allow to assess whether a particular initiative shall support the fulfilment or full realization of the fundamental rights affected, or instead create obstacles to such fulfilment, without such an assessment necessarily leading to the conclusion that, in the latter situation, the right is necessarily violated. Impact assessments serve to guide the decision-maker (in the ordinary legislative procedure, the Parliament and the Council) as to the full range of impacts the legislative proposal submitted may entail. They are not a substitute for a legal assessment as to whether potential interferences with fundamental rights are, or are not, justified as measures that pursue a legitimate objective by proportionate means.

Impact assessments is a standard practice since 2002.<sup>11</sup> They were improved in recent years in order to better take into account the requirements of fundamental rights. The guidelines for the preparation of impact assessments presented in 2005 already paid greater attention to the potential effects of different policy options on the guarantees listed in the Charter.<sup>12</sup> The inclusion of fundamental rights in impact assessments, however, did not lead to modify the basic structure of such assessments, which still rely on a division between economic, social and environmental impacts. Despite requests expressed in this regard by the

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<sup>6</sup> SEC(2001) 380/3.

<sup>7</sup> Communication from the Commission, *Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring*, COM(2005) 172 final of 27.4.2005.

<sup>8</sup> See Communication from the Commission, *Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the charter of fundamental rights*, COM(2009) 205 final of 29.4.2009.

<sup>9</sup> See Israel de Jesus Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission', *European Law Review*, vol. 37, Issue 4 (2012), pp. 397-418.

<sup>10</sup> See, for instance, judgment of the Court (Grand Chamber) of 9 November 2010, *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen*, EU:C:2010:662, C-92/09 and C-93/09, esp. para. 81 (in which the Court concludes that the interference with private life was disproportionate, primarily on the basis that in adopting the challenged regulation, it did not appear that 'the Council and the Commission took into consideration methods of publishing information on the beneficiaries concerned which would be consistent with the objective of such publication while at the same time causing less interference with those beneficiaries' right to respect for their private life in general and to protection of their personal data in particular').

<sup>11</sup> Communication of 5 June 2002 on Impact Assessment, COM(2002)276.

<sup>12</sup> See SEC(2005)791, 15.6.2005.



Parliament,<sup>13</sup> the Commission has repeatedly stated that it was unwilling to perform *separate* human rights impact assessments, distinct from the assessment of economic, social and environmental impacts. This so-called "integrated" approach allows fundamental rights impacts to be factored into a broader set of considerations, making it possible to compensate certain negative impacts (such as, for instance, a narrowing down of civil liberties or of the provision of certain public services) by positive impacts at other levels (including, e.g., on economic growth and social cohesion), in the overall assessment presented to decision-makers. This is a defensible position, however it also is a strong argument for not allowing impact assessments, thus understood, to become a substitute for rigorous compatibility checks based on legal analysis. The Commission notes in this regard, correctly in the view of this author, that 'Impact Assessment does not, and cannot, operate as the fundamental rights check. It cannot be a substitute for legal control. In the end result, fundamental rights proofing can only be performed via a legal assessment based on a crystallised draft legislative text. However, while not being, in itself, the legal control for fundamental rights compliance, the Commission recognises that the Impact Assessment can do some of the groundwork to prepare for the fundamental rights proofing of legislative proposals'.<sup>14</sup>

The role of fundamental rights in impact assessments as practiced by the Commission has been gradually enhanced. In 2009 and 2011, successive Staff Working Papers of the Commission have made the role of fundamental rights in impact assessments increasingly more explicit.<sup>15</sup> The guidance provided to the Commission services by these documents applies only to the legislative proposals submitted by the Commission. In contrast, the tools developed as part of the "Better Regulation" agenda apply to all initiatives, whether legislative or regulatory or whether they consist in the introduction of new policies or in amendments to existing policies. Fundamental rights and (for the external dimension of EU action) human rights are now better integrated in these tools. They are explicitly taken into account in the [Better Regulation "Toolbox"](#), in which they constitute tool # 24. The methodology described in the Toolbox should ensure that a series of questions are asked concerning the nature of the rights at stake (whether they are absolute rights or rights subject to limitations), the acceptability of certain restrictions (whether they pursue a legitimate aim by means that are both necessary and proportionate), and the need to reconcile conflicting fundamental rights. Moreover, since not all services of the Commission can be expected to be fully knowledgeable about fundamental rights issues and thus to be equipped to answer these questions in the more complex cases, the guidelines explicitly suggest to seek advice from the Legal Service of the Commission (SJ) or from DG Justice and Consumers (JUST) (or DG Employment, Social Affairs and Inclusion (EMPL) as regards the rights of persons with disabilities).

The specific position of the Legal Service of the Commission may be underlined in this regard. When Mr Clemens Ladenburger -- then, as now, a member of the Legal Service -- was called to answer questions from the United Kingdom's House of Lords European Union Committee concerning the "human rights proofing" of EU legislation, he went at great lengths to reassure the Lords that the Legal Service of the Commission, the main administration in charge of such "proofing", does possess a certain degree of independence: "while it is, of course, an internal service placed under the authority of the President, [the Legal Service] does perform a special role within the Commission. It is not a political service, it is an independent service and it is its task, though in purely internal dealings and, of course, not through its advice

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<sup>13</sup> European Parliament resolution of 15 March 2007 on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals: methodology for systematic and rigorous monitoring ([2005/2169\(INI\)](#)), OP 11 (where the Parliament 'Calls on the Commission to think over its decision to divide its considerations on fundamental rights into the current three categories in its impact assessment - economic, social and environmental effects - and to create a specific category entitled 'Effects on fundamental rights', to ensure that all aspects of fundamental rights are considered').

<sup>14</sup> Communication from the Commission, *Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the charter of fundamental rights*, cited above, p. 6.

<sup>15</sup> See, respectively, SEC(2009) 92 of 15.1.2009 and SEC(2011) 567 final of 6.5.2011. The latter document is a [Commission Staff Working Paper](#) providing Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments.

given in public to function as an independent reviser of fundamental rights questions."<sup>16</sup> Thus, while the College of Commissioners still takes final political responsibility for the text of legislative proposals, the Commission's Legal Service is requested to provide a legal assessment untainted by considerations of political expediency, providing an important safeguard against the risk that fundamental rights will be ignored or their requirements downplayed where competing considerations are seen to have a greater weight. The same could be said of the Legal Services of the Council and of the Parliament, the two institutions we now turn to.

### 1.3. The Council of the European Union

The Council adopted guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies. The original guidelines were approved by the Committee of Permanent Representatives in May 2011<sup>17</sup> following a request of the Justice and Home Affairs Council that "short but pragmatic and methodological guidelines" be prepared to guide the Council bodies in the negotiation of legislative proposals.<sup>18</sup> This was seen as important, not only because States may wish to amend proposals submitted by the Commission (requiring that such amendments pass fundamental rights scrutiny), but also because under Article 76 TFEU, a group of Member States (representing at least a quarter of the Member States, i.e., 7 States) may submit a legislative proposal relating to judicial cooperation in criminal matters or to police cooperation. These are particularly sensitive areas from the point of view of civil liberties; yet, unless a fundamental rights compatibility check is performed by the Council, there would be no procedure to ascertain that such proposals will comply with the requirements of the Charter of Fundamental Rights.

The guidelines originally adopted in 2011 were updated in 2014 under the responsibility of the Council's Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons.<sup>19</sup> The new version of the guidelines appropriately warn that, in order to take into account the case-law of the Court of Justice, the Council and its preparatory bodies (working groups) 'shall carefully consider any possible interference with fundamental rights and freedoms and shall be able to demonstrate that they have explored alternative ways to attain the pursued objective which would be less restrictive of the right or freedom in question'.<sup>20</sup> They include a "fundamental rights check-list" almost indistinguishable from the checklist relied on by the Commission.

It is also perhaps noteworthy that, recognizing that it may be difficult in some cases to assess whether a particular amendment to a legislative proposal is compatible with the requirements of the Charter, the guidelines recall the need to use the expertise of the Fundamental Rights Agency, which is authorized under its Founding Regulation to formulate and publish conclusions and opinions on specific thematic topics, *inter alia* at the request of the Council.<sup>21</sup> This is in line with the Conclusions adopted by the European Council at its meeting of 26 and 27 June 2014, where it noted that, among other measures, greater reliance on Eurojust and on the Agency for Fundamental Rights could support "the smooth functioning of a true European area of justice with respect for the different legal systems and traditions of the Member States", by further enhancing "mutual trust in one another's justice systems".<sup>22</sup> It

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<sup>17</sup> Council of the EU doc. 10140/11.

<sup>18</sup> Justice and Home Affairs Council, Conclusions on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union adopted at the meeting of 24-25 February 2011.

<sup>19</sup> For the revised guidelines, see Council of the EU doc. 16957/14 (16 Dec. 2014) (FREMP 228, JAI 1018, COHOM 182, JURINFO 58, JUSTCIV 327), reissued as doc. 5377/15.

<sup>20</sup> *Id.*, p. 4.

<sup>21</sup> See Art. 4(1)(d) of Council Regulation (EC) No. 168/2007 establishing a European Union Agency for Fundamental Rights, OJ L 53 of 22.2.2007, p. 1

<sup>22</sup> EUCO 79/14, para. 11 of the Conclusions.

is odd however, that whereas the suggestion that the Fundamental Rights Agency's expertise could be relied on more systematically is referred to in the methodology to assess whether a particular proposal or amendment is compatible with the Charter of Fundamental Rights (in part III of the methodology), the Agency is not referred to where steps are suggested 'in case of doubt' (in part IV): there, reference is made only to the Legal Service of the Council, to the experts at national level, or to the FREMP Working Party of the Council or other preparatory bodies of the Council specializing in certain fundamental rights. The methodology would be more consistent if the suggestion to rely on the Agency's expertise were made explicit also in its part IV.

## 1.4. The European Parliament

Like the Commission and the Council, the Parliament can rely on its Legal Service to provide an independent assessment of the compatibility with fundamental rights of the legislative proposals it is presented with, or the amendments it introduces, untainted by political considerations. In addition however, the Parliament has provided, in its Rules of Procedure, for a mechanism further strengthening its ability to ensure full respect for fundamental rights as laid down in the Charter of Fundamental Rights: the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament may be requested by the committee responsible for the subject matter, a political group or at least 40 Members, "if they are of the opinion that a proposal for a legislative act or parts of it do not comply with rights enshrined in the Charter" to provide its opinion on the matter, which "shall be annexed to the report of the committee responsible for the subject-matter".<sup>23</sup>

While this is an important position of principle, and establishes a procedure to allow the EP to examine the compliance of proposed acts with the Charter,<sup>24</sup> the question arises as to whether the Parliament's LIBE Committee can provide an independent, technical and objective legal assessment.

First, although the LIBE Committee has developed over the years a remarkable expertise on fundamental rights, on topics that at times are highly technical, such as on personal data, on fundamental rights in criminal or civil judicial procedures, or on asylum and immigration, it is composed of elected Members of the European Parliament, organized along political lines. This has an impact on the contents of the opinion adopted through a vote in the committee

Second, whereas the LIBE Committee has developed an important expertise on topics related to Justice and Home Affairs, formerly known as "third pillar" issues by reference to the structure of the Treaty of Maastricht and to its Title VI in particular, it is less certain that it can provide useful analysis on fundamental rights related to education, housing, social security or health, or to the integration of persons with disabilities, to mention but a few areas in which social rights have influenced the drafting of the EU Charter of Fundamental Rights. One could be forgiven for thinking that other committees within the Parliament would be better equipped to assess whether, in these areas, a particular legislative proposal, or indeed any amendment suggested by the Parliament, shall represent an improvement or, instead, a retrogressive step. Indeed, the more fundamental rights issues will be owned by all committees within the Parliament, and taken into account routinely in their work, the more they can be expected to shape legislative reforms in different policy areas, including in those (such as the establishment of the internal market or structural funds) that, under a superficial view, would seem related only loosely, if at all, to fundamental rights concerns.

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<sup>23</sup> Rule 38 of the [Rules of Procedure](#) (version of July 2016).

<sup>24</sup> The procedure foreseen in the EP Rules of Procedure, Rule 38, was used only once, in 2012: see LIBE opinion to the ITRE committee on the compatibility of ACTA with the rights enshrined in the Charter of Fundamental Rights of the European Union. At the same time, LIBE is normally involved in legislative files that touch upon fundamental rights issues dealt with by other Committees in different ways (production of "normal" opinions; procedure with associated committees; procedure with joint committee meetings).

In addition to seeking the opinion of its Legal Service, the Parliament has other means at its disposal to allow for a proper assessment of the compliance with fundamental rights of the proposals it is presented with for adoption. It may request the opinion of the Court of Justice on whether a particular international agreement is compatible with the Treaties, including the provisions of the Treaties that concern fundamental rights<sup>25</sup>: as illustrated by the request for an opinion of the Court on the PNR EU-Canada agreement, this may also have impacts on the protection of fundamental rights within the EU.<sup>26</sup> At administrative level, the Parliament established a Directorate for Impact Assessment and European Added Value, which started work in January 2012, as a follow-up to the own-initiative report on guaranteeing independent impact assessment (Niebler report) which advocated the strengthening of impact assessment throughout the full policy cycle, on both an *ex ante* and an *ex post* basis.<sup>27</sup> Its Impact Assessment Units now allow the Parliament to carry out its own impact assessment, mainly by checking that the Commission has complied with the Better Regulation and the Toolbox, which include fundamental rights compliance. Finally, as further detailed below, the Parliament may seek the opinion of the Fundamental Rights Agency when confronted with doubts about the compatibility with fundamental rights of a legislative proposal it is presented with, or of a proposed amendment.

## 1.5. An assessment

Are these measures sufficient? The following concerns relate both to compatibility checks and to impact assessments, although the specific function of each should be kept in mind:

### 1.5.1. Beyond the Charter of Fundamental Rights

Taking the Charter of Fundamental Rights as the sole reference in the practice of compatibility checks and impact assessments may result in the emergence of serious gaps. It should be recalled that the Charter is only a *partial* and *provisional* codification of the fundamental rights *acquis*, at one point in time, of the EU. In addition to the Charter, the EU institutions, bodies and agencies are duty-bound to act in compliance with the fundamental rights included among the general principles of Union law (Art. 6(3) TEU). According to the EU Treaty, such fundamental rights derive from the European Convention on Human Rights or other international human rights instruments to which the EU Member States have acceded or in the elaboration of which they have cooperated, as well as from the constitutional traditions common to the Member States.

The practice of the Court of Justice in this regard has been selective. Although the EU Treaty does acknowledge the specific position of the European Convention on Human Rights, the Court has frequently relied on the International Covenant on Civil and Political Rights (ICCPR) in areas where the European Convention on Human Rights was insufficiently comprehensive or the case-law of the European Court of Human Rights unclear.<sup>28</sup> It has also taken into account the 1989 Convention on the Rights of the Child. When, invoking in particular the Convention on the Rights of Child, the Parliament sought to have the 2003 Family Reunification Directive<sup>29</sup> annulled, the Court took the view that, just like the ICCPR, the Convention on the Rights of the Child "binds each of the Member States",<sup>30</sup> and thus could

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<sup>25</sup> Article 218(11) of the Treaty on the Functioning of the European Union.

<sup>26</sup> Opinion 1/15 on the envisaged EU-Canada Agreement on the transfer and processing of Passenger Name Record data, requested by the European Parliament on 10 April 2015. Advocate General P. Mengozzi delivered his opinion on 9 September 2016, concluding that the draft agreement cannot be entered into in its current form.

<sup>27</sup> 2010/2016(INI), 8 June 2011.

<sup>28</sup> See, e.g., judgment of 18 October 1989, *Orkem v Commission*, 374/87, [1989] ECR 3283, EU:C:1989:387, para. 31, and judgment of 18 October 1990, *Dzodzi v Belgian State*, C-297/88 and C-197/89, [1990] ECR I-3763, EU:C:1990:360, para. 68.

<sup>29</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

<sup>30</sup> Judgment of 27 June 2006, *European Parliament v. Council of the European Union*, C-540/03, EU:C:2006:429, para. 37.

be a source of inspiration allowing it to develop fundamental rights as part of the general principles of Union law. The 1951 Convention on the Status of Refugees also has a privileged position in Union law, as this instrument is referred to in the Treaty on the Functioning of the European Union as having to guide the Union's common policy on asylum, subsidiary protection and temporary protection,<sup>31</sup> and is explicitly mentioned in Article 18 of the Charter of Fundamental Rights on the right to asylum. Finally, the Convention on the Rights of Persons with Disabilities is part of the EU legal order since the European Union became a party to the convention in 2011. It could be expected that, as recommended by the Committee on the Rights of Persons with Disabilities when it examined the report submitted by the Union in June 2014,<sup>32</sup> the impact assessment guidelines will be "reviewed and modified in order to include a more comprehensive list of issues to better assess compliance with the Convention".<sup>33</sup> This would represent an improvement on the current situation, in which the Convention on the Rights of Persons of Disabilities is only seen as having to guide the interpretation of the Charter.<sup>34</sup>

The Court has been much less keen to rely on international human rights instruments other than those cited above, whose specific position in the EU's fundamental rights landscape is generally acknowledged. Yet, it is arguable at least that instruments such as the International Covenant on Economic, Social and Cultural Rights, or the European Social Charter, should also constitute a source of inspiration for the identification of fundamental rights as part of general principles of Union law, given that they have been ratified by all the EU Member States (although in the case of the European Social Charter, which allows to a certain extent for an *à la carte* approach, with uneven levels of acceptance of its provisions). Indeed, the Court of Justice itself has remarked as much in the 2007 case of *Kiiski*<sup>35</sup>: notwithstanding the fact that their commitments vary, all EU Member States have pledged to "accept [the European Social Charter] as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the ... rights and principles [listed in Part II of the European Social Charter] may be effectively realised".<sup>36</sup> The EU Member States have "confirm[ed] their attachment to fundamental social rights as defined in the European Social Charter" in the Preamble of the Treaty on the European Union,<sup>37</sup> and they further pledged to build on the European Social Charter in Article 151 of the Treaty on the Functioning of the European Union, as well as in the Preamble of the EU Charter of Fundamental Rights.

The Commission has occasionally been explicit about the role of international human rights in fundamental rights compatibility checks or impact assessments, beyond the Charter of Fundamental Rights. For instance, when it proposed to amend the Reception Conditions Directive, it has sought to ensure compliance not only with the Charter of Fundamental Rights but also with relevant international standards, in particular the European Convention on Human Rights, the 1951 Geneva Convention and the United Nations Convention on the Rights of the Child.<sup>38</sup> Already in 2007, the Parliament had called on the Commission to "check the compliance of legislative proposals not only with the Charter of Fundamental Rights, but also with all European and international instruments regarding fundamental rights and with the

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<sup>31</sup> Article 78(1) TFEU (see, prior to the entry into force of the Lisbon Treaty, Articles 63 and 64(1) of the EC Treaty).

<sup>32</sup> UN doc. CRPD/C/EU/1 (3 December 2014).

<sup>33</sup> UN doc. CRPD/C/EU/CO/1 (2 October 2015), para. 13.

<sup>34</sup> The Guidelines state (in Toolbox #24): "The level of protection offered by the Charter cannot be less than that provided by international agreements to which the Union or all the Member States are a party. The Charter should be interpreted in line with such instruments including the UN Convention on the rights of persons with disabilities (CRPD)".

<sup>35</sup> See Judgment of 20 September 2007, *Sari Kiiski*, C-116/06, EU:C:2007:536, paras. 48-49 (where the Court relies on the European Social Charter in order to support its interpretation of the requirements of Council Directive 92/85/EEC on the improvement to safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding).

<sup>36</sup> This is the definition of the undertaking of States parties under both the 1961 and the 1996 versions of the European Social Charter.

<sup>37</sup> See 5th preambular paragraph of the EU Treaty, OJ C 83 of 30.3.2010, p. 13.

<sup>38</sup> Communication from the Commission, *Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the charter of fundamental rights*, cited above, p. 4.

rights derived from the constitutional traditions common to the Member States, as general principles of EC law".<sup>39</sup> In its December 2012 resolution on the situation of fundamental rights in the EU (2010-2011), the Parliament again "recommends that the Commission revise the existing Impact Assessment Guidelines to give greater prominence to human rights considerations, widening the standards to include UN and Council of Europe human rights instruments" (OP 3).

Such references remain sporadic and uneven, however. **For references to fundamental rights beyond the partial codification of the Charter of Fundamental Rights to become systematic and for reliance on international human rights law beyond the Charter to become standard practice, it should be made clear (i) which instruments beyond the Charter of Fundamental Rights should be taken into account; (ii) the weight that should be given to the interpretation of such instruments by the monitoring bodies established to supervise them, particularly within the Council of Europe and the United Nations human rights system, including within the International Labour Organisation as regards relevant ILO conventions; and (iii) especially as regards fundamental rights impact assessments, which indicators should be used to assess the contribution a particular regulatory or policy initiatives makes to the fulfilment of human rights, or the negative impacts such initiatives may result in.**

### *1.5.2. The role of fundamental rights throughout the legislative process*

A second concern relates to the tools that allow fundamental rights to be taken into account throughout the legislative procedure. As currently practiced, the IAs still insufficiently ensure that fundamental rights concerned shall be mainstreamed in the EU's decision-making process: an empirical study assessing how the various horizontal "mainstreaming agendas" are served by IAs concluded, based on a number of case studies, that IAs were not giving equal attention to the six mainstreaming objectives referred to by the TFEU<sup>40</sup>: "While social and environmental concerns are primary objectives of assessment of the IIA system", this study notes, "fundamental rights constitute a more ad hoc horizontal category".<sup>41</sup> Of the 35 IAs examined (covering the period 2011-2014), fundamental rights were taken into account in 19 cases, and in none of the cases where they were ignored was any justification provided for this. The relatively marginal role of fundamental rights in Impact Assessments (certainly compared to economic considerations about regulatory burdens on businesses, but also compared to the other "mainstreaming objectives" listed in the TFEU, with the exception of gender and non-discrimination, is further illustrated by the findings of the Impact Assessment Board, which since 2007 tracks which issues are addressed in IAs and adopts recommendations to improve the process: it would appear that, whereas 80% of the of the IAB reports included comments on the consideration of economic impacts in an average year, recommendations related to fundamental rights were found in only 10% of the reports.<sup>42</sup> The authors of this study attribute this state of affairs to the fact that "the EU's fundamental rights regime is mainly conceived as a negative guarantee, intended to ensure that the EU

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<sup>39</sup> European Parliament resolution of 15 March 2007 on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals: methodology for systematic and rigorous monitoring ([2005/2169\(INI\)](#)), OP 6.

<sup>40</sup> In addition to fundamental rights, these objectives are : gender equality (Article 8 TFEU); the promotion of a high level of employment, adequate social protection, the fight against social exclusion, and a high level of education, training, and protection of human health (as stipulated in the so-called "horizontal social clause" of Article 9 TFEU); non-discrimination on the basis of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 10 TFEU); environmental policy integration for sustainable development (Article 11 TFEU); and consumer protection (Article 12 TFEU).

<sup>41</sup> S. Smismans and R. Minto, "Are integrated impact assessments the way forward for mainstreaming in the European Union?", *Regulation & Governance* (2016), doi:10.1111/rego.12119, p. 2. The study also notes that "while the six mainstreaming objectives receive attention in the IIA [integrated impact assessments] institutional set-up, other objectives receive at least as much attention. Indeed, both the assessment of economic impacts and of regulatory burdens are predominant in the set-up of the IIA system, although neither of these are set out in the treaties as constitutional horizontal objectives" (id.).

<sup>42</sup> Id., p. 15.

should not negatively impact on fundamental rights, rather than as a positive regime promoting these values in a proactive way at policy level. The operational guidelines on fundamental rights in the IA are, thus, steered to set off a warning light whenever policy intervention would negatively impact on fundamental rights, while failing to use IAs actively to define the objectives of new policy initiatives that positively promote fundamental rights".<sup>43</sup> This author concurs.

Moreover, by definition, the guidelines on impact assessments, including Toolbox #24 clarifying the role that fundamental rights play in IAs, only apply to the Commission. The recent improvements to Impact Assessment by the Parliament, which followed the adoption of the Niebler report in June 2011, are an important step to ensure that fundamental rights impacts of amendments to pending legislative proposals shall be adequately assessed by the Parliament's services, thus equipping the relevant parliamentary committees with the information required to allow them to take fundamental rights fully into account. The Council also has established mechanisms to ensure that the amendments the Council makes to legislative proposals from the Commission shall not lead to violations of the Charter of Fundamental Rights. Such mechanisms however are not designed to ensure that, in choosing between different regulatory options, it will opt for the option that will contribute most effectively to the protection and promotion of fundamental rights.

In other terms, **whereas, by combining a fundamental rights compatibility check with the inclusion of fundamental rights in impact assessments, the Commission in principle not only acts proactively to minimize the risk that the measures it proposes will result in fundamental rights being violated, but also guides the decision-making process to ensure that the course of action that will best support the fulfilment of fundamental rights will be chosen, and whereas the Parliament also has developed a practice that combines compatibility checks with impact assessments including a fundamental rights dimension, the Council does not have these same tools at its disposal.** This is only of limited importance as long as the amendments introduced in the course of the legislative procedure remain minor or concern only aspects of the proposal that are unrelated to fundamental rights. It can become a problem, however, where the changes are more substantial, and affect a core dimension of the proposal submitted. The new Interinstitutional Agreement on Better Law Making now provides an opportunity for the Council to strengthen its practice of IAs, seeking inspiration in this regard from the experience of the Commission.

### *1.5.3. The independent and participatory dimensions of fundamental rights compatibility checks and impact assessments*

A third concern has to do with the procedures through which compatibility checks and impact assessments are conducted. Two issues arise here. The first has to do with the importance of an **independent fundamental rights expertise in such procedures.**

The Commission relies on its Legal Service as well as on DG JUST to assess the compatibility of the legislative proposals to be adopted by the College of Commissioners; the Council and the Parliament rely on their own Legal Services. As noted in section 1.4., the more compatibility checks can be performed through mechanisms that have the required legal expertise as well as the necessary independence from immediate political considerations, the more trustworthy such checks will be. However, even the Legal Services of the respective institutions are not fully independent from the bodies to which they belong (they remain "internal" checks); nor are they specialized in the area of fundamental rights. In order to compensate for this, a more systematic consultation of the EU Fundamental Rights Agency

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<sup>43</sup> Id., p. 13 (citing O. De Schutter, "Mainstreaming Human Rights in the European Union", in Ph. Alston and O. De Schutter (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency* (Oxford, Hart Publ., 2005), pp. 37-72).

may be warranted. Under Article 4(1)(a) of its Founding Regulation,<sup>44</sup> the Fundamental Rights Agency may "formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission"; although it is normally not authorized to formulate conclusions and opinions that concern legislative proposals or positions adopted by institutions in the course of the legislative procedure, it may adopt such conclusions and opinions at the request of the said institutions.<sup>45</sup>

A second issue concerns **participation of civil society organizations, representatives of those potentially affected by the measures, or people or organisations working in the field considered, in the impact assessment procedure.**<sup>46</sup> Consistent with the requirements of the EU Treaty, which impose that the institutions of the Union "maintain an open, transparent and regular dialogue with representative associations and civil society", and that the Commission in particular "carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent",<sup>47</sup> the Commission pledges to organize broad consultations prior to making legislative or policy proposals. Specific Guidelines on Stakeholder consultation are included as part of the Better Regulation Guidelines,<sup>48</sup> and Tool #50 of the Better Regulation Toolbox is dedicated specifically to stakeholder consultation.

In the area of fundamental rights, this serves essentially three purposes. First, consultations can help identify the likely impacts on fundamental rights of a regulatory or policy measure that is envisaged, thus enriching the preparation of the fundamental rights dimensions of IAs. Second, consultations are an important tool to ensure that the measures proposed will not go beyond what is proportionate and necessary for the achievement of the aims they pursue: by consulting with stakeholders who are familiar with the practices in a certain field, the Commission can be alerted to the existence of certain good practices (for instance, in certain Member States or in certain regions or municipalities) that it may not have been aware of, and that may constitute less restrictive alternatives to obtain the same results, thus maintaining a better balance between fundamental rights and other societal objectives. Third, consultations can strengthen the legitimacy of the proposals: transparency in decision-making builds trust, at the same time improving accountability of the institutions.

In fact however, participation is often limited to online consultations, based on pre-defined questions prepared by the Commission which prejudice the framing of the issues to be addressed -- presenting as given, therefore, its own diagnosis of the problem. The opportunity for participation being "transformative" is largely missed.<sup>49</sup> It is in this regard welcome that the new Interinstitutional Agreement on Better Law Making emphasizes the importance of public and stakeholder consultation and feedback.<sup>50</sup> **This provides an opportunity to rethink the purpose of public consultations, and to make them more meaningful. This could significantly improve the trust of the public in the decision-making process of the EU.**

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<sup>44</sup> Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53 of 22.2.2007, p. 1.

<sup>45</sup> Id., Article 4(2).

<sup>46</sup> This is less relevant for fundamental rights compatibility checks, which are a primarily legal exercise best achieved by specialized bodies or experts.

<sup>47</sup> Article 11(2) and (3) TEU.

<sup>48</sup> See [http://ec.europa.eu/smart-regulation/guidelines/ug\\_chap7\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/ug_chap7_en.htm)

<sup>49</sup> See E. Bozzini and S. Smismans, "More inclusive European governance through impact assessments?", *Comparative European Politics*, vol. 14(1) (2015), pp. 89–106.

<sup>50</sup> See Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123 of 12.5.2016, at para. 19.



#### 1.5.4. *The permanent adaptation of the regulatory and policy framework to the changing requirements of the fundamental rights*

The requirements of the Charter of Fundamental Rights and, more generally, of fundamental rights recognized in the legal order of the Union, are evolving. In particular, in accordance with Article 52(3) of the Charter, the meaning and scope of the Charter's provisions that correspond to provisions of the European Convention on Human Rights are to be read taking into account the jurisprudence of the European Court of Human Rights. Aligning the interpretation of the Charter on international jurisprudence should not be limited to the provisions directly inspired by the European Convention on Human Rights, however: the same principle could apply, for instance, to the Charter's provisions that are based on the European Social Charter, as explained in another study prepared for the Parliament's Committee on Constitutional Affairs.<sup>51</sup> More generally, the jurisprudence of the Council of Europe monitoring bodies (beyond the European Court of Human Rights and the European Committee of Social Rights) could be more systematically referred to, consistent with the 2007 Memorandum of Understanding between the Council of Europe and the European Union, which provides that "the EU regards the Council of Europe as the Europe-wide reference source for human rights".<sup>52</sup> For the sake of coherence in the promotion and protection of human rights and in order to avoid situations where the EU Member States would be facing conflicting obligations, the same openness could be expected towards findings from United Nations human rights treaty bodies, established by the UN human rights treaties, and towards those of the Special Procedures of the UN Human Rights Council.

The implication is that **a specific mechanism should be established within the Union institutions, to systematically ensure that Union law be adapted to the changing requirements of international human rights law, particularly insofar as such requirements influence the meaning and scope of the provisions of the Charter of Fundamental Rights.** One example may suffice to illustrate this. A judgment delivered by the European Court of Human Rights on 26 June 2016 in the case of *Taddeucci and McCall v. Italy* concludes that the non-discrimination requirement of Article 14 ECHR, in combination with the right to respect for family life guaranteed in Article 8 ECHR, is violated by rules concerning family reunification that reserve the notion of 'spouse' to the opposite-sex partner having married with the sponsor seeking to be joined in the host State. This judgment shall necessarily influence Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Free Movement Directive).<sup>53</sup> Similar conclusions would apply as regards the 2003 Family Reunification Directive<sup>54</sup> which, although it ensures in principle that the spouse will benefit from family reunification (Art. 4(1)a), is still interpreted restrictively on this point in a number of EU Member States. Thus, following this judgment, a clarification of the obligations of the EU Member States under the Free Movement and the Family Reunification directives, as regards the recognition of same-sex married couples, may therefore be required. Whereas, in the [List of Actions by the](#)

<sup>51</sup> The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights (by Olivier De Schutter) (January 2016), study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee (PE 536.488). See, on this point, para. 5.1. of the study.

<sup>52</sup> The continued relevance of the 2007 Memorandum of Understanding was reaffirmed at the 125th session of the Committee of Ministers of the Council of Europe (Brussels, 19 May 2014): Cooperation with the European Union - [Summary Report](#), para. 7. At the 2014 joint meeting of the Council of Europe and the EU, it was agreed that the Union 'could make a more systematic use of the assessments provided by the Council of Europe monitoring bodies. Such a practice has already developed in the context of the evaluation of the functioning of judicial systems in the 28 EU Member States in the European Commission's annual "Justice Scoreboard", which relies on data from the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ)".

<sup>53</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77.

<sup>54</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251 of 3.10.2003, p. 12.

[\*Commission to advance LGBTI equality\*](#) it presented in December 2015, the Commission commits to "continue to ensure that the specific issues related to sexual orientation and gender identity are properly taken into consideration in the transposition and implementation of Directive 2004/38 on the right of EU citizens to move and reside freely within EU countries", a more proactive approach would be required in a case such as this one, to ensure that Union law remains fully compliant the changing requirements of the Charter of Fundamental Rights, as influenced by developments in international human rights law.

**Legislative or policy instruments that have been assessed, at the time of their adoption, to be consistent with the requirements of the Charter of Fundamental Rights, will not necessarily remain so later in time, as the meaning and scope of the Charter's provisions will evolve with the changing jurisprudence of international human rights law. The establishment of a permanent mechanism to ensure that the Union legislative and policy framework will be constantly adapted to such new developments would seem to be required.**

#### *1.5.5. The proactive role of the Charter of Fundamental Rights: positive duties*

Finally, and perhaps most importantly, there is a need to think beyond compatibility checks and impact assessments, both of which are *reactive* (as they follow legislative proposals or policy initiatives that are presented), in order to examine how fundamental rights could inform, *proactively*, the legislative and policy agenda-setting.

In general human rights law, human rights impose not only duties of abstention (negative duties not to adopt measures that could infringe on human rights, unless certain conditions are complied with), but also duties of action (positive duties to take measures that protect and fulfil human rights). In other terms, a commitment to human rights goes beyond accepting a prohibition: it also involves a duty to contribute the realization of human rights, by exercising certain powers so as to maximize the enjoyment of human rights by the rights-holders. Contrary to a widely held view, this dual function of human rights is fully compatible with the principle of conferral, according to which the EU institutions are attributed certain limited powers by the EU Member States, the "masters" of the treaties (Article 5(1) and (2) TEU); and it is fully compatible with the principle of subsidiarity, according to which, in areas of shared competences, the EU should only take action if and in so far as the action envisaged "cannot be sufficiently achieved by the Member States, either at central or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level" (Article 5(3) TEU).

The Charter of Fundamental Rights is not merely a set of prohibitions. It also should serve as a tool to guide action, ensuring that the institutions of the Union exercise their competences with a view to fulfilling the provisions of the Charter. Article 51(1) of the Charter states that the institutions of the Union shall "respect the rights, observe the principles and *promote the application thereof* in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties" (emphasis added). Of course, para. 2 of Article 51 adds that "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties". That does not imply, however, that no positive obligations (duties to take action) can follow from the Charter. The Explanations accompanying the Charter clarify that "an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers". But that is not to say no such obligation exists: it is simply to recall that any such obligation as might arise would be limited to the exercise of the powers that the institutions have been attributed.

There are situations where the effective protection of fundamental rights in the legal order of the Union may require that certain legislative or policy initiatives be proposed at EU level.

This may be the case, for instance, in order to avoid a situation in which economic freedoms, such as the free movement of goods, freedom of establishment or the freedom to provide services across borders, would lead national lawmakers, in the absence of harmonization measures at Union level, to reduce the level of protection of certain rights such as the right to health or the right to education. Or it may be necessary to strengthen the protection of fundamental rights in the area of freedom, security and justice, in order to cement the mutual trust on which mutual recognition of judicial decisions depends. Similarly, the gradual emergence of a common policy in the field of asylum was largely guided by the realization that, in the absence of harmonization at EU level, certain countries would become "magnets" attracting asylum-seekers because of the generosity of their system of protection, which could lead them to lower the level of protection of asylum-seekers, leading to a downward spiral at the expense of refugees' rights.

Many other examples could be given.<sup>55</sup> The significance of such examples is this: **the system of protection of fundamental rights in the Union still lacks a mechanism that would allow to systematically screen developments in the Union in order to identify the need to take action at EU level in order to protect and fulfil the rights, freedoms and principles of the Charter, where an initiative of the Union institutions may be required to avoid the Charter's values being threatened by the decentralized and uncoordinated action of the EU Member States.** Such a mechanism, it may be recalled, had been proposed by the Commission, when it adopted its 2003 communication on the values on which the Union is founded.<sup>56</sup> The Commission referred in that communication to the work of the EU Network of independent experts on fundamental rights, a group of experts established in September 2002 at the request of the Parliament's LIBE Committee in order to support its task of monitoring fundamental rights in the EU.<sup>57</sup> Using the Charter of Fundamental Rights as its benchmark, the network proceeded through comparisons across the EU Member States, systematically comparing how the Member States addressed certain challenges facing the implementation of fundamental rights. The Commission took the view that the monitoring-by-comparison function assumed by the network 'has an essential preventive role in that it can provide ideas for achieving the area of freedom, security and justice or alerting the institutions to divergent trends in standards of protection between Member States which could imperil the mutual trust on which Union policies are founded'.<sup>58</sup> The comparative analyses of the network, in order terms, were seen as favouring the emergence of a proactive fundamental rights policy, one that would allow the Union institutions to be alerted to the need to take initiatives in areas where divergences appeared between the Member States, that could lead to undermine the integration project -- resulting in new barriers within the internal market, creating obstacles to cooperation between national authorities in the area of freedom, security and justice, or leading to undermine the ability for the EU Member States to improve the protection of fundamental rights within their jurisdiction.

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<sup>55</sup> See for an elaboration on this theme, Olivier De Schutter, 'Fundamental Rights and the Transformation of Governance in the European Union', *Cambridge Yearbook on European Legal Studies*, 2007, pp. 133-175; or Olivier De Schutter, 'The Implementation of Fundamental Rights through the Open Method of Coordination', in O. De Schutter and S. Deakin (eds), *Social Rights and Market Forces. Is the open coordination of employment and social policies the future of Social Europe?*, Bruxelles, Bruylant, 2005, pp. [279-343](#).

<sup>56</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final of 15.10.2003.

<sup>57</sup> Resolution of 5 July 2001 on the situation of fundamental rights in the European Union (2000) (rapp. Thierry Cornillet) (2000/2231(INI)) (OJ C 65 E, 14.3.2002, pp. 177-350), para. 9. The EU Network of Independent Experts on Fundamental Rights worked for a period of four years, delivering its final opinions and reports in September 2006. It presented reports on an annual basis on the situation of fundamental rights in the EU and in the EU Member States; it adopted in-depth studies on certain emerging issues related to the protection of fundamental rights in the EU, in the form of so-called "Thematic Comments", focusing for instance on the rights of minorities in the EU or on the balance to be achieved between security and civil liberties in the fight against terrorism; and it adopted "opinions", at the request of the European Parliament's LIBE Committee or of the European Commission.

<sup>58</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, cited above, para. 2.1., p. 10.

## 2. THE ROLE OF THE CHARTER OF FUNDAMENTAL RIGHTS IN THE ECONOMIC GOVERNANCE OF THE EUROPEAN UNION

### KEY FINDINGS

- At present, scant attention is being paid to the social provisions of the Charter in the tools developed in the new economic governance architecture of the Union. This is a major gap, and it breeds suspicion and hostility towards attempts to improve economic coordination in the Union. Vague references to "social fairness" are not a substitute for an approach based on social rights.
- The Charter of Fundamental Rights should be complied with in the European Semester. Country-specific recommendations as well as the annual growth survey recommendations the Commission submits to the Council should take into account the normative components of the social rights of the Charter.
- The notion of "exceptional circumstances" allowing under the Treaty on Stability, Coordination and Governance within the Economic and Monetary Union (TSCG) for a deviation from the medium-term objective or the adjustment path announced (Article 3(3)(b) of the TSCG), should be interpreted to include the inability for a country to comply without compromising its obligations under the social provisions of the Charter.
- Article 7(7) of Regulation (EU) No. 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability specifies that the budgetary consolidation efforts required following the macroeconomic adjustment programme must "take into account the need to ensure sufficient means for fundamental policies, such as education and health care". This provision should be interpreted in line with the requirements of the social provisions of the Charter.
- There is general agreement that the Commission and the European Central Bank (ECB) remain bound by the Charter in the fulfilment of their tasks under the European Stability Mechanism (ESM), established in 2012 through an intergovernmental agreement as an international organisation with a legal personality separate from that of the Union. The Commission and the ECB also are expected to impose that the Charter be complied with in the lending practices of the ESM. This study supports the view adopted by the Court of Justice that the conclusion of Memoranda of Understanding with countries appealing to the ESM should be systematically assessed for their compatibility with the social provisions of the Charter.
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### 2.1. Introduction<sup>59</sup>

The most pressing issue concerning the role of the Charter of Fundamental Rights in guiding the exercise by the institutions of the Union of their powers concerns the economic governance of the EU, and the governance of the eurozone in particular.<sup>60</sup> This economic governance is now composed of four layers. In this section, each of these layers are examined, with a view to describing how, if at all, the Charter of Fundamental Rights is taken into account; and if not, whether this should change.

<sup>59</sup> The author acknowledges the work he has been doing jointly with Prof. M. Salomon, from the London School of Economics, and with Mr. P. Dermine, now at Maastricht University, on the issues covered in this section. He takes full responsibility, however, for the errors and omissions that remain.

<sup>60</sup> For detailed analyses on this issue, see Kaarlo Tuori et Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis*, Cambridge, Cambridge University Press, 2014; C. Kilpatrick and B. De Witte (dir.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, EUI Working Papers, 2014/05.

## 2.2. The European Semester

The European Semester is an institutional process of macroeconomic, budgetary and structural policy coordination driven by the Commission.<sup>61</sup> It is designed to enhance macroeconomic and systemic convergence across the Eurozone and the European Union. It brings together under a single framework a variety of preexisting tools, including the Europe 2020 Strategy, the Stability and Growth Pact, the EuroPlus Pact and the Macroeconomic Imbalance Procedure initially set up as part of the 'Six-Pack' set of instruments to address the sovereign debt crisis which exploded in 2009-2010.<sup>62</sup>

The European Semester has most recently been strengthened by the adoption of the 'Two-Pack'. Regulation (EU) No. 473/2013,<sup>63</sup> the first component of the 'Two-Pack', requires Member States of the Eurozone to submit draft budgetary plans in October for review by the Commission, allowing the Commission to recommend amendments if the draft budgetary plans are assessed to be incompatible with the Stability and Growth Pact. The objective is to strengthen the surveillance of budgetary and economic policies in Euro Area Member States, with closer monitoring of Member States that are subject to an excessive deficit procedure under Article 126 TFEU. The objective is to ensure "macro-financial soundness and economic convergence, to the benefit of all Member States whose currency is the euro",<sup>64</sup>

The European Semester starts with the submission by the Commission, in November of each year, of the Annual Growth Survey (AGS), a document setting out the socio-economic and fiscal priorities of the EU for the year to come<sup>65</sup>, and of the Alert Mechanism Report (AMR), which uses a scoreboard of socio-economic indicators to identify the countries that, in the framework of the Macroeconomic Imbalance Procedure, should be subject to further macroeconomic investigation in the framework of an In-Depth Review (IDR). These documents are presented to the Council for adoption, before being endorsed by the European Council. The EU Member States on their part are expected to present their National Reform Programmes in March, listing the socio-economic reforms envisioned in the framework of Europe 2020 and the Europe Plus Pact and taking into account the conclusions of the Annual Growth Survey. Eurozone Member States also present their Stability Programmes (or Convergence Programmes for non-Eurozone members), in which they describe their budgetary trajectory for the year to come, in the framework of the Stability and Growth Pact. These Programmes are then analyzed by the Commission. By the end of May, the Commission provides for each Member State set of country-specific recommendations (CSR), that are then adopted by the Council.

**Considerations grounded in fundamental rights are almost entirely absent from this process.** This is despite the significant impacts the imposition of budgetary discipline may have, for instance, on education (Article 14 of the Charter), on the right to social security (Article 34), on the level of provision of healthcare (Article 35), or on access to services of general interest (Article 36). Whether we consider the primary law of the Union (Articles 121, 126 and 148 TFEU, Protocol n°12 on the Excessive Deficit Procedure) or secondary legislation (Regulation 1466/97, Regulation 1173/2011, Regulation 1176/2011, Regulation 1174/2011 and Regulation 473/2013), none of the legal instruments under which the European Semester is organized refer explicitly to a duty to take into account fundamental rights. The only exceptions are to be found in Regulation (EU) No. 1176/2011 on the prevention and correction of macroeconomic imbalances and in Regulation (EU) No. 473/2013, part

<sup>61</sup> The European Semester is established under Article 2A, § 2 of Regulation 1466/97, as amended by Regulation 1175/2011 of 16 November 2011, L306, 23 November 2011, p. 12.

<sup>62</sup> A coordination cycle initiated by the Six-Pack in 2011 designed to prevent and correct dangerous macroeconomic evolutions: see Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306, 23.11.2011, p. 25.

<sup>63</sup> Regulation (EU) No. 473/2013 of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ L 140, 27.5.2013, p. 11.

<sup>64</sup> Id., preambular para. 9.

<sup>65</sup> And now also accompanied by a set of recommendations specific to the Eurozone area.

respectively of the 'Six-Pack' and of the 'Two-Pack' packages, to monitor macroeconomic imbalances or to strengthen the surveillance of budgetary and economic policies in Euro Area Member States, with closer monitoring of Member States that are subject to an excessive deficit procedure under Article 126 TFEU: these instruments provide that "[i]n accordance with Article 28 of the Charter of Fundamental Rights of the European Union, [they] shall not affect the right to negotiate, conclude or enforce collective agreements or to take collective action in accordance with national law and practice".<sup>66</sup>

Of course, the lack of explicit references to fundamental rights may be compensated, in part at least, by the establishment of mechanisms ensuring that -- whether they are explicitly mentioned or not --, such rights will be taken into account. However, apart from the fact that explicit recognition of social rights may be seen as a condition for their effective institutionalization in policy processes and, ultimately, of accountability,<sup>67</sup> whatever safeguards are established in the European Semester remain weak. It is welcome that many instruments encourage a strong involvement of all relevant stakeholders, with a specific emphasis on the social partners, and the organisations of civil society.<sup>68</sup> But this remains mainly recommendatory, and is left to the Commission's discretion: Article 2a(4) of Regulation No. 1466/97, for instance, requires the Commission to involve social partners only "when appropriate".<sup>69</sup> Such involvement is furthermore not provided for in the framework of the Excessive Deficit Procedure (although it is for the Excessive Imbalance Procedure). Some instruments do also explicitly refer to Article 152 TFEU (which recognizes and promotes the role of social partners at EU level) or, as already mentioned, to Article 28 of the Charter of Fundamental Rights of the European Union. Others emphasize the need for the European Semester to respect national practice and institutions for wage formation.<sup>70</sup> Regulation No. 473/2013 specifies, in its Recital n° 8 and Article 2(3), that the budgetary monitoring mechanisms it sets up should be applied without prejudice to Article 9 TFEU, the so-called "horizontal social clause".<sup>71</sup> Finally, the intervention of the Parliament, and exceptionally of national parliaments, is also provided for, notably through the establishment of an Economic Dialogue with the Commission and the Council.<sup>72</sup> In reality however, the involvement of parliamentary assemblies in the process remains very weak, and it has at yet an essentially symbolic value.

Although the Commission's methodology in the framework of the European Semester remains difficult to assess for external observers, there is nothing to suggest that fundamental rights concerns play any role either in the macro-economic assessments it prepares, or in the recommendations it addresses to Member States. Whatever the reasons for this omission, it seems clearly in contradiction with the pledge to "better regulation": to improve decision-making by better assessing the impacts of various legislations and policies. Indeed, the country-specific recommendations as well as the annual growth survey recommendations the Commission submits to the Council would seem to be among the kind of initiatives that require an Impact Assessment under the Commission's own rules as stipulated in its Impact Assessment Guidelines. These guidelines state that impact assessments are necessary "for the most important Commission initiatives and those which will have the most far-reaching impacts. This will be the case for all legislative proposals of the Commission's Legislative and Work Programme (CLWP) and for *all non-CLWP legislative*

<sup>66</sup> Recital n° 7 and Article 1, § 2 of Regulation 473/2013 ; Recital n° 20 and Article 1, § 3 and 6, § 3 of Regulation 1176/2011.

<sup>67</sup> As noted by the Special Rapporteur on Extreme Poverty and Human Rights, Mr Philip Alston, in his report to the 32nd session of the Human Rights Council (UN doc. A/HRC/32/31), paras. 22-27.

<sup>68</sup> Article 2a Regulation 1466/97.

<sup>69</sup> Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 209, 2.8.1997, p. 1.

<sup>70</sup> See, for example, Article 1, § 2 of Regulation No. 473/2013.

<sup>71</sup> Article 9 TFEU provides that "in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health".

<sup>72</sup> See Article 2ab of Regulation No. 1466/97; Article 2a of Regulation No. 1467/97; Recital n°29 and Article 15 of Regulation No. 473/2013 ; Recital n° 5 and Article 14 of Regulation No. 1176/2011; Article 3 of Regulation No. 1173/2011.

*proposals which have clearly identifiable economic, social and environmental impacts (with the exception of routine implementing legislation) and for non-legislative initiatives (such as white papers, action plans, expenditure programmes, negotiating guidelines for international agreements) which define future policies. It will also be the case for certain implementing measures (so called 'comitology' items) which are likely to have significant impacts".*<sup>73</sup>

Of course, this is not to suggest that the EU institutions' action under the European Semester systematically flouts the fundamental rights they are legally bound to respect. But the approach currently taken seems inadequate to the task. Consistent with President Juncker's July 2014 Political Guidelines for the next Commission, in which he committed to ensure that future support and reform programmes would be subjected to social impact assessments to feed into the public discussion,<sup>74</sup> the Commission has announced its intention to pay greater attention to "the social fairness of new macroeconomic adjustment programmes to ensure that the adjustment is spread equitably and to protect the most vulnerable in society", and it has proposed a number of improvements in this regard.<sup>75</sup> This however, it should be emphasized, is not equivalent to an explicit recognition that the social provisions of the Charter of Fundamental Rights should be complied with in the European Semester, and that the country-specific recommendations as well as the annual growth survey recommendations the Commission submits to the Council should take into account the normative components of the social rights of the Charter.

### **2.3. The Fiscal Compact**

The Treaty on Stability, Coordination and Governance within the Economic and Monetary Union (TSCG) was signed on 2 March 2012 by the representatives of 25 EU Member States (all Member States with the exceptions of Croatia, which was not at the time an EU Member State, of the Czech Republic and of the United Kingdom) in the margins of the European Council convened in Brussels. It entered into force on 1 January 2013. The objectives of the TSCG are to "strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of [the] economic policies [of the Eurozone Member States] and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion" (Article 1).

The TSCG has a number of provisions on the coordination and convergence of economic policies in its Title IV, and on the governance of the Euro Area in its Title V. But its most crucial provisions are certainly to be found in its Title III, entitled 'Fiscal Compact'. States parties commit to seek to maintain balanced public budgets, or even to strive to having a surplus (Article 3(1) a)). To this end, they must ensure swift convergence towards their country-specific medium-term objective (Article 3(1), b) and c)), from which they may only deviate if faced with exceptional circumstances. Finally, if significant deviations from the medium-term objective or the adjustment path towards it, a correction mechanism, managed by a national independent authority, will be automatically triggered (Article 3(1), e)). The main innovation of the TSCG lies in the requirement Article 3(2) imposes on the States Parties to internalize the rules of the Fiscal Compact (including the balanced-budget rule and the

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<sup>73</sup> European Commission, *Impact Assessment Guidelines*, 15 January 2009, SEC(2009)92, p. 6 (emphasis added).

<sup>74</sup> *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change*, Political Guidelines for the next European Commission, 15 July 2014.

<sup>75</sup> European Commission, *Communication from the Commission to the European Parliament, the Council and the European Central Bank: On Steps Towards Completing Economic and Monetary Union*, COM(2015) 600 final of 21.10.2015, p. 5. See also European Commission, *Commission Work Programme 2016*, COM(2015) 610 final of 27.10.2015 (in which, under the heading 'A deeper and fairer Economic and Monetary Union', the Commission announces its intention to contribute to the development of a 'European pillar of social rights', both by 'modernising and addressing gaps in existing social policy legislation' and by 'identifying social benchmarks, notably as concerns the flexicurity concept, built on best practices in the Member States with a view to upwards convergence, in particular in the euro area, as regards the functioning of the labour market, skills and social protection' (p. 9)).

automatic correction mechanism), in principle, in rules of constitutional rank in the domestic legal order.<sup>76</sup> This was considered by the Treaty makers as locking in budgetary discipline.

The TSCG pays little heed to fundamental rights and their preservation in the framework of the application of the rules set out in the Fiscal Compact -- although here again, the role of the social partners is acknowledged in its Preamble. It is noteworthy that Article 3(3)(b) of the TSCG defines the notion of 'exceptional circumstances' as referring to "an unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn as set out in the revised Stability and Growth Pact"; moreover, "exceptional circumstances" thus understood may only allow for a deviation "provided that the temporary deviation of the Contracting Party concerned does not endanger fiscal sustainability in the medium-term". Under no possible stretch of interpretation could this encompass a situation in which the requirement to balance public budgets is seen as incompatible with the fulfilment of economic and social rights. However, a declaration could be adopted stipulating that such "exceptional circumstances" may include the inability for a country to comply without compromising its obligations under the social provisions of the Charter.

## 2.4. Enhanced surveillance

Regulation (EU) No. 472/2013,<sup>77</sup> the second component of the 'Two-Pack', defines the conditions applying to countries of the eurozone placed under 'enhanced surveillance'. These are countries experiencing or threatened with serious financial difficulties, or which have called on the financial assistance either from one or several other Member States or third countries or from the International Monetary Fund, or from one of the financial mechanisms that were established since the start of the crisis. Regulation (EU) No. 472/2013 places countries having received financial assistance under closer monitoring than that provided normally under the 'European semester' for economic policy coordination. The enhanced form of surveillance is established in order to ensure that the macroeconomic structural adjustment programmes imposed as a condition for the provision of financial assistance are effectively implemented: the objective, as stated in the Regulation, is to allow for the "swift return to a normal situation" and to "[protect] the other euro area Member States against potential adverse spill-over effects".<sup>78</sup>

Regulation No. 472/2013 requires that any measures adopted as part of economic adjustment programmes comply with the right of collective bargaining and action recognized in Article 28 of the EU Charter of Fundamental Rights (Article 1(4), Article 7(1)). Likewise, the Regulation recalls the duty to observe Article 152 TFEU and to involve social partners and civil society (Recital n° 11 of the Preamble, Article 1(4), Article 7(1), Article 8). The Preamble (Recital n°2) also mentions the Horizontal Social Clause of Article 9 TFEU. Article 7(7) moreover specifies that the budgetary consolidation efforts required following the macroeconomic adjustment programme must "take into account the need to ensure sufficient means for fundamental policies, such as education and health care". Nowhere does it state that fundamental economic and social rights will be duly taken into account in the preparation, and implementation, of such programmes. In order to fill this gap, the interpretation of Article 7(7) of Regulation No. 472/2013 could be systematically guided by the social provisions of the Charter.

The impression that economic and social rights would deserve far more attention in this context is confirmed by a general overview of the two most recent macroeconomic

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<sup>76</sup> Such internalization is to be carried out, following Article 3(2), "through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes".

<sup>77</sup> Regulation (EU) No. 472/2013 of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ L 140 of 27.5.2013, p. 1.

<sup>78</sup> Regulation (EU) No. 472/2013, Preamble, para. 5.



adjustment programmes adopted under Regulation No. 472/2013 : the third Greek Rescue Package,<sup>79</sup> adopted in the Summer of 2015, and the 2013 Cyprus bailout programme.<sup>80</sup> The relevant decisions do refer to the need to minimize harmful social impacts (Article 1(3) of Decision 2013/463, Article 1(3) of Decision 2015/1411), especially so on disadvantaged people and vulnerable groups (Article 2(2) of Decision 2013/463, Article 2(2) of Decision 2015/1411); and the third rescue package for Greece also emphasizes its ambition to promote growth, employment and social fairness (Recital 7 of Decision 2015/1411) as well as to involve social partners and civil society in all the phases of the adoption and implementation of the adjustment programme (Recital 16 of Decision 2015/1411). However, the resistance the programmes encountered from workers' unions and from public opinion in the countries concerned illustrates the limits of an inclusiveness thus conceived.

## 2.5. Financial assistance: the European Stability Mechanism

A number of financial support mechanisms have been established since the sovereign debt crisis exploded in 2009-2010, threatening the stability of the Eurozone. The initial mechanisms were temporary in nature: they were the European Financial Stabilisation Mechanism (EFSM), a mechanism created under EU law,<sup>81</sup> and the European Financial Stability Facility (EFSF), a temporary rescue mechanism established on 7 June 2010 in the form of a 'société anonyme' under the laws of Luxembourg, with the then 17 Eurozone Member States as shareholders.<sup>82</sup> More recently, the European Stability Mechanism (ESM) was set up following a decision of the European Council meeting on 17 December 2010 to create a permanent mechanism to provide financial assistance to countries encountering financial difficulties, such that the stability of the eurozone could be affected. The ESM has now succeeded to the EFSM and the EFSF, in effect taking over the functions that these emergency mechanisms were fulfilling.

Whereas the EFSM is clearly a creation of Union law, the legal nature of the ESM (like that of the EFSF) may be described as hybrid. The ESM, which is recognized a legal personality, is established through an international treaty, initially signed on 2 February 2012 between the eurozone Member States, and later amended following Lithuania's accession to the ESM.<sup>83</sup> But the agreement itself is based on the new provision (a paragraph 3) inserted into Article 136 TFEU by a decision adopted on 25 March 2011 by the European Council<sup>84</sup> allowing the establishment of a permanent financial assistance mechanism in order to ensure the stability of the eurozone.<sup>85</sup> The amendment to the TFEU was achieved following the simplified amendment procedure provided for in Article 48(6) TEU. The insertion of Article 136(3) TFEU was seen as way to circumvent the 'no bailout' clause of Article 125 TFEU which prohibits the

<sup>79</sup> See Council Implementing Decision (EU) No. 2015/1411 of 19 August 2015 approving the macroeconomic adjustment programme of Greece, L 219, 20.8.2015, p. 12.

<sup>80</sup> See Council Implementing Decision (EU) No. 2013/463 of 13 September 2013 on approving the macroeconomic adjustment programme for Cyprus and repealing Decision 2013/236/EU, L 250, 20.9.2013, p. 40.

<sup>81</sup> Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ 2010 L 118, p. 1). The instrument establishing the EFSM was challenged before the General Court in an action for annulment, which was found inadmissible: Orders of 29 November 2010 and of 15 June 2011, *Ax v. Council*, T-259/10 (EU:T:2011:274).

<sup>82</sup> Though it only joined the single currency in 2011, Estonia is among the shareholders of the EFSF.

<sup>83</sup> Treaty Establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland ('the ESM Treaty') was concluded in Brussels (Belgium). The ESM Treaty entered into force on 27 September 2012.

<sup>84</sup> Decision 2011/199/EU of the European Council amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, OJ L 91, 6.4.2011, p. 1.

<sup>85</sup> Article 136(3) TFEU states: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

debts of the EU Member States from being assumed either by the Union itself or by any other Member State.<sup>86</sup>

The Members of the ESM are the EU Member States that belong to the eurozone. The ESM is managed by a Board of Governors, each ESM Member appointing a Governor (the Finance Minister of the State concerned) and an alternate Governor.<sup>87</sup> "The Member of the European Commission in charge of economic and monetary affairs and the President of the [European Central Bank], as well as the President of the Euro Group (if he or she is not the Chairperson or a Governor) may participate in the meetings of the Board of Governors as observers".<sup>88</sup> For the purposes of this study, a key provision of the Treaty establishing the ESM is Article 13, which defines the conditions under which financial assistance may be granted to a eurozone member State, upon that State's request. The provision reads as follows:

**Article 13. Procedure for granting stability support**

1. An ESM Member may address a request for stability support to the Chairperson of the Board of Governors. Such a request shall indicate the financial assistance instrument(s) to be considered. On receipt of such a request, the Chairperson of the Board of Governors shall entrust the European Commission, in liaison with the ECB, with the following tasks:

(a) to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, unless the ECB has already submitted an analysis under Article 18(2);

(b) to assess whether public debt is sustainable. Wherever appropriate and possible, such an assessment is expected to be conducted together with the IMF;

(c) to assess the actual or potential financing needs of the ESM Member concerned.

2. On the basis of the request of the ESM Member and the assessment referred to in paragraph 1, the Board of Governors may decide to grant, in principle, stability support to the ESM Member concerned in the form of a financial assistance facility.

3. If a decision pursuant to paragraph 2 is adopted, the Board of Governors shall entrust the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (an "MoU") detailing the conditionality attached to the financial assistance facility. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen. In parallel, the Managing Director of the ESM shall prepare a proposal for a financial assistance facility agreement, including the financial terms and conditions and the choice of instruments, to be adopted by the Board of Governors.

The MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned.

4. The European Commission shall sign the MoU on behalf of the ESM, subject to prior compliance with the conditions set out in paragraph 3 and approval by the Board of Governors.

5. The Board of Directors shall approve the financial assistance facility agreement detailing the financial aspects of the stability support to be granted and, where applicable, the disbursement of the first tranche of the assistance.

6. The ESM shall establish an appropriate warning system to ensure that it receives any repayments due by the ESM Member under the stability support in a timely manner.

7. The European Commission – in liaison with the ECB and, wherever possible, together with the IMF – shall be entrusted with monitoring compliance with the conditionality attached to the financial assistance facility.

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<sup>86</sup> In this regard, see J.-V. Louis, "The No-Bailout Clause and Rescue Packages", *Common Market Law Review*, 2010, vol. 47, n° 4, pp. 971-986.

<sup>87</sup> Article 5(1) of the Treaty Establishing the European Stability Mechanism.

<sup>88</sup> Article 5(2).

Therefore, while the ESM is a creation of international law, it is closely linked in its functioning to Union law. Two institutions of the Union, the Commission and the European Central Bank, are closely associated with the negotiation of the Memorandum of Understanding with the Member State requesting financial assistance, as well as with the supervision of the compliance with the conditionalities attached to the loan. Moreover, the content of the MoU itself must be aligned with the economic policy coordination measures adopted under Articles 136 to 138 of the TFEU describing the economic policy coordination and budgetary discipline mechanisms applying to the eurozone Member States.

Finally, following the adoption of Regulation (EU) No. 472/2013, the links with European Union law have been further strengthened, since that regulation provides for a monitoring of the countries to which financial assistance has been granted, which results in substance in transferring under Union supervision the monitoring of the compliance with the conditionalities imposed on these countries: by ensuring compliance with the conditionalities listed in the macroeconomic adjustment programme adopted by the Council as provided by Article 7 of Regulation (EU) No. 472/2013, the Commission acts, in effect, both under an EU law instrument, and under the ESM Treaty, which are complementary and partially overlap. Indeed, Article 7(2) specifically states that:

The Commission shall ensure that the memorandum of understanding signed by the Commission on behalf of the ESM or of the EFSF is fully consistent with the macroeconomic adjustment programme approved by the Council.

and Article 7(3) provides that:

The Commission shall ensure consistency in the process of economic and budgetary surveillance with respect to a Member State under a macroeconomic adjustment programme to avoid duplication of reporting obligations.

These elements have led a majority of the legal doctrine to conclude that the Charter of Fundamental Rights should apply to the lending by the ESM (as well as by the EFSF) and to the conditionalities accompanying such lending.<sup>89</sup> In a report that concluded his mission to Greece from 30 November to 8 December 2015, Mr Juan Pablo Bohoslavsky, appointed by the UN Human Rights Council the Independent Expert on the effects of foreign debt on human rights, expressed the view that 'the Commission remains bound by the full extent of European Union laws, the Charter of Fundamental Rights and has to protect and respect human rights enumerated therein also when it acts on the basis of the treaty establishing the European Stability Mechanism (ESM). In addition, the ESM itself has to protect and respect the human rights enumerated in the Charter of Fundamental Rights given that, despite having a legal basis separate from the treaties, it constitutes a vehicle for the exercise of public authority in the framework of the Eurozone as referred to in Art. 136(3) of the Treaty on the Functioning of EU'.<sup>90</sup>

The Court of Justice has provided some indications concerning this issue, but some uncertainties remain. In the *Pringle* case in which the validity of the establishment of the

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<sup>89</sup> Paul Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance', *European Constitutional Law Review*, 2013, 263-284, at 281; A. Fischer-Lescano, 'Human Rights in Times of Austerity Policy: The EU institutions and the conclusion of Memoranda of Understanding', *Legal Opinion commissioned by the Chamber of Labour*, Vienna, 2014 ; Steve Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework', *European Constitutional Law Review*, 2013, 37-72, at 51-52; Margot Salomon, 'Of Austerity, Human Rights and International Institutions', *European Law Journal*, vol. 21(4), July 2015; Armin Bogdandy and M. Goldmann, 'Sovereign Debt Restructurings as Exercises of International Public Authority: Towards a Decentralized Sovereign Insolvency Law', in Esposito et al. (eds), *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing* (New York, Oxford University Press, 2013), 39.

<sup>90</sup> Report of the Independent Expert on the effects of foreign debt and other related international obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights on his mission to Greece (30 November-8 December 2015), presented to the thirty-first session of the Human Rights Council, A/HRC/31/60/Add.2, para. 23.

European Stability Mechanism (ESM) was challenged, the Court took the view that 'the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where [...] the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism'.<sup>91</sup> The reasoning of the Court was that, since 'neither Article 122(2) TFEU nor any other provision of the EU and FEU Treaties confers a specific power on the Union to establish a permanent stability mechanism such as the ESM',<sup>92</sup> the EU Member States were not implementing EU law when establishing the ESM. It follows, according to the Court, that the EU Charter of Fundamental Rights does not apply to the establishment of the ESM, in accordance with the wording of Article 51(1) of the Charter, which defines its scope of application.

However, whether or not one agrees with this position insofar as it concerns the establishment by the EU Member States of the ESM -- the only question that the Court was requested to address in *Pringle* --, it is clear that this does not extend to the situation where *mechanisms or institutions established by the EU Treaties* take action. Article 51 paragraph 1 of the EU Charter of Fundamental Rights states:

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.

The phrase 'when they are implementing Union law' in that sentence applies to the EU Member States, and to their actions only. The Member States may act either in the field of application of EU law, or in situations that are not covered by EU law. In contrast, EU institutions per definition are bound to comply with the requirements of the Charter, since the same distinction does not apply to them: they owe their very existence to EU law, and the Charter necessarily applies to any conduct they adopt. The Explanations relating to the Charter of Fundamental Rights strongly support this reading :<sup>93</sup> the explanations to Article 51 clearly distinguish EU institutions, bodies, offices and agencies, on the one hand, and the EU Member States on the other hand, referring to the expression 'implementing Union law' *only with regard to the latter*.<sup>94</sup>

In the *Pringle* case itself, assessing the tasks assigned by the ESM Treaty to the Commission and the European Central Bank in the light of Article 13(2) TEU, which provides that each institution is to act within the limits of the powers conferred on it in the Treaties, Advocate General J. Kokott noted that the Commission "remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights."<sup>95</sup> Similarly, AG Kokott noted with regard to the European Central Bank that "the conclusion and ratification of the ESM Treaty does not infringe the first sentence of Article 13(2) TEU if it performs the tasks specified for it in the ESM Treaty while respecting its obligations under European Union law".<sup>96</sup>

Indeed, the *Pringle* judgment delivered by the Court on 27 November 2012 recalls that "the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance (...), provided that those tasks do not alter the essential character of the

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<sup>91</sup> Judgment of 27 November 2012 (Full Court), *Thomas Pringle*, C-370/12, EU:C:2012:756, para. 180.

<sup>92</sup> *Id.*, para. 105.

<sup>93</sup> OJ C 303/17 of 14.12.2007.

<sup>94</sup> Steve Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework', cited above, at 51-52; see also, supporting that view, D. Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe', *Common Market Law Review*, vol. 50(5) (Oct. 2013), pp. 1267-1304, at pp. 1272-3.

<sup>95</sup> View of Advocate-General J. Kokott, delivered on 26 October 2012, para. 176.

<sup>96</sup> *View*, para. 182.

powers conferred on those institutions by the EU and FEU Treaties".<sup>97</sup> One of the conditions for such delegation of tasks to EU institutions to be acceptable, according to the Court, is that such tasks "do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties".<sup>98</sup> The Court notes that the Commission, in fulfilling the tasks it is assigned by the Treaty establishing the European Stability Mechanism, is acting in a way that is fully consistent with the powers attributed to it by the EU Treaties:

...the objective of the ESM Treaty is to ensure the financial stability of the euro area as a whole. By its involvement in the ESM Treaty, the Commission promotes the general interest of the Union. Further, the tasks allocated to the Commission by the ESM Treaty enable it, as provided in Article 13(3) and (4) of that treaty, to ensure that the memoranda of understanding concluded by the ESM are consistent with European Union law.<sup>99</sup>

In other terms, not only does the Commission carry on its duties to comply with the Charter of Fundamental Rights when it acts, even in the fulfilment of the tasks attributed to it by the ESM Treaty; it also must accept the positive duty to 'ensure' that the MoUs it negotiates are fully consistent with Union law, and this would include the Charter.<sup>100</sup>

The Commission, as well as the European Central Bank, thus remain fully bound to comply with the Charter of Fundamental Rights in the fulfilment of their tasks as defined by the ESM Treaty. These are institutions of the Union acting within the limits of their powers as required by Article 13(2) TEU, and bound as such by the Charter; the tasks in question overlap and complement those defined under Regulation (EU) No. 472/2013. Indeed, it may be argued that not only must the Commission and the ECB comply with the Charter; they also must ensure that Union law is complied with in the negotiation of the MoUs with the Member States of the eurozone seeking financial assistance, and that would include ensuring that the conditionalities attached to the assistance provide are fully compatible with the rights, freedoms and principles of the Charter.

This was confirmed by the recent case-law of the Court of Justice. Following the conclusion of the Memorandum of Understanding with Cyprus, providing for ESM support to the country, a series of actions for compensation were filed before the Court of Justice by Cypriot citizens against the Commission and the ECB, arguing that the MoU's conditions regarding the restructuring of the banking sector were in violation of the right to property as ensured, among others, by Article 17 of the Charter of Fundamental Rights. In five orders adopted on 10 November 2014, the General Court rejected these claims. It ruled that the ECB and the Commission, while entrusted with some tasks relating to the implementation of the objectives of the ESM Treaty, were not fulfilling those tasks acting in their own name, but only on behalf of the ESM. The MoU for example, even if negotiated by the Commission, is solely concluded by the ESM member requesting assistance and the ESM itself. As a consequence, the Court reasoned, the Charter does not apply to the EU institutions when acting under the ESM framework.

The case of *Ledra Advertising Ltd v. Commission and European Central Bank (ECB)* is representative.<sup>101</sup> Here, the applicant complained that the restructuring of the Bank of Cyprus, decided on 25 March 2013 by a decree (No. 103) of the Governor of the Central Bank of Cyprus (acting by delegation under a Law of 22 March 2013 on the resolution of credit and

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<sup>97</sup> *Pringle* judgment, cited above, para. 158.

<sup>98</sup> *Id.*, para. 162.

<sup>99</sup> *Id.*, para. 164.

<sup>100</sup> Anastasia Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?', *German Law Journal*, vol. 15(6) (2014) 1145, at 1158.

<sup>101</sup> Order of 10 November 2014, *Ledra Advertising Ltd. v. Commission and ECB*, T-289/13, EU:T:2014:981. Four similar orders were adopted on the same day by the General Court in the following cases : *CMBG Ltd v. Commission et BCE*, T-290/13 (EU:T:2014:976) ; *Eleftheriou et Papachristofi v. Commission and ECB*, T-291/13 (EU:T:2014:978) ; *Evangelou v. Commission and ECB*, T-292/13 (EU:T:2014:977) ; *Theophilou v. Commission and ECB*, T-293/13 (EU:T:2014:979) ; *Fialtor Ltd v. Commission and ECB*, T-294/13 (EU:T:2014:980).

other institutions), had led to a violation of the right to property: indeed, the restructuring involved the conversion of debt instruments or obligations into equity, leading to a substantial reduction of the value of the deposit of the applicant in the Bank of Cyprus. The measure was, politically if not legally, connected to the support provided to Cyprus by the ESM: on 16 March 2013, the Eurogroup had publicly welcomed that a political agreement had been found between the Republic of Cyprus and the other eurozone Member States on a MoU which referred to some of the adjustment measures envisaged, including the introduction of a levy on bank deposits<sup>102</sup>; and when the MoU was finally signed on 26 April 2013 by the Minister for Finance of the Republic of Cyprus, the Governor of the Central Bank of Cyprus and the Commission, before approved on 8 May 2013 by the ESM Board of Directors (allowing a first tranche of aid to be provided to the Republic of Cyprus), it included a reference to the restructuring of the two major banks of the country, the Bank of Cyprus and Laïki. Did the involvement of the Commission and/or the ECB imply that they, as institutions of the EU, might have engaged their extra-contractual responsibility, by approving terms of the MoU that, allegedly, led to a violation of the right to property? The General Court believed not. Citing *Pringle*, it expressed the view that:

The MoU was adopted jointly by the ESM and the Republic of Cyprus. It was signed on 26 April 2013 by the Cypriot authorities ..., on the one hand, and by the Vice-President of the Commission on the Commission's behalf, on the other. However, it is apparent from Article 13(4) of the ESM Treaty that the Commission is to sign the MoU only on behalf of the ESM. [A]lthough the ESM Treaty entrusts the Commission and the ECB with certain tasks relating to the implementation of the objectives of that Treaty, it is apparent from the case-law of the Court of Justice that the duties conferred on the Commission and the ECB within the ESM Treaty do not entail any power to make decisions of their own and, moreover, that the activities pursued by those two institutions within the ESM Treaty solely commit the ESM (Case C-370/12 *Pringle* [2012] ECR, paragraph 161).<sup>103</sup>

The applicant in *Ledra Advertising Ltd* argued, alternatively, that the source of the liability of the EU for the purposes of Article 340 TFEU stemmed from the failure the Commission to guarantee that the MoU is in conformity with EU law. The General Court however, recalling that for non-contractual liability to be established, in addition to the conduct having to be unlawful and to a damage being incurred, it was necessary to establish the existence of a causal link between the conduct and harm alleged. Such a link that was particularly required "in cases where the conduct allegedly giving rise to the damage pleaded consists in refraining from taking action", where the Court requires "that that damage was actually caused by the inaction complained of and could not have been caused by conduct separate from that alleged against the defendant institution".<sup>104</sup> The Court considered that the complainants had not met the burden of proving, to a sufficient degree, the existence of a direct link between the conclusion of the MoU and the reduction in the value of the applicant's deposit at the Bank of Cyprus: "That reduction", the Court recalled, "actually occurred on the entry into force of Decree No 103 [of 25 March 2013], pursuant to which part of that deposit was converted into shares or convertible instruments. Therefore, the applicant cannot be regarded as having established with the necessary certainty that the damage it claims to have suffered was actually caused by the inaction alleged against the Commission".<sup>105</sup> Indeed, the MoU was formally approved only on 8 April 2013 by the Board of Governors of the ESM, *after* the adoption of the said decree. However, although the Court seems to attach great weight to this chronology, this approach does seem rather formalistic, in the light of the fact that the adoption of decree No. 103 was fully in line with the political agreement reached between Cyprus and the Eurozone Member States, publicly announced already on 16 March 2013.

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<sup>102</sup> In fact, on 19 March 2013, the Cypriot Parliament rejected the Cypriot Government's Bill relating to the introduction of a levy on all bank deposits in Cyprus. As an alternative, the Cypriot Government drew up a new Bill providing only for the restructuring of two banks, the Bank of Cyprus and Laïki. The Parliament adopted the new bill on 22 March 2013.

<sup>103</sup> *Id.*, paras. 44-45.

<sup>104</sup> *Id.*, para. 53.

<sup>105</sup> *Id.*, para. 54.

After these orders by the General Court were appealed before the Court of Justice, Advocate General Wahl issued an opinion generally supporting the approach of the General Court. Remarkably however, AG Wahl joined his colleague AG Kokott and the doctrine which considers that, in whichever capacity it takes action, the Commission, as an institution of the EU, is bound to comply with the Charter of Fundamental Rights. Citing Peers in support, he said to have "no doubt that the Commission is to respect the EU rules, especially the Charter, when it acts outside the EU legal framework. After all, Article 51(1) of the Charter does not contain any limit as to the applicability of the Charter with respect to the EU institutions, as it does for Member States. Furthermore, that provision also calls on the EU institutions to *promote* the application of Charter".<sup>106</sup> In AG Wahl's view however, it did not follow that the Commission should impose that the Charter be complied with by non-EU actors acting outside the EU framework: when negotiating and concluding an MoU on behalf of the ESM, the Commission is not "required to impose the standards of the EU Charter on acts which are adopted by other entities or bodies acting outside the EU framework".<sup>107</sup> The implicit suggestion was that, far from discharging its duties to comply with the Charter if it were to impose that the Charter be taken into account in the MoUs, the Commission would be acting in violation with the limited scope of application of the Charter, as defined by its Article 51(1).

In its judgment of 20 September 2016 delivered in Joined Cases C-8/15 P to C-10/15 P,<sup>108</sup> the Court of Justice, sitting in Grand Chamber, took a different view. It considered that "the tasks allocated to the Commission by the ESM Treaty oblige it, as provided in Article 13(3) and (4) thereof, to ensure that the memoranda of understanding concluded by the ESM are consistent with EU law",<sup>109</sup> and that the Commission "retains, within the framework of the ESM Treaty, its role of guardian of the Treaties as resulting from Article 17(1) TEU, so that it should refrain from signing a memorandum of understanding whose consistency with EU law it doubts".<sup>110</sup> The Court concludes that the General Court erred in dismissing the claim filed by the appellants seeking compensation for the damage resulting from the inclusion of the paragraphs concerning the "bail-in" in the Memorandum of Understanding -- which, in their view, was an infringement of the Commission's supervisory obligation. Instead, the Court of Justice agreed to assess such claims for compensation taking into account the duty of the EU institutions to comply with the Charter of Fundamental Rights: the Charter, the Court noted,

is addressed to the EU institutions, including [...] when they act outside the EU legal framework. Moreover, in the context of the adoption of a memorandum of understanding such as that of 26 April 2013, the Commission is bound, under both Article 17(1) TEU, which confers upon it the general task of overseeing the application of EU law, and Article 13(3) and (4) of the ESM Treaty, which requires it to ensure that the memoranda of understanding concluded by the ESM are consistent with EU law (see, to that effect, judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraphs 163 and 164), to ensure that such a memorandum of understanding is consistent with the fundamental rights guaranteed by the Charter.<sup>111</sup>

In examining the merits of the claim, the Court did conclude that the non-contractual liability of the European Union was not engaged, since the restrictions to the right to property were proportionate to the legitimate aim pursued.<sup>112</sup> However, the significance of the case is that the Commission should ensure that fundamental rights as part of the general principles of EU law, and as recognized in the Charter, are fully complied with in the design and implementation of the Memoranda of Understanding concluded with States seeking support from the European Stability Mechanism. Thus, should such a Memorandum deprive a State from its ability to uphold the right to education (Article 14 of the Charter) or the right to social security (Article 34), or to maintain high levels of provision of healthcare (Article 35)

<sup>106</sup> Opinion of 21 April 2016, para. 85 (referring to S. Peers, cited above).

<sup>107</sup> *Id.*, para. 86.

<sup>108</sup> The appeal concerns three of the five orders adopted on 10 November 2014 by the General Court.

<sup>109</sup> Judgment of the Court of 20 September 2016, *Ledra Advertising Ltd, et al.*, C-8/15 P to C-10/15 P, EU:C:2016:701, para. 58.

<sup>110</sup> *Id.*, para. 59.

<sup>111</sup> *Id.*, para. 67.

<sup>112</sup> *Id.*, para. 74.

or access to services of general interest (Article 36), the non-contractual liability of the Commission could be engaged.<sup>113</sup>

In the Joined Cases of *Mallis and Others* (C-105/15 P to C-109/15 P), the Court of Justice was asked to examine whether the General Court had erred in rejecting actions for annulment of the Eurogroup statement of 25 March 2013 concerning, in particular, the restructuring of the banking sector in Cyprus.<sup>114</sup> The Eurogroup has issued a statement on that date indicating that it had reached an agreement with the Cypriot authorities on the key elements of a future macro-economic adjustment programme, which was supported by all the Member States whose currency is the euro, as well as by the Commission, the ECB and the IMF, and it welcomed the plans for the restructuring of the financial sector that were mentioned in the annex to that statement. The appellants argued that the statement could be attributed to the Commission and the ECB and that it should be annulled. In its orders of 16 October 2014, the General Court considered the actions for annulment inadmissible. It considered that the Eurogroup was a mere "forum for discussion" at ministerial level, between representatives of the Member States whose currency is the euro. Although the Eurogroup is established in Article 137 TFEU, which provides that the composition of and arrangements for meetings between ministers of those Member States whose currency is the euro are laid down by Protocol No 14 on the Eurogroup, annexed to the FEU Treaty, the General Court took the view that it was not a decision-making body. The General Court also considered that even if the statement could be attributed to the ESM, it could not be attributed to the Commission or the ECB, as if these institutions had in fact instigated the adoption of the challenged statement.

The Court of Justice broadly agrees with the assessment of the General Court. It considers that the statement by the Eurogroup is "of a purely informative nature", as it "was intended to inform the general public of the existence of a political agreement between the Eurogroup and the Cypriot authorities reflecting a common intention to pursue the negotiations in accordance with the statement's terms".<sup>115</sup> It also considers that the Eurogroup is an informal body: it is not among the different configurations of the Council and "cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union within the meaning of Article 263 TFEU".<sup>116</sup> The positions of the Eurogroup therefore cannot be challenged by actions for annulment, since they are not legal acts adopted by the institutions of the EU.

## 2.6. An assessment

### 2.6.1. *The duty to comply with the Charter of Fundamental Rights in the economic governance architecture*

The question of the role of the Charter of Fundamental Rights in the economic governance of the EU raises first of all a legal question, which is whether the Charter applies in this framework.

The answer is clearly affirmative as to all the *acts adopted by the EU institutions*, including not only the Commission and the European Central Bank, but also the Council of the EU and the European Council, all of which have a role to play in various parts of the new economic architecture outlined above.

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<sup>113</sup> Actions for annulment of the actions taken by the Commission in the framework of the ESM, however, remain excluded, since these actions fall outside the EU legal order: see *Ledra Advertising*, judgment of 20 September 2016, para. 54.

<sup>114</sup> See the orders of the General Court of the European Union of 16 October 2014, *Mallis and Malli v Commission and ECB* (T-327/13, EU:T:2014:909), of 16 October 2014, *Tameio Pronoias Prosopikou Trapezis Kyprou v Commission and ECB* (T-328/13, EU:T:2014:906), of 16 October 2014, *Chatzithoma v Commission and ECB* (T-329/13, EU:T:2014:908), of 16 October 2014, *Chatziioannou v Commission and ECB* (T-330/13, EU:T:2014:904), and of 16 October 2014, *Nikolaou v Commission and ECB* (T-331/13, EU:T:2014:905).

<sup>115</sup> Judgment of 20 September 2016, *Mallis and Others*, C-105/15 P to C-109/15 P, EU:C:2016:702, para. 59.

<sup>116</sup> *Id.*, para. 61.



As regards the measures adopted by the EU Member States, the answer is more controversial. The Court of Justice has taken the view that it has no competence to assess the compatibility with Union law (including the Charter of Fundamental Rights) of national measures implementing macroeconomic programmes designed under the framework of a MoU negotiated with a Member State receiving financial assistance.<sup>117</sup> If however the duty to take the Charter into consideration in the negotiation of macroeconomic reform programmes is complied with -- as seems to be required following the *Ledra Advertising* judgment of the Court of Justice --, the question of whether national measures implementing such programmes are to be seen as "implementation of Union law" for the purposes of extending to such measures the scope of application to the Charter (article 51(1) of the Charter), becomes to a certain extent academic: preventative measures shall have been taken, presumably, to ensure that whatever reforms are adopted at domestic level shall not infringe upon the social provisions of the Charter.

The problem of course is that, despite the general recognition, in principle, that the Charter applies in the negotiation of MoUs by the institutions of the Union (in practice, this concerns chiefly the Commission), the commitment to social rights is not made explicit; nor is it complied with in practice. This is an important gap that must be remedied as a matter of urgency.

### 2.6.2. The hybrid nature of the European Stability Mechanism

One of the mechanisms described above, resulting from the establishment of the ESM, deserves a specific comment. The ESM is established, by 26 Member States acting jointly, as a separate international organisation, endowed with its own legal personality. Two views have been defended as to whether or not the Charter applies to the measures taken within the ESM. One view is that we are outside the scope of application of EU law: although the Commission and the ECB, two EU institutions, play an important role in the functioning of the ESM, and must as such comply with the Charter, they are not to impose that the Charter be complied with by the ESM, since the Charter does not extend to organisations situated outside the remit of EU law. AG Wahl of the Court of Justice, who defended this view, considers that the EU institutions involved should be seen as "in fact acting on behalf of an international organisation (the ESM), whose members are sovereign States, with a view to concluding an international agreement (the MoU) between that organisation and one of its contracting States [the State seeking financial assistance from the ESM]. Under the rules of public international law [...], the conduct of agents of international organisations is generally imputable to the organisation itself."<sup>118</sup> He made reference in this regard to Article 7 of the Draft Articles on the responsibility of international organizations presented by the International Law Commission, which states that "[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct".<sup>119</sup> That reasoning, however, seems to beg the question, and to presuppose what is to be demonstrated, i.e., that the ESM effectively controls the conduct of the Commission public servants who conduct the negotiations with the State party concerned. A realistic assessment

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<sup>117</sup> See Order of the Court (Sixth Chamber) of 21 October 2014, *Sindicato Nacional dos Profissionais de Seguros e Afins*, C-665/13, EU:C:2014:2327 (Court of Justice lacking jurisdiction to assess compliance with the Charter of Fundamental Rights of Portuguese Law No 64-B/2011 of 31 Dec. 2011 approving the State Budget for 2012, which resulted in salary reductions for certain public sector employees, although the budgetary measures involved were explicitly stated in Article 21(1) of the 2012 Budget Law to be linked to the Economic and Financial Assistance Programme (EFAP) applied to Portugal).

<sup>118</sup> Opinion delivered on 21 April 2016 in Joined Cases C-8/15 P, C-9/15 P and C-10/15 P, para. 98.

<sup>119</sup> Draft Articles on the responsibility of international organizations presented by the International Law Commission, adopted by the International Law Commission of the United Nations at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10) (*Yearbook of the International Law Commission*, 2011, vol. II, Part Two).

of the situation suggests instead that, far from having a will of its own, the ESM is an instrument controlled by the Commission, the ECB and the States parties.

The opposite view therefore, which this author has defended, is that the Charter of Fundamental Rights is fully applicable to the negotiation, conclusion and implementation of MoUs between the ESM and the States parties receiving financial assistance. In addition to the arguments put forward by the Court of Justice in its *Ledra Advertising* judgment of 20 September 2016, this view can be based on two separate arguments. First, as acknowledged both by AG Kokott in *Pringle* and by AG Wahl himself, the Charter imposes on EU institutions not only negative duties of abstention, but also *positive* duties to 'promote' the rights, freedoms and principles of the Charter. The implication would seem to be that, in discharging their functions under the ESM Treaty, the Commission and the ECB should endeavour to ensure that the States concerned do not enter into commitments that might result in violations of the social provisions of the Charter.

Second, the view that the MoUs could ignore the requirements of the Charter would provide an easy escape route from the duty of the EU institutions, and of the EU Member States when acting in the scope of application of EU law, to fully comply with these requirements, also in the framework of the economic governance of the EU -- a duty that is uncontroversial as such. Indeed, the establishment of the ESM as a separate international organization, should not allow the EU Member States to circumvent this obligation, in the specific meaning international law gives to this notion.<sup>120</sup>

This would also appear to be the position of international human rights bodies which examined the issue. In a statement adopted on 24 June 2016 on 'Public Debt, Austerity Measures, and the International Covenant on Economic, Social and Cultural Rights', the Committee on Economic, Social and Cultural Rights expresses the view that the Covenant requires both Lenders and States seeking loans against the fulfilment of certain conditionalities that they

carry out a human rights impact assessment prior to the provision of the loan concerned, in order to ensure that the conditionalities do not disproportionately affect economic, social and cultural rights, and do not lead to discrimination. The Committee reminds States parties in this regard of the Guiding Principles on Foreign Debt and Human Rights, endorsed by the Human Rights Council in 2012, as well as of the Guiding Principles on Extreme Poverty and Human Rights, adopted by the Human Rights Council in 2012, both of which call for human rights impact assessment of conditionalities attached to loans or of measures which create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their national territory.<sup>121</sup>

The duty to ensure that fundamental rights are fully taken into account in the design and implementation of macroeconomic reform programmes is also imposed on the EU Member States acting within the European Union, or as Members of the European Stability Mechanism. As also recalled in its recent Statement by the Committee on Economic, Social and Cultural Rights:

States parties to the Covenant would be acting in violation of their obligations if they were to delegate powers to the IMF or to other agencies and to allow such powers to be exercised without ensuring that they do not infringe on human rights. Similarly, they would be acting in breach of their obligations if they were to exercise their voting rights within such agencies without taking such rights into account. The same duties apply to States that are not parties to the Covenant, under human rights law as part of general international law. Their responsibility would not be absolved even where a State party,

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<sup>120</sup> Draft Articles on the responsibility of international organizations, cited above, art. 61.

<sup>121</sup> UN doc. E/C.12/2016/1 (referring to the Guiding Principles on Foreign Debt and Human Rights (A/HRC/20/23), par. 40; and to the Guiding Principles on Extreme Poverty and Human Rights (A/HRC/21/39), par. 92).

in its capacity of a member State of an international organisation, would be acting fully in accordance with the rules of the organisation.<sup>122</sup>

Though explicit reference is made only to the IMF in this statement, this reasoning applies, *mutatis mutandis*, to the EU Member States acting under the European Stability Mechanism (sometimes colloquially referred to as 'the IMF of the EU'), or acting within the Council under the 'European semester'. States cannot circumvent their human rights obligations by delegating competences to international institutions without establishing adequate safeguard mechanisms,<sup>123</sup> nor can they coerce other States, such as States seeking loans from these institutions, into violating their own human rights obligations.<sup>124</sup>

### *2.6.3. The role of fundamental rights impact assessments in the economic governance of the Union*

The problem however, is less a legal one that it is cultural and political. The failure to take seriously the Charter of Fundamental Rights in the architecture of the economic governance of the EU may be explained by the widespread (though wrong) prejudice against social rights that does not see them as 'real rights' (i.e., something else than programmatic objectives); by the confusion between social indicators (such as at-risk-of-poverty levels or levels of integration in the labour market) and rights-based indicators (that require to assess potential instances of discrimination against certain groups within society, and that should result in improved accountability); or by the (equally ill-informed) presupposition that the impacts of macro-economic policies on the enjoyment of rights are too indirect to be worth considering.

**What seems needed is to move beyond these antiquated views. It is to ensure that the negotiations of MoUs and macroeconomic reform programmes are guided by a robust fundamental rights impact assessment, informed by the recent normative developments concerning in particular social rights in international human rights law, and using an appropriate set of indicators broken down by gender, age group, nationality or ethnic origin where appropriate, and region, in order to ensure that sufficient attention is paid to the situation of the members of the weakest groups of society. Rather than generous but vague references to social fairness, such assessments should be based explicitly on the normative components of social rights. They should move beyond references to the EU Charter of Fundamental Rights alone, to integrate the full range of social rights guaranteed in the Council of Europe Social Charter and the International Covenant on Economic, Social and Cultural Rights, both of which have been ratified by all EU Member States. And they should ensure that procedures are established to allow for participation of unions and other components of civil society in the design and implementation of such programmes, and for re-examination of the draft programmes if negative impacts on social rights are found to occur.**

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<sup>122</sup> UN doc. E/C.12/2016/1 (referring to International Law Commission, Articles on the Responsibility of International Organizations with Commentaries (A/66/10) Art. 58(2) at 91, para. 5).

<sup>123</sup> Draft Articles on the responsibility of international organizations, cited above, art. 61.

<sup>124</sup> International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts (annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4), Art. 18; see also General Comment No. 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights, E/1998/22, para. 51.

### **3. THE ROLE OF THE CHARTER OF FUNDAMENTAL RIGHTS IN THE EU'S OPERATIONAL POLICIES: EU AGENCIES**

#### **KEY FINDINGS**

- The comparison between Frontex and the European Asylum Support Office (EASO) illustrates that EU agencies have widely diverging practices as regards whether, and how, to integrate the Charter in their working methods. There is considerable room for progress through collective learning across agencies.
- All EU agencies could consider: (i) adopting a fundamental rights strategy; (ii) including a reference to fundamental rights in a code of conduct that could define the duties of their staff; (iii) setting up mechanisms ensuring that any violation of fundamental rights be detected and reported, and that risks of such violations be swiftly brought to the attention of the main bodies of the agency; (iv) establishing the position of a fundamental rights officer, reporting directly to the management board to ensure a certain degree of independence vis-à-vis other staff, in order to ensure that threats to fundamental rights shall be immediately addressed, and that a constant upgrading of the fundamental rights policy within the organization; (v) developing a regular dialogue with civil society organisations and relevant international organizations on fundamental rights issues; and finally, but perhaps most importantly, (vi) making compliance with fundamental rights a central component of the terms of reference of the collaboration of the agency concerned with external actors, including in particular members of national administrations with whom they interact at operational level.

#### **3.1. Introduction**

This section offers some considerations on the duty of EU agencies to respect the rights and freedoms of the Charter of Fundamental Rights, to observe the principles it includes, and to promote the application of both, as stated under Article 51(1) of the Charter. Rather than offering a systematic overview of the EU agencies' relationship to fundamental rights, it highlights two examples, those of Frontex (the European Border and Coast Guard Agency, formerly European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union) and of the European Asylum Support Office (EASO), to illustrate the wide discrepancies that exist between agencies -- even between agencies, such as the two agencies mentioned, whose mandates are relatively similar. These examples then are taken as illustrations to feed into broader considerations about the potential role of the EU agencies in upholding a fundamental rights culture within the EU. Clearly, the establishment in 2007 of the European Union Agency for Fundamental Rights (FRA) should not be seen as allowing other agencies to dispense with fundamental rights which, far from imposing restrictions to their work, could guide them and enable them to contribute more effectively to the aims for which they were set up.

#### **3.2. The European Border and Coast Guard Agency (Frontex)**

Frontex was initially established in 2004 by Council Regulation No. 2007/2004, which set up the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.<sup>125</sup> Frontex succeeded the External Border Practitioners Common Unit, established in 1999, which coordinated the work of seven ad-hoc centres across different Member States, all in charge of different topics related to external border control management. Given that the topics of external border control and the return of third-country national illegally residing in the EU Member States are highly sensitive from

<sup>125</sup> OJ L 349 of 25.11.2004, p. 1.

the point of view of civil liberties, the 2004 Regulation establishing Frontex was explicit that it should be implemented in accordance with the requirements of fundamental rights.<sup>126</sup>

Significant progress was made in recent years to place fundamental rights at the heart of Frontex's activities. Remarkably, this progress was to a large extent driven by the Agency itself, even before amendments to the Founding Regulation of 2004 entered into force, creating a legislative framework for these various initiatives.<sup>127</sup> On 31 March 2011, the Management Board of Frontex approved a fundamental rights strategy for the Agency, the result of a consultative process involving active input from Member States as well as from the International Organization for Migration (IOM), the United Nations High Commissioner for Refugees (UNHCR) and the Fundamental Rights Agency (FRA). In addition to the fact that the adoption of such a strategy, together with monitoring of its implementation, is now made obligatory under the revised Regulation establishing Frontex<sup>128</sup> -- an important sign in itself of the centrality of fundamental rights to the mandate of the Agency --, a few remarkable features of the strategy itself deserve to be highlighted.

First, in addition to the Charter of Fundamental Rights, reference is made to the 1951 Geneva Convention on the Status of Refugees, which Article 78 TFEU mentions<sup>129</sup>: although, considering both the tasks of the Agency and the position of the Geneva Convention in EU primary law, this reference may seem inevitable, it nevertheless provides a rare example of an explicit commitment to a human rights instrument outside the EU legal order. In addition, the Strategy goes further, providing that: 'All human rights instruments adopted by the United Nations and the Council of Europe Conventions as ratified by all the Member States are applicable'.<sup>130</sup> Article 1(2), al. 2, of the Frontex Regulation as amended in 2011 now confirms this understanding of the duty of the Agency to comply with fundamental rights -- as listed in the Charter of Fundamental Rights, but going beyond the Charter.<sup>131</sup>

Secondly, the Strategy is explicit about the need to ensure proper monitoring of compliance with fundamental rights in the Agency's activities. This concerns both the discrete operational activities of the Agency and its general mode of operation. At the level of each of the operational activities of the Agency: "Frontex will put in place an effective reporting system to ensure that any incidents or serious risks regarding fundamental rights are immediately reported by any participating officer or Frontex staff member and can be acted upon. This reporting should be the basis for effective monitoring of all its operations. The monitoring effectiveness and credibility will rely heavily on the commitment of national border-guard services to report but also on the involvement of external stakeholders. The Operational Plan shall set out the modalities for reporting, including how and to who report."<sup>132</sup>

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<sup>126</sup> In the original Regulation, the Preamble refers to the Charter, although at the time the Regulation was adopted the Charter still was not recognized binding legal effect: Recital 22 states that the Regulation 'respects the fundamental rights and observes the principles recognised by Article 6(2) of the Treaty on European Union [Article 6(3) following the entry into force of the Treaty of Lisbon] and reflected in the Charter of Fundamental Rights of the European Union'. This reference has been strengthened in the more recent amendments to the Regulation, as detailed below.

<sup>127</sup> See in particular, in this regard, the response of the Executive Director of Frontex, Mr Laitinen, to the own-initiative inquiry of the European Ombudsman, then Mr Nikiforos Diamandouros (OI/5/2012/BEH-MHZ): letter of 17 May 2012, available from the website of the Agency: [http://frontex.europa.eu/assets/Images\\_News/Letter\\_to\\_Ombudsman.pdf](http://frontex.europa.eu/assets/Images_News/Letter_to_Ombudsman.pdf).

<sup>128</sup> Article 26a of Regulation (EC) No 2007/2004, as amended by Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 304 of 22.11.2011, p. 1).

<sup>129</sup> Para. 9 of the strategy.

<sup>130</sup> Frontex fundamental rights strategy (2011), para. 11.

<sup>131</sup> See Article 1(2), al. 2, of Regulation (EC) No 2007/2004, as amended by Regulation (EU) No 1168/2011: 'The Agency shall fulfil its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the European Union; the relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951; obligations related to access to international protection, in particular the principle of non-refoulement; and fundamental rights, and taking into account the reports of the Consultative Forum referred to in Article 26a of this Regulation.'

<sup>132</sup> Frontex fundamental rights strategy (2011), para. 17.

Moreover, the Frontex Regulation as amended in 2011 provides that if there are allegations, related to a particular joint operation or pilot project, of fundamental rights violations, the Executive Director of Frontex "shall suspend or terminate, in whole or in part, joint operations and pilot projects if he/she considers that such violations are of a serious nature or are likely to persist".<sup>133</sup>

This again deserves notice. Rather than simply trusting the established judicial mechanisms through which allegations about fundamental rights violations can be filed, the Strategy commits to ensure specific internal grievance mechanisms.<sup>134</sup> Moreover, this 'reporting' relies both on Frontex officers and on national border-guards (such as those participating in joint operations), acting as 'whistle-blowers' if they are informed about 'incidents or serious risks', and on external stakeholders. Thus, monitoring of compliance with fundamental rights is decentralized, and may influence the very culture of the organization. In addition, where particularly sensitive operations are launched, 'Frontex will endeavour to include persons with a qualified fundamental rights expertise among participating staff.'<sup>135</sup> The idea that emerges here is that of a 'fundamental rights focus person', in effect responsible for ensuring that the operation does not lead to fundamental rights violations, and if such violations do occur or if the risks are too important, to alert the Agency to this.

Indeed, it is such a 'fundamental rights focus person' that has also been designated to ensure, at the organisational level, that Frontex complies with fundamental rights. In 2011, the revised Frontex regulation<sup>136</sup> provided for the establishment of a position of Fundamental Rights Officer, a position that was filled in September 2012. The revised Regulation provides that the Fundamental Rights Officer, who must possess "the necessary qualifications and experience in the field of fundamental rights", "shall be independent in the performance of his/her duties as a Fundamental Rights Officer and shall report directly to the Management Board and the Consultative Forum. He/she shall report on a regular basis and as such contribute to the mechanism for monitoring fundamental rights."<sup>137</sup>

Thirdly, fundamental rights play an important role both in the training of Frontex personnel and in the Code of Conduct that all staff must comply with; indeed, knowledge of fundamental rights is also included among the selection criteria in recruitment.<sup>138</sup> The Regulation establishing the Agency later stipulated that the Code of Conduct, which shall be developed in cooperation with the Consultative Forum also provided for in the Regulation, "shall lay down procedures intended to guarantee the principles of the rule of law and respect for fundamental rights with particular focus on unaccompanied minors and vulnerable persons, as well as on persons seeking international protection, applicable to all persons participating in the activities of the Agency."<sup>139</sup>

Fourth, Frontex established a consultative body -- later codified as the 'Consultative Forum' in the Founding Regulation of the Agency after it was amended in 2011 -- through which it maintains a permanent dialogue with a number of external partners, including the European Asylum Support Office, the Fundamental Rights Agency, the United Nations High Commissioner for Refugees and "other relevant organisations".<sup>140</sup> In practice, in addition to the two EU agencies cited and the UNHCR, three other international organisations (the Council of Europe, the International Organisation on Migration (IOM), and the Organization for Security and Co-operation in Europe - Office for Democratic Institutions and Human Rights

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<sup>133</sup> Article 3(1)(a) of Regulation (EU) No. 2007/2004, as amended by Regulation No. 1168/2011.

<sup>134</sup> On the follow-up to be given to such grievances, see *id.*, para. 19: 'Alleged violations of human rights reported either by national or Frontex officers or third parties, when substantiated, will be followed up by Frontex by communicating and clarifying the situation in cooperation with the competent national authorities without prejudice to any resulting administrative or penal procedures. Member States should also inform Frontex on the follow-up measures.'

<sup>135</sup> *Id.*, para. 20.

<sup>136</sup> Regulation (EU) No 1168/2011, cited above.

<sup>137</sup> Article 26a(3) of Regulation (EU) No. 2007/2004, as amended by Regulation (EU) No 1168/2011, cited above.

<sup>138</sup> *Id.*, paras. 21 and 26.

<sup>139</sup> Article 2a.

<sup>140</sup> Article 26a(2).

(OSCE-ODIHR)) as well as nine civil society organisations (AIRE Centre, Amnesty International, Caritas Europa, ECRE, ICJ, Jesuit Refugee Service, PICUM, Churches' Commission for Migrants in Europe, and the Red Cross EU Office) take part in the Forum. This Forum meets three times per year. Like the Fundamental Rights Officer, it is to have access to "all information concerning respect for fundamental rights, in relation to all the activities of the Agency",<sup>141</sup> allowing both to fulfil monitoring functions at the same time. The Forum is to be consulted "on the further development and implementation of the Fundamental Rights Strategy, Code of Conduct and common core curricula": in other terms, it is anticipated that it should shape the fundamental rights culture of Frontex, identifying gaps and suggesting remedial measures.

Fifth and finally, Frontex also saw its role as encouraging a fundamental rights culture among the national corps of body-guards, which it helps train relying a Common Core Curriculum that is explicit about fundamental rights.<sup>142</sup> In other terms, Frontex considered that it should not only comply with fundamental rights, but also 'promote' them, in accordance with the Charter of Fundamental Rights. Indeed, the Code of Conduct, that all Frontex staff must comply with, includes provisions that all persons participating in activities coordinated by Frontex must follow, consistent with the principle according to which "No Union financial means should be made available for activities or operations that are not carried out in conformity with the Charter of Fundamental Rights of the European Union".<sup>143</sup> In the context of joint operations with national border-guards, "Any suspected violation of the provisions of the Frontex Code of Conduct must immediately be reported to Frontex. All are briefed prior to their engagement about their obligation to report any possible violations of the Frontex Code of Conduct and fundamental rights, and the possible sanctions taken by the Frontex Executive Director in case of the involvement of Frontex staff member."<sup>144</sup>

Regulation (EU) No. 2016/1624 has expanded the tasks of Frontex, now renamed as the European Border and Coast Guard Agency.<sup>145</sup> The new regulation, which entered into force on 6 October 2016, has maintained the different features that have been highlighted. Its Preamble notes that "The extended tasks and competence of the Agency should be balanced with strengthened fundamental rights safeguards and increased accountability",<sup>146</sup> and that "Given the increased number of its tasks, the Agency should further develop and implement a strategy to monitor and ensure the protection of fundamental rights. To that end it should provide its fundamental rights officer with adequate resources and staff corresponding to its mandate and size. The fundamental rights officer should have access to all information necessary to fulfil her or his tasks. The Agency should use its role to actively promote the application of the Union acquis relating to the management of the external borders, including with regard to respect for fundamental rights and international protection".<sup>147</sup> Article 34 of Regulation (EU) No. 2016/1624 defines the role of such a fundamental rights strategy, referring not only to the Charter of Fundamental Rights but also to the 1951 Geneva Convention Relative to the Status of Refugees and "relevant international law", and providing in para. 1 that the strategy shall include "an effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency". The code of conduct applicable to all persons participating in Frontex's activities "shall lay down procedures intended to guarantee the principles of the rule of law and respect for fundamental rights",<sup>148</sup> and fundamental rights shall be part of the training provided to border guards and other relevant staff who are members of the European Border and Coast Guard teams (including the national border

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<sup>141</sup> Article 26a(4).

<sup>142</sup> Frontex fundamental rights strategy (2011), para. 23.

<sup>143</sup> Preamble of Regulation (EU) No. 1168/2011, cited above, Recital 20.

<sup>144</sup> As stated on Frontex' website: see <http://frontex.europa.eu/pressroom/faq/fundamental-rights/>

<sup>145</sup> Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251, 16.9.2016, p. 1.

<sup>146</sup> Preamble, para. 14.

<sup>147</sup> Id., para. 48.

<sup>148</sup> Regulation (EU) No 2016/1624, Article 35.

guards).<sup>149</sup> Article 70 of the new Regulation establishes the Consultative Forum, to which EASO, the European Union Agency for Fundamental Rights, the United Nations High Commissioner for Refugees and other relevant organisations shall be invited to participate. Remarkably, in a significant advance in comparison to the former description of the tasks of the Consultative Forum,<sup>150</sup> the new Regulation provides in Article 70(5) that:

Without prejudice to the tasks of the fundamental rights officer, the consultative forum shall have effective access to all information concerning the respect for fundamental rights, including by carrying out on-the-spot visits to joint operations or rapid border interventions subject to the agreement of the host Member State, and to hotspot areas, return operations and return interventions.

This is a potentially significant upgrading of the role of the Consultative Forum, strengthening its ability to ensure full respect with fundamental rights in the operations of Frontex.

Finally, the new Regulation confirms the role of the Fundamental Rights Officer (Article 71) and the contours of the complaints mechanism that shall be established, to be filed in the hands of that Officer (Article 72). The strengthening of the complaints mechanism, including by the provision of information about the availability of such a mechanism to the persons concerned (Art. 72(10)) and the processing of complaints by the Fundamental Rights Officer (who is expected to act in compliance with the principle of good administration) are further improvements to the fundamental rights armature of Frontex.

### **3.3. The European Asylum Support Office (EASO)**

Initially agreed to in 2004 as part of the Hague Programme on the Area of Freedom, Security and Justice, the European Asylum Support Office (EASO) was set up by Regulation (EU) No 439/2010 as a centre of expertise on asylum, responsible for facilitating, coordinating and strengthening practical cooperation among Member States in that area.<sup>151</sup> It is operational since 1 February 2011.

EASO's mandate is to focus on three major duties<sup>152</sup>: to contribute to the implementation of the Common European Asylum System (CEAS), for instance by collecting information on the practice of national authorities in the field of asylum and on the implementation of the asylum acquis of the Union; to support practical cooperation among Member States on asylum, for instance by gathering information on countries of origin, by organizing the relocation of beneficiaries of international protection in the Union or by providing training to members of national administrations and courts and tribunals, and national services responsible for asylum matters in the Member States; and to support Member States whose asylum and reception systems are under particular pressure, inter alia by the deployment of an 'asylum support team' in the country concerned.<sup>153</sup> EASO has no powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection, although it can 'help Member States subject to particular pressure to facilitate an initial analysis of asylum applications under examination by the competent national authorities'.<sup>154</sup>

The Founding Regulation of EASO states that it "respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European

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<sup>149</sup> Id., Article 36.

<sup>150</sup> See Article 26a(2) of Regulation (EC) No. 2007/2004, as inserted by Article 1(26) of Regulation (EU) No 1168/2011, as summarized above.

<sup>151</sup> Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132, 29.5.2010, p. 11.

<sup>152</sup> Article 1 of the Founding Regulation.

<sup>153</sup> See Chapter 3 of the Founding Regulation.

<sup>154</sup> Articles 2(6) and 10(a) of the Founding Regulation.



Union and should be applied in accordance with the right to asylum recognised in Article 18 of the Charter".<sup>155</sup> The UN High Commissioner for Refugees is represented on the Management Board of EASO,<sup>156</sup> and working arrangements are to be concluded between EASO and UNHRC,<sup>157</sup> which can facilitate compliance with the Geneva Convention on the Status of Refugees. Moreover, the Regulation establishes a Consultative Forum, meeting once per year, in order to "maintain a close dialogue with relevant civil society organisations and relevant competent bodies operating in the field of asylum policy at local, regional, national, European or international level".<sup>158</sup> UNHCR is a member *ex officio* of the Consultative Forum, which also includes academics, non-governmental organisations, and members of the judiciary. The Consultative Forum was first convened in October 2011.

EASO's initiatives to ensure that, in the fulfilment of its mandate, it fully respects the rights of the Charter, observes the principles the Charter includes, and promotes their application, as it is required to do under Article 51(1) of the Charter, are certainly less ambitious than those developed by Frontex. In part, this may be explained by the fact that EASO, like the Fundamental Rights Agency itself, is conceived more as a think tank -- a centre that can analyse information and provide expert analysis to the EU institutions and the Member States -- than as an operational body, whose activities may directly impact fundamental rights. However, this argument has only a limited weight: EASO in fact does also have operational activities, as it responds to requests from Member States facing a sudden influx of persons in search of international protection, and it cooperates regularly with national agents operating at the frontline of the reception of asylum-seekers and processing their claims. There is more in common between Frontex and EASO, in other terms, than would seem to be suggested by a superficial reading of their respective mandates. A number of practices developed by Frontex, described above, could inspire EASO, as well as other EU agencies.

### 3.4. An assessment

All agencies of the EU are duty-bound to respect the rights and freedoms listed in the Charter of Fundamental Rights, to observe its principles, and to promote the application thereof. Yet, the potential for the agencies to improve their role in upholding the Charter's provisions and in encouraging other actors, with whom they work, to take into account fundamental rights in their activities, remains largely untapped. Although this study could only analyse two agencies, Frontex and EASO, the contrast between the two is already significant: a lot could be gained simply by exchanging best practices in the protection and promotion of fundamental rights, and by ensuring that the best practices inspire all EU agencies.

One could envision that all agencies adopt a fundamental rights strategy; that all include a reference to fundamental rights in a code of conduct that could define the duties of their staff; that they set up mechanisms ensuring that any violation of fundamental rights be detected and reported, and that risks of such violations be swiftly brought to the attention of the main bodies of the agency; that they establish the position of a fundamental rights officer, reporting directly to the management board to ensure a certain degree of independence vis-à-vis other staff, in order to ensure that threats to fundamental rights shall be immediately addressed, and that a constant upgrading of the fundamental rights policy within the organization; that they develop a regular dialogue with civil society organisations and relevant international organizations on fundamental rights issues; and finally, but perhaps most importantly, that full compliance with fundamental rights becomes a central component of the terms of reference of the collaboration of the agency concerned with external actors, including in particular members of national administrations with whom they interact at operational level.

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<sup>155</sup> Preamble, Recital 31.

<sup>156</sup> Article 25(4) of the Founding Regulation.

<sup>157</sup> Article 50 of the Founding Regulation.

<sup>158</sup> Article 51(1) of the Founding Regulation.

Such a dissemination of best fundamental rights practices could be easily achieved through the already existing Justice and Home Affairs (JHA) inter-agency cooperation mechanism. This brings together the European Police College (CEPOL), the European Institute for Gender Equality (EIGE), the European Asylum Support Office (EASO), the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), the European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), the European Union's Judicial Cooperation Unit (Eurojust), the European Police Office (Europol), the European Union Agency for Fundamental Rights (FRA) and the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex). This network could efficiently compare the practices of different agencies supporting the establishment of the Area of freedom, security and justice, to assess how these agencies protect and promote the Charter of Fundamental Rights in the fulfilment of their respective mandates, and encourage a certain degree of harmonization across these agencies.

Similar efforts could be expected from other EU agencies, even when the mandates of these agencies, to a hurried observer, seem to present little or no connections to fundamental rights issues. In fact, EU agencies operating outside the JHA remit may deeply affect fundamental rights, and they can be especially effective in promoting them. Although no systematic review can be provided here, some examples come to mind: the European Agency for Safety and Health at Work (EU-OSHA) could focus more systematically on ensuring access to remedies and information of workers about their rights, as well as support a fundamental rights approach to emerging issues related to fundamental rights at work, such as the right to respect for private or freedom of expression on the workplace ; the European Foundation for the Improvement of Living and Working Conditions (Eurofound) could emphasize questions related to the right to the reconciliation of work and family life, or the requirements of the right to respect for private life as a right to pursue alternative lifestyles ; the European Food Safety Authority (EFSA) could ground its work explicitly in the right to health ; and the European Environment Agency (EEA) could contribute to the development of the right to healthy environment. This is not to say that these various agencies should mutate into agencies dedicated to the protection and promotion of fundamental rights. But until the areas of work covered by these agencies are linked to the relevant provisions of the Charter, and of other relevant human rights instruments, the potential of strengthening their contribution by adopting a rights-based approach shall remain under-explored, and untapped.

## 4. THE CHARTER OF FUNDAMENTAL RIGHTS AND MEASURES ADOPTED BY THE MEMBER STATES

### KEY FINDINGS

- In certain borderline cases, national jurisdictions may experience difficulties in applying the Charter to the cases they are presented, given the unclear definition of the situations to which the Charter applies.
- Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom has worsened such uncertainty, as regards whether or not, and if so, under which conditions, the provisions contained in Title IV of the Charter ("Solidarity") can be invoked before domestic courts. In order to dispel any doubts that may have emerged, a declaration could be adopted stipulating that effect that the said Protocol did not intend to, and does not have the effect of, questioning the status of the provisions of Title IV of the Charter.
- The EU Member States may have to be provided with guidance as to how fundamental rights should be taken into account in the adoption of measures implementing Union law, where the instrument implement is vague or silent in this regard. This could be a task for the Fundamental Rights Agency. It could also be achieved by the means of a communication of the Commission to the Member States.

### 4.1. The applicability of the Charter to measures adopted by national authorities

Article 51(1) of the Charter states that the Charter only applies to the EU Member States "only when they are implementing Union law". Reading this wording literally, some authors and practitioners initially queried whether the drafters of the Charter intended this instrument to have a narrower scope of application than fundamental rights as general principles of Union law have received. The Court of Justice, indeed, has taken the view since the 1980s that fundamental rights apply to EU Member States in all situations that fall under the scope of application of Union law (or present sufficiently close links with Union law).<sup>159</sup> This includes situations when national authorities 'implement' Union law, i.e., act as a decentralized administration as an 'agent' of Union law (for instance for the implementation of directives by the adoption of domestic legislation, for the application of a regulation, or for the execution of a judgment delivered by the Union's judicature), however it is by no means limited to such situations: the Court of Justice has routinely imposed on national authorities that they comply with fundamental rights, for instance, when they restrict economic freedoms guaranteed by the Treaties,<sup>160</sup> or when they take action to influence a situation to which Union law applies, even when they are not 'implementing' Union law, i.e., fulfilling a requirement Union law imposes on Member States.

It is in fact highly implausible that the drafters of the Charter would have sought to restrict the case-law of the Court of Justice as regards the scope of application of fundamental rights in the EU legal order. Indeed, both the Explanations of the Charter,<sup>161</sup> as well as a comparison

<sup>159</sup> See, e.g., Judgment of 13 July 1989, *Wachauf*, 5/88, [1989] ECR 2609, EU:C:1989:321; Judgment of 18 June 1991, *ERT*, C-260/89, [1991] ECR I-2925, EU:C:1991:254.

<sup>160</sup> For example, Judgment of 26 June 1997, *Familiapress*, C-368/95, [1997] ECR I-3689, EU:C:1997:325, and Judgment of 12 June 2003, *Schmidberger*, C-112/00, [2003] ECR I-5659, EU:C:2003:333.

<sup>161</sup> These Explanations state that 'it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'. The reference to the existing case-law of the Court of Justice indicates clearly that there was no intention to question this line of jurisprudence, and the terms used in the Explanations ('...when they act in the scope of Union law'), though perhaps imprecise, clearly suggest a broader reading of the scope of application than the expression ('...when they implement Union law') used in Article 51(1) of the Charter

between the different linguistic versions of the Charter (some of which use a term closer to 'application' than to 'implementation' to designate the situations in which Member State action should comply with the Charter), clearly suggest that the wording of the English version of Article 51(1) of the Charter was chosen for ease of expression, rather than with the intention to question the well-established case-law of the Court of Justice.<sup>162</sup>

Any doubts regarding the scope of application of the Charter with respect to Member States' action were removed by the judgments delivered by the Court of Justice in the 2011 case of *Dereci*<sup>163</sup> and in the 2013 case of *Åkerberg Fransson*.<sup>164</sup> The Court of Justice took the view in *Åkerberg Fransson* that the Charter applied even to measures adopted by a Member State not to implement a particular directive, but more broadly to implement the obligation imposed on the Member States by the Treaty to "impose effective penalties for conduct prejudicial to the financial interests of the European Union".<sup>165</sup> This provides a generous extension of the scope of application of the Charter. Indeed, because it seems to go beyond even what the Court of Justice had previously stated concerning the scope of application of fundamental rights as part of the general principles of EU law (although the Court does state that Article 51(1) of the Charter "confirms the Court's case law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union"<sup>166</sup>), it may have increased legal uncertainty, while at the same time reassuring practitioners of EU law that the Charter applies to all situations in which the Member States act in the scope of application of EU law.

At the risk of further adding to the confusion, the Court seems to retreat from the position it took in *Åkerberg Fransson* in the more recent case of *Willems and others*, decided in 2015.<sup>167</sup> The Court was requested to interpret a 2004 regulation providing for the collection, storage and use of biometric data by Member States for the purposes of issuing passports and other related travel identity documents.<sup>168</sup> The Dutch authorities intended to use the same data, collected for the purposes stipulated in the regulation, for other purposes, in particular for the detection and prosecution of criminal offences and the conduct of investigations. The applicants in the main proceedings refused to provide the Dutch authorities with their digital fingerprints, and therefore were denied identity documents. In response to the argument that the use of the data for the purposes intended by the Netherlands was in violation of Articles 7 and 8 of the Charter (right to respect for private and family life and protection of personal data), the Court answered, citing *Åkerberg Fransson*, that:

... it is clear from the case-law of the Court that the fundamental rights guaranteed by the Charter must be respected where national legislation falls within the scope of EU law. In other words, the applicability of EU law entails the applicability of the fundamental rights guaranteed by the Charter (...). Given that, in the present case, Regulation No 2252/2004 is not applicable, there is no need to determine whether the storage and use of biometric data for purposes other than those referred to in Article 4(3) thereof are compatible with those articles of the Charter.<sup>169</sup>

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itself. Article 6(1) EU refer to the Explanations has having to guide the interpretation of the Charter of Fundamental Rights.

<sup>162</sup> See D. Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe', cited above, pp. 1275-1276.

<sup>163</sup> Judgment of 15 November 2011, *Dereci and Others*, C-256/11, [2011] ECR I-11315, ECLI:EU:C:2011:734, para. 72 (taking the view that the Charter applies insofar as 'the situation of the applicants in the main proceedings is covered by European Union law').

<sup>164</sup> Judgment of 26 Feb. 2013, *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, para. 28.

<sup>165</sup> *Id.*, para. 28.

<sup>166</sup> *Id.*, para. 18.

<sup>167</sup> Judgment of 16 April 2015, *Willems, Kooistra, Roest and van Luijk*, C-446/12 to C-449/12, EU:C:2015:238.

<sup>168</sup> Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (OJ 2004 L 385, p. 1), as amended by Regulation (EC) No 444/2009 of the European Parliament and of the Council of 6 May 2009 (OJ 2009 L 142, p. 1, and corrigendum OJ 2009 L 188, p. 127).

<sup>169</sup> *Id.*, paras. 49-50.

This line of case-law provides a sense of the difficulty domestic courts may encounter when the Charter of Fundamental Rights is invoked before them, in situations which present only a faint relationship to Union law: it should come as no surprise if, in a large portion of cases where they do cite the Charter, the Charter in fact does not apply<sup>170</sup> -- a situation that would be problematic if the provisions of the Charter were not for the most part simply restating and confirming provisions from other human rights instruments that are applicable to all the situations in which Member States act, whether or not in the scope of application of Union law.

#### **4.2. The so-called 'opt-out' Protocol on the application of the Charter to Poland and the United Kingdom**

Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, appended to the Treaty of Lisbon,<sup>171</sup> does create problems of its own.<sup>172</sup> Article 1(1) of the protocol, its key operative provision, states:

The Charter does not extend the ability of the Court of Justice, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

Contrary to what an 'opt-out' protocol would entail, the said protocol in fact does not exempt British or Polish courts from applying fundamental rights, as recognized in the EU legal order -- including the rights, freedoms and principles listed in the Charter --, to the cases presented before them that fall under the scope of application of EU law. The protocol simply restates that the Charter extends neither the scope of application of Union law (and therefore that of the Charter), nor (therefore) the jurisdiction of the Court of Justice or the competence of domestic courts to apply the Charter, beyond the existing scope of application of Union law. In other terms, the Charter is without effect on the reach of Union law: it only shall apply to the extent that Union law already applies to any particular situation. But, far from establishing a derogation in favor of Poland and the United Kingdom, this is already what the Charter itself says: the protocol is, in that measure at least, redundant, and crafted for domestic political purposes only. Indeed, the Preamble of the Protocol refers to 'the wish of Poland and the United Kingdom to *clarify* certain aspects of the application of the Charter' (emphasis added), thus clearly recognizing that the Protocol does not bring about any change to the situations of Poland or the United Kingdom. When requested to explain their position before the House of Lords' European Union, the British government confirmed the view that the Protocol should be seen 'as an interpretation guide rather than an opt-out', stating that:

The UK Protocol does not constitute an 'opt-out'. It puts beyond doubt the legal position that nothing in the Charter creates any new rights, or extends the ability of any court to strike down UK law'.<sup>173</sup>

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<sup>170</sup> Fundamental Rights Agency of the European Union, *Fundamental Rights: Challenges and Achievements in 2014 - Annual Report 2014, 2015*, p. 176.

<sup>171</sup> OJ 2010 C 83, p. 313.

<sup>172</sup> For a good overview, see Steve Peers, 'The 'Opt-out' that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights', *Human Rights Law Review*, vol. 12 (2)(2012), pp. 375-389.

<sup>173</sup> Conclusions of House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, 2007-8, HL Paper 62, para. 5.86. This point was further emphasized by Mr Jack Straw, Secretary of State for Justice under the Blair government at the time the Lisbon Treaty was negotiated, who stated that 'the Protocol was intended to reflect the terms of the Charter's horizontal articles themselves': the Protocol, he said, 'puts beyond doubt what should have been obvious from other provisions' (id., para. 5.96). As to Lord Goldsmith, the representative of the British Government in the Convention which drafted the Charter and who later shared responsibility in the drafting of the Protocol, he confirmed that: 'The negotiations at the June European Council and subsequent Intergovernmental Conference provided Government with the opportunity to bolster existing safeguards and set in stone how the Charter will operate in the UK, as in all Member States' (Speech by the Rt Hon Lord Goldsmith QC to the British Institute for International and Comparative Law, 15 January 2008: "The Charter of Fundamental Rights", quoted id., para. 5.98).

This statement confirms the view that the Protocol is a simple restatement of the scope of application of the Charter as agreed by all Member States; any suggestion that Poland or the UK would be placed in a specific position vis-à-vis the Charter as a result of the Protocol is based on a mistaken reading of the instrument -- both in its letter and in its intention. Moreover, any reading of the Protocol according to which the Charter would not apply to situations falling under the scope of application of Union presented to the Polish or British courts would be immediately neutralized by applying fundamental rights as general principles of Union law, as the Court of Justice had been doing routinely since the 1970s, a practice which Article 6(3) TEU explicitly approves of and 'constitutionalizes'.

This debate is, in any case, largely moot since the Court of Justice delivered its judgment in the Joined Cases C-411/10 and C-493/10.<sup>174</sup> Noting that in the *N.S.* case, in the domestic proceedings before the UK courts, the Government abandoned the position that Protocol (No 30) excluded the possibility of invoking the Charter in order to challenge measures adopted by the UK authorities in the scope of application of EU law, the Court nevertheless felt compelled to remove any doubt as to whether such a position, if it were to be put to the Court, would be defensible. It made it clear that it would not:

Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, according to the third recital in the preamble to Protocol (No 30), Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles. In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.<sup>175</sup>

That is not all, however. At the request of the United Kingdom -- Poland was less interested in this provision of the Protocol<sup>176</sup>--, Protocol (No. 30) states that "*for the avoidance of doubt*, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law" (Art. 1(2)). In *N.S.*, the Court of Justice did not provide an interpretation of this provision: that was unnecessary, since the rights referred to in the cases in the main proceedings were not part of Title IV of the Charter. The formulation of article 1(2) of the Protocol is nevertheless deeply problematic, since it creates the impression that none of the provisions of Title IV ('Solidarity') include justiciable rights. Although the provision presents itself as a mere restatement of what the Charter requires, this is an entirely implausible reading of the Charter: the Explanations to the Charter note, for instance, that some provisions of the Charter 'may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34', although Articles 33 and 34, which refer to 'Family and professional life' and to 'Social security and social assistance' respectively, are both located in Title IV of the Charter of Fundamental Rights.

Nevertheless, much as Protocol (No 30) seems to be based, in this regard, on an incorrect reading of the Charter, it cannot be excluded that British and Polish national courts, at least,

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<sup>174</sup> Judgment of 21 December 2011, *N.S. and M.E. and Others*, C-411/10 and C-493/10, EU:C:2011:865.

<sup>175</sup> *Id.*, paras. 119-120.

<sup>176</sup> Comp. with Declaration (No. 62) by Poland concerning the Protocol, in which the Polish government 'declares that, having regard to the tradition of social movement of "Solidarity" and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter ...' This provides an indication as to the intention of the Polish government, which was primarily concerned about the potential impacts on family law issues of a broad reading of the Charter, that might influence areas which, hitherto, remain the sole competence of the EU Member States.

will refrain from addressing a referral to the European Court of Justice when questions of interpretation or of validity of EU law shall be raised on the basis of Title IV of the Charter. This was, for instance, the understanding of the House of Lords EU Select Committee, as expressed in its report on the impact of the Treaty of Lisbon. Article 1(2) of Protocol (No 30), it stated,

... is in line with the frequent references in the Title IV rights to national laws and practices and also with Article 52(5) of the Charter which sets out the approach which should be taken to "principles" in the Charter. But it also brings some welcome clarity to Title IV. Article 52(5) read in the light of the Explanations could have led to a conclusion that some Title IV "rights", such as Article 33 [family and professional life], represent enforceable rights which could be relied upon directly before British courts. The Protocol appears to put beyond doubt that this would not be possible. In these circumstances it must be regarded as very unlikely that the ECJ would, in interpreting the Charter, hold that Title IV involved justiciable rights in relation to any Member State, but Article 1 paragraph 2 of the Protocol would in our view preclude it making such a ruling in relation to the United Kingdom. However, Title IV reflects principles which could, we think, still bear on the interpretation, or even the validity, of legislative and executive acts under Union law, as provided by the last sentence of Charter Article 52(5), and so indirectly affect individual rights.<sup>177</sup>

If this were true, it would of course concern not just the position of Poland or that of the United Kingdom, but the status of all the rights listed in Title IV of the Charter. All such rights would be relegated to becoming mere 'principles', enforceable only in combination with acts (legislative, regulatory or administrative) implementing them (or violating them), in accordance with the definition (in Article 52(5) of the Charter) of the conditions under which principles may be recognized 'normative justiciability'. They would not be directly invocable outside those situations. This position however is incorrect. A declaration by the EU Member States to the effect that Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom did not intend to, and does not have the effect of, questioning the status of the provisions of Title IV of the Charter, which contain both elements of "rights" and elements of "principles", could serve to dispel any remaining doubts in this regard.

#### **4.3. Positive duties to ensure that fundamental rights are protected in the implementation of EU law**

A final consideration related to the contribution of national authorities to the implementation of the Charter of Fundamental Rights concerns their positive duties to ensure that fundamental rights are fully complied with in the implementation of EU law. Domestic courts, the previous paragraphs have shown, may find this difficult to do, given the uncertainty concerning the exact range of situations to which the Charter applies. Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom further contributes to this uncertainty.

Similar duties are imposed, however, on the Executive and on the Legislature, when they take action to implement EU law. This is particularly important to emphasize since the EU institutions, when they adopt legal acts, are not obliged to ensure, positively, that such acts guarantee an adequate protection of fundamental rights. They are allowed to remain vague in this regard: it shall then be left to the EU Member States to fill the gap, and to take the fundamental rights dimension into account in the adoption of implementing measures.<sup>178</sup>

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<sup>177</sup> Conclusions of House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, cited above, para. 5.103.

<sup>178</sup> See Judgment of 27 June 2006, *Parliament v Council*, C-540/03, EU:C:2006:429 ([2006] ECR I-5769) (where the Court of Justice refused to annul the 2003 Family Reunification Directive, since "while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights"). See also, in the same vein, judgment of 6 November 2003, *Lindqvist*, C-101/01, EU:C:2003:596 (where the Court notes, as regards

Better and more systematic guidance could be provided to the EU Member States in this regard. When legislative instruments are adopted at EU level which leave to States a broad margin of appreciation and, in particular, when they contain provisions that are vague enough to allow Member States to adopt implementation measures that may lead to violations of the Charter of Fundamental Rights, the EU Member States would benefit from being provided with clear explanations as to how fundamental rights need to be taken into account in the adoption of such measures, including clear indications as to what implementation measures would not be compatible with the requirements of the Charter. Such guidance could be provided either by the Fundamental Rights Agency or in the form of a communication of the Commission to the Member States.

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Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), that whereas "It is true that, in many respects, the Member States have a margin for manoeuvre in implementing Directive 95/46", "there is nothing to suggest that the regime it provides for lacks predictability or that its provisions are, as such, contrary to the general principles of Community law and, in particular, to the fundamental rights protected by the Community legal order": in other terms, even though the directive itself does not define how the balance should be struck between the right to respect for private life and other fundamental rights such as freedom of expression, the directive cannot be challenged simply because it leaves it to the Member States to define that balance).



## 5. THE ROLE OF THE CHARTER OF FUNDAMENTAL RIGHTS IN THE EXTERNAL RELATIONS OF THE UNION

### KEY FINDINGS

- Article 21(1) TEU imposes on the EU to be guided, in its action on the international scene, by the principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the United Nations Charter and international law. In the Front Polisario case moreover, in a judgment it delivered on 10 December 2015, the General Court has confirmed that the Union institutions cannot ignore the requirements of the Charter of Fundamental Rights when they take action in the area of external policies. This was already the assumption underlying the adoption in 2015 by the Commission of the Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives.
- The operational implications of these duties, however, remain unclear. In the negotiation of trade and investment agreements, it remains debated, in particular, whether the integration of fundamental rights considerations in integrated impact assessments, without treating fundamental rights separately and without relying on a separate methodology to that effect, shall be sufficient to meet the expectations both of civil society and of the European Ombudsman as regards the preparation of human rights impact assessment prior to the conclusion of negotiations. At the very least however, the visibility of fundamental rights in the Impact Assessments accompanying the negotiation and conclusion of trade and/or investment agreements should be further strengthened.
- Various innovations could further improve the consistency and coherence between the internal and external policies in the area of fundamental rights. This could be done by referring on a more systematic basis to international human rights standards in the design and implementation of the Union's legislation and in its internal and external policies; by the Council's Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP) reviewing the accepted recommendations addressed to the EU Member States under the UN Human Rights Council's Universal Periodic Review; and by the institutions of the EU moving towards the adoption of a fundamental rights strategy for the EU.

### 5.1. The application of the Charter in the field of external relations

The EU is committed to promoting its values, listed in Article 2 EU, in its external policies, and its Member States have pledged to cooperate in all fields of international relations to support the principles of "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law" (Art. 21(1) TEU). The EU is also committed to policy coherence for development, which is now a legal obligation under Article 208 TFEU.

Among the preliminary questions that arise here are the role of so-called extraterritorial obligations in the area of human rights, and whether the Charter of Fundamental Rights or international human rights law (human rights as universally recognized through United Nations and International Labour Organization instruments) should be taken into account by the Union in its external policies.

In the *Front Polisario* case decided by the General Court on 10 December 2015 (the case has been appealed before the Court of Justice),<sup>179</sup> the Front populaire pour la libération de la sagaia-el-hamra et du rio de oro (Front Polisario) sought the annulment of a Decision adopted by the Council in 2012 approving on behalf of the European Union the Agreement in the form of an Exchange of Letters between the Union and Kingdom of Morocco concerning reciprocal liberalisation measures, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the 1996 Association Agreement with Morocco.<sup>180</sup> The Front Polisario argued in particular that, by deciding to implement an agreement which (in its own words) 'flouts the right to self-determination of the Sahrawi people and which has the immediate effect of encouraging the policy of annexation conducted by Morocco, the occupying power', the Council was breaching 'the principle of freedom, security and justice, and turns its back on the respect for the fundamental rights and legal systems of the Member States'.<sup>181</sup> The Front Polisario was in fact alleging that the Council had failed to appropriately examine the relevant facts of the case before deciding to approve the Exchange of Letters amending the 1996 Agreement, 'especially as regards the possible application of the agreement, the conclusion of which was approved by the contested decision, to Western Sahara and to the goods exported from that territory'.<sup>182</sup>

Remarkably, the General Court does not dismiss as irrelevant in this context the reference to Article 6 of the EU Treaty and to the Charter of Fundamental Rights. According to the Court, although 'it does not follow from the Charter of Fundamental Rights ... that the European Union is subject to an absolute prohibition on concluding an agreement which may be applicable on disputed territory, the fact remains that the protection of fundamental rights of the population of such a territory is of particular importance and is, therefore, a question that the Council must examine before the approval of such an agreement'.<sup>183</sup> The General Court goes on to list the provisions of the Charter of Fundamental Rights that could be relevant in this context, noting that

the Council must examine, carefully and impartially, all the relevant facts in order to ensure that the production of goods for export is not conducted to the detriment of the population of the territory concerned, or entails infringements of fundamental rights.<sup>184</sup>

Unless it proceeds to such an examination, the General Court implies, the European Union could be encouraging violations of fundamental rights or profit from such violations -- in other terms, be complicit in the commission of such violations. Indeed, given that the sovereignty of Morocco over Western Sahara is contested, it cannot be simply presumed that Morocco shall ensure that the implementation of the Association Agreement with Morocco will benefit the Saharaoui population: the Court thus takes the view that, prior to adopted its decision approving the Exchange of Letters, the Council "should have satisfied itself that there was no evidence of an exploitation of the natural resources of the territory of Western Sahara under Moroccan control likely to be to the detriment of its inhabitants and to infringe their fundamental rights".<sup>185</sup> This, the Council did not do. The Court concludes that the contested decision should be annulled in so far as it approves the application of the agreement referred to by it to Western Sahara.

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<sup>179</sup> Judgment of 10 December 2015, *Front populaire pour la libération de la sagaia-el-hamra et du rio de oro (Front Polisario) v. Council of the EU*, T-512/12, EU:T:2015:953.

<sup>180</sup> Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ 2012 L 241, p. 2).

<sup>181</sup> Judgment in *Front populaire pour la libération de la sagaia-el-hamra et du rio de oro (Front Polisario) v. Council of the EU*, above, EU:T:2015:953, para. 143 (where the General Court quotes the submission from the applicant).

<sup>182</sup> Id., para. 226.

<sup>183</sup> Id., para. 227.

<sup>184</sup> Id., para. 228.

<sup>185</sup> Id., para. 241.

The *Front Polisario* case confirms that there is no territorial limitation attached to scope of application the Charter of Fundamental Rights. The Charter binds the EU institutions in whichever field they act, whether in the adoption of internal policies of the Union or in external policies. Commentators may evoke in this regard the "extraterritorial" applicability of the Charter of Fundamental Rights, but this is metaphorical language, since as an international organization the European Union has no territory of its own : only the EU Member States have territories.<sup>186</sup> The source of the obligation matters less, however, than the recognition of the obligation itself.

The duty of the European Union to duly take into account human rights in its external relations is not limited to the Charter of Fundamental Rights. It would extend to the fundamental rights that are recognized as part of the general principles of Union law which the Court of Justice ensures respect for, on the basis of the Article 6(3) TEU. Moreover, the European Union 'must respect international law in the exercise of its powers'.<sup>187</sup> Article 3(5) TEU explicitly states that it is to contribute to the strict observance and the development of international law. It follows that 'when it adopts an act, it is bound to observe international law in its entirety, including customary international law<sup>[188]</sup>, which is binding upon the institutions of the European Union'.<sup>189</sup> A majority of the doctrine takes the view today that the rights stipulated in the Universal Declaration of Human Rights<sup>190</sup> now have acquired the status of customary international law or should be considered as part of the 'general principles of law recognized by civilized nations' mentioned in Article 38(1)(c) of the Statute of the International Court of Justice as a source of international law.<sup>191</sup> The Union cannot ignore such rights in the exercise of its powers, including when it acts in the field of external relations.

Whereas the principle according to which the Union institutions cannot ignore the requirements of human rights and fundamental freedoms as well as the principles of the United Nations Charter and international law in its external relations,<sup>192</sup> the position adopted by the General Court in the *Front Polisario* case, according to which the Charter of Fundamental Rights as such should be complied with, remains contested. Article 51 of the Charter identifies, correctly, the institutions, agencies or bodies of the EU, or the EU Member States insofar as they implement EU law, as its addressees, without including any territorial limitation. Yet it is noteworthy that Advocate General M. Wathelet, in the opinion he delivered on 13 September 2016<sup>193</sup> concerning the appeal against the *Front Polisario* judgment of the

<sup>186</sup> While Articles 52 TEU and 355 TFEU define the territorial scope of the EU Treaties, these provisions do not imply that the European Union has a "territory" over which it can claim sovereign powers. The territories to which EU law apply are those of the EU Member States, with the clarifications provided by these provisions of the Treaties.

<sup>187</sup> Judgment of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, para. 123.

<sup>188</sup> For an initial statement to the effect that the Union must comply with customary international law, see Judgment of 24 November 1992, *Poulsen and Diva Navigation*, C-286/90, [1992] ECR I-6019, EU:C:1992:453, paras. 9 and 10; and especially Judgment of 16 June 1998, *Racke*, C-162/96, [1998] ECR I-3655, EU:C:1998:293, paras. 45-46.

<sup>189</sup> *Id.*, para. 101. The case followed the reference from United Kingdom courts for a preliminary ruling on the validity of Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ 2009 L 8, p. 3). Directive 2008/101 sought to extend the application of Directive 2003/87 to aircraft operators of third States whose flights which arrive at and depart from an airport situated in the territory of an EU Member State: the Court was requested to decide whether the Union could thus extend the reach of the 2003 Directive establishing the EU's emissions trading scheme to portions of the flights carried out over the high seas and over the third States' territory.

<sup>190</sup> GA Res. 217, UN GAOR, 3d sess., UN Doc. A/810 (1948).

<sup>191</sup> See, among many authorities, T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989).

<sup>192</sup> Art. 21(1) TEU; and see Judgments of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 101), and 14 June 2016, *Parliament v Council* (C-263/14, EU:C:2016:435, paragraph 47).

<sup>193</sup> The main conclusion reached by AG Wathelet, however, is that the judgment of the General Court of the European Union of 10 December 2015 in *Front Polisario v Council* (T-512/12, EU:T:2015:953), by which it annulled Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, should be set aside, because it

General Court, took the view that "since in this case [concerning the conclusion of an Agreement in the form of an Exchange of Letters between the Union and Kingdom of Morocco concerning reciprocal liberalisation measures] neither the European Union nor its Member States exercise control over Western Sahara and Western Sahara is not among the territories to which EU law is applicable, there can be no question of applying the Charter of Fundamental Rights there"<sup>194</sup>: this position in effect denies to the Charter of Fundamental Rights any applicability to situations outside those to which EU law applies by virtue of Articles 52 TEU and 355 TFEU, unless the EU Member States (or the EU itself) were occupying territories other than those designated by those provisions of the treaties.<sup>195</sup>

However, whether on the basis of the Charter of Fundamental Rights itself or of human rights as part of international law, there is broad agreement that the EU must take into account fundamental rights when it acts in the area of external policies. Yet, though the principle itself can hardly be contested, the operational implications remain unclear. There is broad agreement as to *whether* duties exist; much less as to *how* such duties should be implemented. We explore this in two areas.

## 5.2. Trade and investment

Trade and investment policies provide a first example.<sup>196</sup> The Parliament has regularly insisted that, in the conclusion of trade agreements, regard should be had to human rights. The most influential resolution in this regard was adopted on 25 November 2010. Underlining that the common commercial policy should be 'an instrument in the service of the European Union's overall objectives', as listed in Article 21(1) TEU and that it should, in particular, serve the protection of human rights,<sup>197</sup> the Parliament suggests that trade agreements should be subject to 'constant monitoring of implementation', 'with an open and inclusive approach at all phases:

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assumed the application of that agreement to Western Sahara, although under AG Wathelet's reading this constitutes an incorrect reading of Article 94 of the Association Agreement. This provision states that '[the Association Agreement] shall apply, on the one hand, [to the territory of the European Union] and, on the other hand, to the territory of the Kingdom of Morocco'. According to AG Wathelet, Western Sahara cannot be part of the territory of the Kingdom of Morocco within the meaning of that provision: therefore, the Association and Liberalisation Agreements are not applicable to it, and the Front Polisario has no legal interest in the first place in challenging the decision of the Council (see paras. 55-115 of the Opinion). We are not concerned with the part of the argument here. The reference to AG Wathelet's opinion focuses on the reading of the conditions under which the Charter of Fundamental Rights can apply to the conclusion of international agreements by the European Union, which plays only a subsidiary role in the opinion.

<sup>194</sup> Opinion of AG Wathelet in *Council of the EU v. Front Polisario*, C-104/16 P, delivered on 13 September 2016, para. 177.

<sup>195</sup> AG Wathelet nevertheless would agree with the General Court that before adopting the challenged decision, the Council should have considered the impacts on the right to self-determination of the Sahraoui people, since "international law imposes a clear obligation on the European Union and its Member States not to recognise an illegal situation resulting from the infringement of principles and rules concerning fundamental rights and not to render aid or assistance in maintaining the situation created by that infringement" (Opinion, para. 269; reference is made in this regard to various judgments of the International Court of Justice concerning the right to self-determination, the most relevant of which is the Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, p. 136, paragraph 155).

<sup>196</sup> External trade has always been a common policy of the Union (formerly, of the European Economic Community). The Treaty of Lisbon has included investment among the areas that the common commercial policy should cover. Article 207(1) TFEU states in this regard: 'The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'. These 'principles and objectives' are those listed in Article 21(1) TEU, referred to above.

<sup>197</sup> European Parliament resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements ([2009/2219\(INI\)](#)), Par. 19. The Parliament refers in this regard to Article 207(1) TFEU, as well as to Article 3 TEU.

- (a) notes the use of impact studies on sustainable development but considers that they should also be carried out before, during and after the negotiations, to ensure continuing evaluation; also points out the importance of acting in full on their results; also considers that the negotiators should take more account of the priorities and concerns that emerge from these impact studies;
- (b) asks the Commission to carry out impact studies on human rights in addition to those on sustainable development, with comprehensible trade indicators based on human rights and on environmental and social standards;
- (c) calls on both parties to submit regular reports on the general progress of implementation of all the commitments made under the agreement;
- (d) asks the Commission to ensure that partner countries' parliaments are involved in trade negotiations, with a view to enhancing governance and democratic scrutiny in developing countries;
- (e) underlines the importance of public involvement at all stages of the negotiations and follow-up to the agreement, and to this end calls for sustainable development fora or advisory groups to be set up to allow the social partners and representatives of independent civil society to be consulted;'

The question of how the human rights impacts of trade agreements should be assessed has been a contentious issue in recent years. Since 1999, the systematic practice of the Commission, when it negotiates trade agreements, has been to commission from independent (but paid) consultants the preparation of 'sustainability impact assessments' (SIAs); such consultants should in principle be equipped also to address human rights impacts.<sup>198</sup> Such SIAs follow an *integrated* approach taking into account economic, social, environmental and human rights impacts in one single document. They include in principle an analysis of these impacts (both in the EU and in the country or region with which the agreement is negotiated, and third countries), as well as a consultation process allowing relevant stakeholders to play a role in the assessment: the consultants conducting the impact assessment should consult with stakeholders both within the EU and within the partner country/ies, and the consultation should be broad enough to involve all interests (i.e., workers' and employers' organisations, non-governmental organisations and civil society, the private sector and academic experts).

The role of human rights in SIAs accompanying the negotiation of trade agreements has been strengthened in recent years. The Action Plan appended to the *Strategic Framework on Human Rights and Democracy* adopted by the Council on 25 June 2012<sup>199</sup> called on the Commission to "incorporate human rights in all impact assessments on an on-going basis" (point 1) and to develop by 2014 "a methodology to aid consideration of the human rights situation in third countries in connection with the launch or conclusion of trade and/or investment agreements" (point 11a). The revised Action Plan on Human Rights and Democracy, adopted for the 2015-2019 period, commits the European External Action Service, the Commission, the Council and the Member States to work together in order to "continue to develop a robust and methodologically sound approach to the analysis of human rights impacts of trade and investment agreements, in ex-ante impact assessments, sustainability impact assessments and ex-post evaluations", and to "explore ways to extend the existing quantitative analysis in assessing the impact of trade and investment initiatives on human rights."<sup>200</sup>

In the 'Trade for All' communication of 2015, referring to the obligations imposed on the

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<sup>198</sup> *Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives*, 2015, p. 6. On these *Guidelines*, see further below.

<sup>199</sup> Council of the EU, doc. 11855/12 (25 June 2012).

<sup>200</sup> Council of the EU, doc. 10897/15 (20 July 2015). This is part of objective 25 "Trade/Investment Policy", under IV. Fostering Better Coherence and Consistency.

Union by the Treaties,<sup>201</sup> the Commission notes that 'One of the aims of the EU is to ensure that economic growth goes hand in hand with social justice, respect for human rights, high labour and environmental standards, and health and safety protection. This applies to external as well as internal policies, and so also includes trade and investment policy. The EU has been leading in integrating sustainable development objectives into trade policy and making trade an effective tool to promote sustainable development worldwide'. In addition to referring to various tools through which human rights are integrated in trade policies (particularly under the Generalized Scheme of Preferences), it pledges to 'enhance the analysis of the impact of trade policy on human rights both in impact assessments and in ex post evaluations based on the recently developed guidelines'.<sup>202</sup>

The revised *Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives*, provide detailed guidance as to how that pledge shall be fulfilled.<sup>203</sup> The Guidelines should be relied on, in principle, not only in the course of the negotiation of trade agreements, but also to allow for *ex post* evaluations a few years after the entry into force of the agreement, once sufficient data have been collected on the impacts of the agreement. Four issues deserve to be highlighted.

First, the *Guidelines* confirm that, rather than being subjected to a separate impact analysis, the human rights impacts should be part of 'integrated impact assessments', which the Commission states 'provide the most effective way of making a balanced assessment of the potential impacts of any proposed legislative or non-legislative initiative'. The integration of the evaluation of the human rights impacts within a broader evaluation allows to assess whether certain negative impacts on human rights might be compensated by gains in other areas, for instance, by the creation of job opportunities thanks to economic growth, or by the introduction of cleaner technologies in the country concerned allowing to produce through less polluting methods. *A contrario*, the preparation of a separate human rights impact assessment would make it more difficult, politically, to pursue the conclusion of a negotiation that would have shown to lead to a deterioration in the human rights situation in the country.

Second, the *Guidelines* note that the purpose of identifying human rights impacts is to assess 'how trade measures which might be included in a proposed trade-related policy initiative are likely to impact: either on the human rights of individuals in the countries or territories concerned; or on the ability of the EU and partner country/ies to fulfil or progressively realise their human rights obligations'. This confirms the understanding (illustrated by the *Front Polisario* case referred to above) that fundamental rights that are binding in the EU legal order should be complied with also for the benefit of individuals situated outside the territories of the Member States: such fundamental rights have, in other terms, an 'extraterritorial' scope, provided this expression can be used to apply to the conduct of the institutions of the European Union as an international organization.

Moreover, the assessment of the human rights impacts should serve to identify whether the Union, or the States concerned, shall be able to 'fulfil or progressively realise' their human rights obligations. This constitutes a clear recognition that a certain 'policy space' is required in order to allow the Union and the States concerned to discharge their obligations under international human rights law to respect, protect and fulfil human rights (although that typology, as such, is not referred to).

Third, it is remarkable that the *Guidelines* refer to the Charter of Fundamental Rights, in addition to international sources, as having to guide the assessment of the human rights

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<sup>201</sup> Article 207(1) TFEU states that: "[...] The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action." Article 21(3) TEU provides as follows: "[t]he Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and Part Five [TFEU ...]". Part Five TFEU covers, inter alia, the common commercial policy.

<sup>202</sup> European Commission Trade for All. Towards a more responsible trade and investment policy, 2015, p. 26.

<sup>203</sup> See also the second edition of the *Handbook for trade sustainability impact assessment*, published in 2016, providing further operational guidance.

impacts of trade-related initiatives: 'Respect for the Charter of Fundamental Rights in Commission acts and initiatives is a **binding legal requirement** in relation to both internal policies and external action.'<sup>204</sup> Although the assessment should, in particular, allow to determine whether the State with which the Union negotiates a trade agreement can comply with its human rights obligations, as flowing from customary international law and as listed in the human rights treaties to which that State is a party (rather than with the Charter of Fundamental Rights itself, respect for which obviously cannot be imposed on the trading partner of the Union), the Charter is binding on the institutions of the Union also in the field of external relations, imposing on them that they do not directly violate the rights listed in the Charter, for instance, by imposing on the other Party that it agrees to certain concessions in trade negotiations.

The sensitivity of the issue of human rights impact assessment of trade and investment agreements is perhaps best illustrated by the controversy concerning the negotiation of the EU-Vietnam Free Trade Agreement between 26 June 2012, when the negotiation process was launched, and the conclusion of the agreement on 2 December 2015. Following the start of the negotiations, two non-governmental organisations (the International Federation for Human Rights (FIDH) and its Vietnamese member organisation, the Vietnam Committee on Human Rights) requested that the Commission prepare a human rights impact assessment of the agreement under preparation. They based this request both on the commitment made in June 2012 in the Council's Action Plan appended to the *Strategic Framework on Human Rights and Democracy*, referred to above, and to the legal obligation that would follow from Article 21(1) TEU and Article 207 TFEU, as well as from the general duty of the EU to ensure that its trade agreements do not harm human rights abroad. The Commission refused to follow that request. It argued, in particular, that its practice was to follow an integrated approach towards the assessment of impacts which takes into account economic, social, environmental and human rights impacts in one single document, and that therefore there was no need for a separate human rights impact assessment. It also noted that the negotiations with Vietnam were taking place under the legal framework established for ASEAN free trade agreement negotiations launched in 2007 and reviewed in 2009: the EU-Vietnam Free Trade Agreement was merely the result of the negotiations with ASEAN as a whole having been abandoned, yet a detailed SIA had been prepared in 2009 concerning ASEAN (including a focus on social issues and labor rights), and no separate analysis for Vietnam was warranted.

The refusal expressed by the Commission led the Parliament to include, in its resolution of 17 April 2014 on the state of play of the EU-Vietnam Free Trade Agreement, a paragraph urging the Commission to 'carry out as soon as possible a Human Rights Impact Assessment, as requested by Parliament in its resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements, with a view to ensuring 'comprehensible trade indicators based on human rights and on environmental and social standards', and in line with the Report of the UN Special Rapporteur on the right to food'.<sup>205</sup> In parallel, following a complaint filed in August 2014 by the two non-governmental organizations cited above, the European Ombudsman launched an inquiry into the matter. The inquiry led the European Ombudsman to publish on 26 March 2015 a recommendation to the Commission that it 'carry out, without further delay, a human rights impact assessment in the matter'.<sup>206</sup> Again however, the Commission declined. On 31 July 2015, it justified its rejection of the recommendation of the Ombudsman by reiterating its view that 'it was only in 2011 that the Commission undertook the commitment to include human rights in its sustainability impact assessments while the sustainability impact assessments of EU-ASEAN free trade agreement negotiations was finalized in 2009'. It also indicated that 'a standalone

<sup>204</sup> *Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives*, 2015, p. 5 (emphasis in the original).

<sup>205</sup> European Parliament resolution of 17 April 2014 on the state of play of the EU-Vietnam Free Trade Agreement ([2013/2989\(RSP\)](#)), OP 25.

<sup>206</sup> Draft Recommendation of the European Ombudsman in the inquiry into complaint 1409/2014/JN against the European Commission, 26 March 2015, available on: <http://www.ombudsman.europa.eu/cases/recommendation.faces/en/59398/html.bookmark>.

human rights impact assessment for the free trade agreement at issue is against the Commission's established policy and commitment to ensure that economic, social, environmental and - as from 2011 - human rights impacts are all considered side by side in all the assessments and evaluations in line with an integrated approach. This is reflected in the EU Action Plan adopted in 2012 which does not require the Commission to carry out a specific human rights impact assessment for free trade agreements but to "*insert human rights in impact assessments, as and when it is carried out*".<sup>207</sup>

The European Ombudsman finally closed the case with a decision, adopted on 26 February 2016, which is critical of the Commission's attitude.<sup>208</sup> It noted that 'the Commission's approach involves concluding the Free Trade Agreement whatever its impact may be, promoting human rights by using traditional policies and tools, and then, where human rights have been negatively affected, carrying out a retrospective human rights impact assessment. Clearly, prior human rights impact assessments are aimed at anticipating and eliminating or avoiding such negative effects on human rights. The Commission failed to convince the Ombudsman of the correctness of its approach in this case. The Ombudsman does not believe that it is sufficient to develop a range of general policies and instruments to promote human rights compliance while at the same time concluding a Free Trade Agreement which may, in fact, result in non-compliance with human rights requirements. In the view of the Ombudsman, it is far preferable, when negotiating such an Agreement, that any measures intended to prevent or mitigate human rights abuses should be informed by a prior human rights impact assessment.'<sup>209</sup>

The discussion on the EU-Vietnam Free Trade Agreement relates, to a significant extent, to the past practice of the Commission, prior to the improvements announced in 2015 as regards the inclusion of human rights in SIAs and the clarification of the associated methodological challenges. Two aspects still remain relevant, however. First, among the concerns expressed by the non-governmental organisations that approached the European Ombudsman, was that the 'integrated approach' followed by the Commission -- and which it still follows post 2015 -- would not allow to treat the human rights impacts with the seriousness they deserve. The complaint argued that 'Even SIAs made since 2012, which are supposed to have a human rights component, do not adequately refer to the normative content of human rights. In addition they do not properly proceed to consultations of rights holders, including affected groups and their representatives. The "integrated approach" adopted fails to address potential incompatibilities with human rights before the conclusion of trade and investment agreements'.<sup>210</sup> The argument, in other terms, is that human rights impact assessments require to be dealt with according to a specific methodology, taking into account the normative content of human rights and including a strong participatory dimension, involving the groups most likely to be affected.

Second, and relatedly, the complainants argued that the methodology for human rights impact assessments should rely on the Guiding Principles on human rights impact assessments of trade and investment agreements, presented to the UN Human Rights Council in March 2012 by the United Nations Special Rapporteur on the right to food.<sup>211</sup> Since these

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<sup>207</sup> Position of the European Commission as summarized in the Decision in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement, para. 15.

See <http://www.ombudsman.europa.eu/cases/decision.faces/en/64308/html.bookmark>

<sup>208</sup> Id.

<sup>209</sup> Id., para. 27.

<sup>210</sup> The complaint is available at:

[https://www.fidh.org/IMG/pdf/20140807complaint\\_ombudsperson\\_vn.pdf](https://www.fidh.org/IMG/pdf/20140807complaint_ombudsperson_vn.pdf).

<sup>211</sup> Report of the Special Rapporteur on the right to food, Olivier De Schutter, to the 19th session of the Human Rights Council, Addendum: Guiding Principles on human rights impact assessments of trade and investment agreements, UN doc. A/HRC/19/59/Add.5 (19 Dec. 2011).



Guiding Principles were prepared by the author of this study in another (official) capacity, it would be inappropriate for the study to express views as to whether or not this document should be taken as departure point for the preparation of human rights impact assessments in the context of trade negotiations, as requested by the Parliament in its above-mentioned resolution of 17 April 2014.<sup>212</sup> It will suffice to recall that the reason why such Guiding Principles were prepared was precisely to highlight what was distinct to human rights impact assessments, as a means by which States (or, *mutatis mutandis*, organizations such as the Union to which powers have been attributed for the negotiation of trade agreements) discharge their human rights obligations. As stated in the introduction to the Guiding Principles, although States have regularly been asked to prepare human rights impact assessments of trade and investment agreements, they 'have been provided with little guidance as to how such human rights impact assessments should be prepared, what is specific to a human rights impact assessment (as distinct, for instance, from sustainability impact assessments or social impact assessments), and how the conduct of human rights assessments relates to the undertakings of States under human rights treaties'. However they are implemented in practice, and whether or not they are a 'standalone' exercise separate from the assessment of broader economic, social and environmental impacts, it is this specific nature of human rights impact assessments that should be maintained -- including an explicit reliance on the normative framework of human rights, as well as independence, transparency, inclusive participation, expertise, sufficient funding, in the preparation of the assessment, and the imposition of a duty to act on the results of the assessment.

### 5.3. The Common Foreign and Security Policy

According to Article 21(1) TEU, the Union's action on the international scene shall be guided by the principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the United Nations Charter and international law. The Court of Justice confirmed that this applies to all external relations, including to the EU's Common Foreign and Security Policy.<sup>213</sup>

Significant progress has been achieved in recent years to ensure that this requirement is taken into account in the CFSP. The Council has adopted two successive action plans on human rights and democracy, respectively in 2012 and 2015. The first Strategic Framework for Human Rights and Democracy, to which an Action Plan on Human Rights and Democracy was appended covering the years 2012 to 2014, was adopted on 25 June 2012.<sup>214</sup> It listed a total of 36 outcomes to be achieved, through 97 actions, associated with timelines and an identification of whether the EU (and which institution of the UE) or the Member States are responsible for implementation: indeed, although the Action Plan was adopted by the Council, responsibility for carrying out the commitments listed resides with the High Representative assisted by the EEAS, and with the Commission, the Council and Member States, within their respective fields of competence as defined by the Treaties. The second action plan was adopted on 20 July 2015.<sup>215</sup> It runs until 31 December 2019, although a review of its implementation is anticipated to take place in 2017. The action plan is structured around five major themes: I. Boosting ownership of local actors; II. Addressing Human Rights challenges; III. Ensuring a comprehensive Human Rights approach to conflicts and crises; IV. Fostering better coherence and consistency; and V. A more effective EU Human Rights

<sup>212</sup> It is perhaps slightly surprising that, in the 2015 *Guidelines on the analysis of human rights impacts in impact assessment for trade-related policy initiatives*, the 2011 *Guiding Principles on human rights impact assessments of trade and investment agreements* are cited among academic sources, and referred to by the name of their author, as if they constituted a scientific publication, rather than presented as an official United Nations document. That said, many of the elements contained in the 2015 *Guidelines* presented by the Commission are very closely inspired by the 2011 *Guiding Principles on human rights impact assessments of trade and investment agreements*.

<sup>213</sup> Judgments of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 101), and 14 June 2016, *Parliament v Council* (C-263/14, EU:C:2016:435, paragraph 47).

<sup>214</sup> Council of the EU doc. 11855/12.

<sup>215</sup> Council of the EU, doc. 10897/15.

and democracy support policy. The second action plan too lists a series of outcomes and actions to be taken under those chapters.

At the more operational level, the EU's professed ambition to develop a coherent external human rights policy led it in June 2012 to establish the position of EU Special Representative for Human Rights, which Mr. Stavros Lambrinidis, who took office in September 2012, has assumed since. The mandate of the EU Special Representative for Human Rights is to enhance the effectiveness and visibility of the EU's human rights policy.<sup>216</sup> The EU also designates Focal Points for Democracy and Human Rights in its Delegations abroad. These focal points are responsible for dealing with Democracy and Human Rights issues in their countries including contact with and support to local civil society organisations.

As this study, prepared at the request of the Committee on Constitutional Affairs (AFCO) of the Parliament, aims at identifying the role of the Charter of Fundamental Rights in the EU institutional framework, it does not enter into the details of these developments. It is not its purpose to examine, in general, the promotion of human rights and democracy through the CFSP. Indeed, the Charter of Fundamental Rights plays only an indirect role in these developments. The "principles" which, in accordance with Article 21(1) TEU, should guide the Union's external relations, should not be confused with the Charter of Fundamental Rights: in the initiatives above, the Charter is barely mentioned at all, and the legal references used are, rather, the UN human rights treaties and (to a lesser extent) the ILO conventions. Indeed, much as the EU acts consistently with its values in seeking to promote human rights and democracy in its relationships with third countries, it would not be appropriate to rely on the Charter of Fundamental Rights in doing so: this might be seen as a unilateralist approach, through which the Union would unjustifiably be seeking to impose its own values on its partners in international relations.

Nevertheless, it is important to underline the connections between compliance with the Charter of Fundamental Rights in the EU legal order, on the one hand, and the promotion of human rights and democracy in the external relations of the Union. First, while the EU's external human rights policy develops under a complex institutional framework,<sup>217</sup> all EU institutions are bound by the Charter of Fundamental Rights, whether their actions have impacts within the European Union or whether they have impacts outside the national territories of the EU Member States.<sup>218</sup> Therefore, whereas the EU institutions are not expected to impose compliance with the Charter of Fundamental Rights, for instance, through human rights clauses in cooperation agreements or in the human rights dialogues it develops with about 40 countries across the globe,<sup>219</sup> the EU institutions are duty-bound to comply with the Charter in the adoption of any measures that could affect populations also in third countries. This line may at times be a thin one to draw. A clarification in this regard, defining precisely what follows from the duty of the EU institutions to comply with the Charter of Fundamental Rights also in their external action, may be required.

Second, the ability for the EU to effectively promote human rights, democracy and the rule of law in its bilateral diplomacy and in multilateral fora, depends on it acting in full compliance with these values at home. In the conclusions it adopted following its meeting of 5-6 June 2014, the Justice and Home Affairs Council recognized "the importance of consistency between internal and external aspects of human rights' protection and promotion in the Union framework in terms of enhancing the Union's credibility in its external relations and leading

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<sup>216</sup> Council of the EU Decision 2012/440/CFSP of 25 July 2012.

<sup>217</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, 'Human Rights and Democracy at the Heart of the EU External Action- Towards a More Effective Approach', COM(2011) 886 final, 12.12.2011.

<sup>218</sup> Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union, JHA Council meeting, Luxembourg, 5-6 June 2014, para. 14 (recalling that "the provisions of the Charter are also applicable to the external action of the Union").

<sup>219</sup> These dialogues develop under a set of guidelines adopted by the Council, initially as an annex to conclusions of the Council adopted on 25 June 2001, and updated in 2009.

by example in the area of human rights".<sup>220</sup> The examples classically cited are the absence, within a number of EU Member States, of a national institution for the promotion and protection of human rights, established in accordance with the Paris Principles, when this is a standard recommendation addressed to countries in the UN; the unwillingness of some EU Member States to ratify UN human rights treaties or protocols that the EU is encouraging third countries to ratify; and the reluctance of the EU Member States to ratify the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. To these examples, this author would add a fourth, which is the imbalance between civil and political rights on the one hand, and economic, social and cultural rights on the other hand, in the promotion of human rights by the EU: it is in that regard significant that, whereas the EU has adopted ten policy guidelines on substantive human rights,<sup>221</sup> ranging from the death penalty to children and armed conflict, and from freedom of religion and belief to human rights defenders, not a single guideline was adopted on rights such as the right to health, the right to food, or the right to education -- an imbalance which, to any commentator trained into UN human rights discussions, is striking.

In that regard, any initiative to improve compliance with the Charter of Fundamental Rights in internal policies should be welcomed as a means to strengthen the ability of the EU to speak credibly on the world stage in favour of human rights, democracy and the rule of law. In order to enhance policy coherence between the EU's internal and external human rights policies, COHOM (the Working Group of the Council responsible for human rights in EU external action) and the Council Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP) have been seeking to cooperate since 2013, organizing joint meetings to discuss both coherence between internal and external human rights policies and specific human rights issues.<sup>222</sup> It is apparent, however, that these meetings still stumble on the difficulty of defining exactly how the requirements of "consistency" and "coherence" should be understood, and what, in practice, such requirements imply. In the view of this author, agreement could be found on some good practices to give these requirements concrete meaning, and thus to further enhance the credibility of the Union's promotion of its values on the international stage:

(i) In the design and implementation of the Union's internal policies and legislation, references to international human rights standards could be more systematic, both as a way to interpret the corresponding provisions of the Charter of Fundamental Rights (beyond the requirement to do so under Article 52(3) as regards rights and freedoms corresponding to provisions of the European Convention on Human Rights), and as a way to include fundamental rights beyond the partial codification of the Charter, consistent with Article 6(3) TEU. As regards the reference to Council of Europe standards and to the findings and recommendations of Council of Europe monitoring bodies, this is already what is stipulated by the 2007 Memorandum of Understanding between the Council of Europe and the European Union, which provides that "the EU regards the Council of Europe as the Europe-wide reference source for human rights".<sup>223</sup> As explained above in section 1.5., this practice should go beyond the Council of Europe standards and monitoring mechanisms, and include references to UN and ILO standards as well as to the United Nations Human Rights Council's Special Procedures and human rights treaties monitoring bodies, and the findings of the ILO's Committee of Experts on the Application of Conventions and Recommendations.<sup>224</sup>

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<sup>220</sup> Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights' protection and promotion in the European Union, JHA Council meeting, Luxembourg, 5-6 June 2014, para. 13.

<sup>221</sup> The eleventh guideline is on human rights dialogues with third countries.

<sup>222</sup> The first such meeting was held on 19 June 2013 under Irish presidency. A list of the meetings that took place since, accompanied with a brief summary of the results, is presented as an annex to the Presidency discussion paper, Coherence and consistency between internal and external EU human rights policy, presented on 24 February 2016 (Council of the EU doc. 6256/16).

<sup>223</sup> The continued validity and importance of the 2007 Memorandum of Understanding was reaffirmed at the 125th session of the Committee of Ministers of the Council of Europe (Brussels, 19 May 2014): Cooperation with the European Union - [Summary Report](#), para. 7.

<sup>224</sup> In its conclusions of 5-6 June 2014, the JHA Council states cautiously in this regard that "further consideration should be given to attaining further progress in relation to the ratification by the Union and the Member States, as

(ii) Following the examination of a EU Member State by the UN Human Rights Council's Universal Periodic Review, the accepted recommendations could be reviewed within FREMP in order to examine how the State concerned can be supported by the EU and by other EU Member States in fulfilling its commitments before the next review cycle.

(iii) Another study prepared at the request of the European Parliament's Civil Liberties, Justice and Home Affairs (LIBE) Committee recommended that the EU institutions receive from the Fundamental Rights Agency, on an annual basis, a report on the situation of fundamental rights in the EU, identifying the major challenges both at EU level and in the EU Member States.<sup>225</sup> The EU institutions could agree on a Fundamental Rights Strategy, to be regularly updated on the basis of the information thus collected, to ensure that the gaps in the protection of fundamental rights are identified and, once identified, are closed.<sup>226</sup> The establishment of such a fundamental rights strategy would also provide an appropriate framework for ensuring that, in its policy and law-making functions, the EU takes into account human rights standards beyond the current references to the Charter of Fundamental Rights.

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appropriate, of international human rights instruments and the implementation of recommendations issued by international human rights monitoring bodies, in particular those of the United Nations, the Council of Europe and the Organisation for Security and Cooperation in Europe" (para. 20).

<sup>225</sup> "Follow-up to the European Parliament resolution of 8 September 2015 on "The situation of fundamental rights in the European Union (2013-2014)", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, PE 556.962 (June 2016).

<sup>226</sup> See again the JHA Council conclusions of 5-6 June 2014 (referring to the possibility of "a Union internal strategy on fundamental rights, possibly through an action plan on a mid-term basis, regarding the respect and promotion of the Charter" (para. 24).)

## 6. THE ROLE OF JUDICIAL REMEDIES IN ENFORCING THE CHARTER OF FUNDAMENTAL RIGHTS

### KEY FINDINGS

- There remains an apparent gap in the judicial protection of individuals in the Treaties, insofar as Article 263(4) TFEU only allows private applicant to seek the annulment of normative acts of a general scope of applicability that directly affect them without requiring further measures of implementation to the extent that such acts are "regulatory" rather than "legislative" in nature.
- The EU Member States are obliged under Article 47 of the Charter and under Article 19(1) TEU to fill this gap. This, they may do by establishing within their domestic system of judicial remedies a procedure allowing an individual applicant to preventatively apply for judicial protection, without having to adopt a form of unlawful conduct that could give rise to that individual's liability, in order to obtain from the domestic courts an assessment as to the compatibility with fundamental rights of any measure enforcing the regulation vis-à-vis the applicant concerned.
- Another gap exists in the domain of the CFSP, due to the restricted conditions under which the Court of Justice may exercise jurisdiction in this area.
- To close this gap, the EU Member States adopting measures in the framework of an action decided by the Council under the CFSP could adopt a declaration recognizing that they remain fully accountable for any impacts on fundamental rights that may result from such action.

### 6.1. Introduction

This study shall not examine in detail the competences of the Court of Justice to protection fundamental rights in the EU legal order. First, a comprehensive review is beyond the capacity of a study of this nature, which does not focus on judicial protection. Secondly, these competences are set in the primary law of the Union, requiring Treaty amendments to be changed: this, within the foreseeable future, in the present political situation, does not appear a realistic prospect. Nevertheless, there are two areas of direct relevant to the protection of fundamental rights in which improvements can be suggested, even without having to amend the treaties. It is therefore on these two areas that this section focuses. It shall first consider the much debated question of the possibility for private applicants (individual or legal persons) to challenge acts adopted by EU institutions by filing actions for annulment, under Article 263(4) TFEU. Next, it shall examine the gap in judicial protection that exists under the framework of the CFSP.

### 6.2. The *locus standi* of private applicants in direct annulment proceedings

The question of which actors have standing to file a direct action in annulment of legal acts adopted by the EU has been central to the debate on the protection of fundamental rights in the Union since the 1970s. At domestic level, constitutional courts have grown in importance and in influence, as the possibilities for individuals to seek the annulment of national laws alleged not to be in conformity with the constitution have been expanding. The development of the remedies available to individuals in the EU legal order has hardly been able to follow that pace.

Prior to the entry into force of the Lisbon Treaty, Article 230(4) EC allowed natural and legal persons to institute proceedings either against decisions (as acts of individual application) or

against acts of general application such as a regulation, but only if such act of general application *is of direct concern to those persons and affects them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee of a decision*. This restrictive understanding of the *locus standi* in the context of actions for annulment was firmly established in the case-law of the Court of Justice, since the early 1960s.<sup>227</sup> However, it created a gap: it led to a situation in which a regulation of general applicability (i.e., a regulation that does not constitute a decision in disguise, as it does not distinguish the addressees individually as a decision might) could affect the enjoyment of an individual's fundamental rights, without that individual having any possibility to challenge that regulation directly: in such cases, the only recourse the individual concerned would have would be to violate the prescriptions of the regulation, face the sanctions imposed under domestic law, challenge the sanction before domestic courts, and then -- and only then -- request that the domestic courts refer a question to the Court of Justice in order to obtain a preliminary ruling on the question of the validity of the regulation concerned. Thus, the addressees of regulations of general applicability would not have access to remedies against such a regulation directly affecting them, *except if they were willing to face the risk of being imposed penalties for violating the regulation*. This was a situation of concern to practitioners of EU law as well as to commentators.<sup>228</sup>

In order to address this gap in judicial protection, Article I-33 of the proposed treaty establishing a Constitution for Europe (signed on 29 October 2004) distinguished between *legislative acts*, on the one hand, and *regulatory acts*, on the other; and it provided in Article III-365(4) that *regulatory acts*, even though they are of general applicability, could be challenged by direct actions of annulment if they affected the applicant *directly*, that is, even in the absence of national measures of implementation. (Article III-365(4) of the draft Constitutional treaty stated that "Any natural or legal person may, ... institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, *and against a regulatory act which is of direct concern to him or her and does not entail implementing measures*" (emphasis added)). When the Treaty of Lisbon was negotiated, this wording was replicated in Article 263(4) TFEU, in the third limb which defines the conditions under which natural or legal persons may file direct actions in annulment of acts adopted by the EU institutions. Article 263 al. 4 TFEU now states that:

[a]ny natural or legal person may, ... institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

However, the choice to replicate the wording from the proposed treaty establishing a Constitution for Europe is rather odd, since Article 288 TFEU, which defines the different legal acts that the Union may adopt, does not anymore refer to a distinction between "legislative acts" and between "regulatory acts". Rather, repeating the definition of the EC Treaty, it defines that a regulation "shall have general application. It shall be binding in its entirety and directly applicable in all Member States". Although Article 289(3) TFEU does define legislative acts as "legal acts adopted by legislative procedure", there is no corresponding definition of "regulatory acts", so that the distinction between the two categories of acts remains unclear. How, then, should the notion of "regulatory act" as referred to in Article 263(4) TFEU be

<sup>227</sup> See, for the classic interpretation, Judgment of 15 July 1963, *Plaumann v Commission*, 25/62, [1963] ECR 95, EU:C:1963:17 ("Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed"), . For a more recent reiteration, see, e.g., Judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' v Commission*, C-71/09 P, C-73/09 P and C-76/09 P, [2011] ECR I-4727, EU:C:2011:368, para. 52.

<sup>228</sup> See, e.g., Judgment of 25 July 2002, *Unión de Pequeños Agricultores v Council*, C-50/00 P, [2002] ECR I-6677, EU:C:2002:462.

understood?

It was left to the Court of Justice to clarify the implications of the new wording found in the third limb of Article 263(4) TFEU. It did so in the *Inuit Tapiriit Kanatami* case, in which the appellants sought to annul a 2009 regulation on the trade in seal products.<sup>229</sup> In its judgment of 3 October 2013, the Grand Chamber of the Court of Justice took the view that the category of "regulatory acts" was to be understood restrictively, and that the relaxation of the conditions under which natural or legal persons may challenge legal acts of general applicability (since such persons are now allowed to challenge such an act where the act concerned does not entail implementing measures provided the act is of direct concern to the applicant) should not extend to "legislative acts".<sup>230</sup>

Considering that the Treaties do not define "regulatory acts", the Court could have taken a more open approach in its interpretation of Article 263(4) TFEU. However, the interpretation it opted for does not necessarily result in a gap in judicial protection, *provided the EU Member States understand the role that they must play in ensuring effective judicial protection to the individuals*. It is clear, following the *Inuit Tapiriit Kanatami* judgment, that regulations that constitute legislative acts cannot be challenged *directly* before the Court of Justice by the filing of actions of annulment by individuals or legal persons, even where such individuals or legal persons are directly affected (i.e., even when they are affected in the absence of implementing measures at national level). Such regulations however may be challenged *indirectly*. First, if EU institutions adopt implementing acts of direct and individual concern to the addressee, this may lead to an action for annulment of such acts, in the course of which a plea can be made, under Article 277 TFEU, that the general act is invalid and ought to be annulled. Second, when such regulations that have the status of "legislative acts" are applied by the national authorities, national courts should provide effective judicial protection to the addressee. This is a requirement both under Article 47 of the Charter of Fundamental Rights and under Article 19(1) TEU, providing that Member States "shall provide remedies sufficient to ensure effective judicial protection in the fields covered by European Union law". It would be unacceptable, of course, if, in order to have access to an effective judicial remedy as required under Article 47 of the Charter, the individual or legal person had to commit an unlawful act, thereby risking the imposition of penalties.<sup>231</sup> "Effective" therefore should mean, in the context: judicial protection that does not oblige the individual to take the risk of being sanctioned, as a condition for that individual to have access to a remedy.

The EU Member States should therefore establish within their domestic system of judicial remedies a procedure allowing an individual applicant to *preventatively* apply for judicial protection, even before the adoption of conduct that could give rise to that individual's liability, in order to obtain from the domestic courts an assessment as to the compatibility with fundamental rights of any measure enforcing the regulation *vis-à-vis* the applicant concerned. The domestic courts then could request from the Court of Justice a preliminary ruling on the validity of the regulation in question, should they entertain any doubt as to the compatibility of the regulation with fundamental rights. Domestic courts, it should be recalled, are fully part of the EU's system of judicial remedies, which the Court of Justice has described as "a complete system of legal remedies and procedures designed to ensure judicial

<sup>229</sup> Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (OJ 2009 L 286, p. 36).

<sup>230</sup> Judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others*, C-583/11 P, EU:C:2013:625, paras. 55-61.

<sup>231</sup> See Judgment of 13 March 2007, *Unibet*, C-432/05, [2007] ECR I-2271, EU:C:2007:163, para. 64 ("...If [the applicant were] forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law, that would not be sufficient to secure for it [...] effective judicial protection"); or see Judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others*, cited above, EU:C:2013:625, para. 104 (suggesting that the EU Member States may have to reform their judicial system of protection "if the structure of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from European Union law, or again if the sole means of access to a court was available to parties who were compelled to act unlawfully").

review of the legality of European Union acts".<sup>232</sup> National systems of judicial protection should play their role in order to ensure that Article 47 of the Charter of Fundamental Rights is fully complied with.

### 6.3. Judicial protection in the framework of the Common Foreign and Security Policy

Specific challenges arise also in the domain of the CFSP, covered by chapter 2 of Title V of the Treaty on the European Union. Indeed, due to the restrictions to its jurisdiction in this area, the Court of Justice has only a limited ability to ensure that fundamental rights are complied with in the conduct of the CFSP. Yet, although the Treaties do not provide for the adoption of legislative acts in this area,<sup>233</sup> the European Council and the Council acting unanimously are empowered to define general guidelines (as recommendations addressed to the Member States), but also to take decisions defining '(i) actions to be undertaken by the Union; (ii) positions to be taken by the Union; (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii)'; they also may take action to strengthen systematic cooperation between Member States in the CFSP.<sup>234</sup> The jurisdiction of the Court of Justice is however strictly circumscribed. The Court is only competent either (a) to monitor compliance with Article 40 TEU, in other terms, to ensure that the measures adopted under the CFSP 'do not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences'; or, (b) in the context of actions for annulment filed in accordance with Article 263 TFEU, to review 'the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.'<sup>235</sup>

The powers of the Court of Justice thus defined are not unimportant. In particular, the possibility for individuals or organisations to file actions for annulment against 'restrictive measures' affecting them in the conditions provided for by Article 263(4) TFEU is meant to ensure access to a judicial review mechanism against the adoption of sanctions against natural or legal persons subject to sanctions, in the context of the fight against terrorism, for instance when such persons are prohibited entry into the territory of the Member States or when their assets are frozen: such situations have given rise since 2001 to a significant case-law of the Court of Justice, which the Treaty of Lisbon intended to confirm. Nevertheless, gaps remain. In the context of peace operations conducted under the framework of the CFSP (i.e., where the Council decides to deploy a military presence in third countries, relying on troops of the EU Member States) or in the context of the nascent common defence and security policy, the conduct of troops would in principle be attributed to the Union rather than to the Member States.<sup>236</sup> This would seem to follow from the provisions of the treaties setting out how such operations are to be conducted.<sup>237</sup> It would also be consistent with the rules established under general international law<sup>238</sup> and with the case-law developed on that topic

<sup>232</sup> Judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others*, cited above, EU:C:2013:625, para. 92 (citing Judgment of 23 April 1986, *Les Verts v Parliament*, 294/83, [1986] ECR 1339, EU:C:1986:166, para. 23).

<sup>233</sup> Article 24(1), al. 2, TEU.

<sup>234</sup> Article 25 TEU.

<sup>235</sup> Art. 275 TFEU.

<sup>236</sup> See Opinion 2/13 of 18 December 2014, on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, para. 95: it is precisely to avoid that implication that Article 1(4) of the draft agreement providing for the accession of the EU to the ECHR provided that, even with respect to operations conducted in the framework of the CFSP, the acts of the Member States are to be attributed to the Member State in question and not to the EU.

<sup>237</sup> For instance, Article 42(3) TEU states: 'Member States shall make civilian and military capabilities available to the Union for the implementation of the common security and defence policy, to contribute to the objectives defined by the Council.' It thus seems to consider military troops placed at the disposal of an operation decided by the Union as placed under the supervision of the Union, which -- to borrow from the classic phrase used in international law in such circumstances -- 'retains ultimate authority and control' of the operation.

<sup>238</sup> See Article 7 of the Draft Articles on the responsibility of international organizations presented by the International Law Commission, according to which '[t]he conduct of an organ of a State or an organ or agent of an



by the European Court of Human Rights.<sup>239</sup>

Therefore, if these rules of attribution are adhered to (i.e., if the acts resulting in human rights violations are indeed attributed to the Union, rather than to the individual Member States whose agents are put at the disposal of the Union), any victims of such operations who would seek to complain that their fundamental rights have been violated, may not be able to hold the State having contributed troops liable for compensation before domestic courts: closing to these victims the avenue of the Court of Justice -- particularly, in the scenario considered here, the possibility of engaging the extra-contractual liability of the Union -- could result in a denial of justice within the EU legal order.

It has been suggested that, in such cases, national courts could refer a request to the Court of Justice to obtain a preliminary ruling on the interpretation or the validity of the decision taken by the Council deciding on which action should be taken by the Union and setting out the necessary arrangements therefor, as provided for under Article 25 TEU.<sup>240</sup> The argument that such a request for a preliminary ruling should be considered admissible by the Court of Justice, which could therefore accept jurisdiction and thus provide a judicial protection to the victims, is derived from the judgment of the Court in the 2007 case of *Segi and Others*. In that case, the appellants were challenging the fact that their rights and interests had been infringed by the inclusion of Segi and of two persons associated with Segi on a list of persons associated with terrorism and who should therefore be subject to sanctions, in accordance with common positions adopted by the Council: they argued that they were denied access to judicial remedies, since they could not claim compensation for the damage inflicted; nor could they seek the annulment of the common position concerned. In response, the Court of Justice considered that it could deliver preliminary rulings even concerning common positions adopted by the Council, although the provision applicable to the Court's jurisdiction at the material time, Article 35 TEU, only allowed the Court to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under Title VI of the EU Treaty and on the validity and interpretation of the measures implementing them: the jurisdiction of the Court of Justice in its view should be considered to extend to "all measures adopted by the Council and intended to produce legal effects in relation to third parties".<sup>241</sup>

The Court of Justice justified thus extending its jurisdiction beyond a strict (literal) reading of the EU Treaty based on three arguments. First, referring to Article 6 of the EU Treaty (now Article 6(3) TEU), the Court noted that "the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union".<sup>242</sup> Second, the Court took the view that "the procedure enabling the Court to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty, [and therefore] it would run counter to that objective to interpret Article 35(1) EU narrowly".<sup>243</sup> Finally, the Court did seem to attach some weight to a

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international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct' (Draft Articles on the responsibility of international organizations presented by the International Law Commission, adopted by the International Law Commission of the United Nations at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10) (*Yearbook of the International Law Commission*, 2011, vol. II, Part Two)).

<sup>239</sup> Eur. Ct. HR (GC), *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (Appl. nos 71412/01 and 78166/01), decision on admissibility of 2 May 2007 (finding in the context of the UNMIK and NATO operations in Kosovo that 'that the [United Nations Security Council] retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO' (§ 140)).

<sup>240</sup> This was the position of the Commission in the procedure that led to the adoption of Opinion 2/13 of the Court of Justice on the Accession of the European Union to the European Convention on Human Rights. See Opinion 2/13 of 18 December 2014, para. 95.

<sup>241</sup> Judgment of 27 February 2007, *Segi and Others*, C-355/04 P, EU:C:2007:116, para. 53.

<sup>242</sup> *Id.*, para. 51.

<sup>243</sup> *Id.*, para. 53.

declaration adopted by the Council concerning the right to compensation: the Council had stated on 18 December 2001 that it "recalls regarding Article 1(6) of Common Position [2001/931] that in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress."<sup>244</sup> In other terms, the Council itself had acknowledged the need to provide potential victims of errors in the designation of individuals or organisations associated with terrorism with a right to redress.

In the view of this author, it would be very surprising if these arguments were considered to allow the Court of Justice to assess the validity of a decision adopted in the framework of the CFSP, and thus to assist a national court seeking a preliminary ruling to that effect. Of course, the Council may or may not adopt a declaration concerning the right to redress for victims of actions undertaken as part of the CFSP (or the common defence and security policy), beyond the annulment that the persons targeted by "restrictive measures" may seek to obtain under Article 263(4) TFEU. But in the scenario here, in contrast to what occurred in *Segi and Others*, the violation would have its source, not in the decision of the Council itself, but in its implementation in field operations. In any case, the argument that the jurisdiction of the Court of Justice in the framework of the CFSP should be read extensively, beyond the strict limits to that jurisdiction imposed by the Treaties, was met with scepticism by the Court of Justice itself. In its Opinion 2/13 of 18 December 2014, it noted that "the Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions. ... However, ... as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice".<sup>245</sup>

In such circumstances of course, alleged victims of decisions adopted in the framework of the CFSP still would have the possibility of filing an application with the European Court of Human Rights. However, in addition to the fact that the European Court of Human Rights would then have to assess the compatibility of a measure adopted in the framework of EU law with the requirements of the European Convention on Human Rights without there being a possibility for the Court of Justice to first examine such compatibility -- a prospect which the Court of Justice understandably has expressed reservations about --, it is likely that the European Court of Human Rights would dismiss such an application as inadmissible *ratione personae*, since the act complained of would be attributable to the European Union, which is not a party to the European Convention on Human Rights.<sup>246</sup> The result, ultimately, would be to leave such victims without a judicial remedy.

In order to fill this gap, it would be recommended that the EU Member States contributing to the implementation of the action decided by the Council accept full responsibility for the potential impacts of such action on fundamental rights, by making a declaration to that effect. Such a declaration would allow domestic courts to hear claims seeking compensation for any damages caused as a result of the implementing measures taken by the national agents concerned, even though, under an orthodox understanding of the rules on attribution in the law of international responsibility, the measures in question would have been attributed to the European Union, rather than individually to the EU Member State concerned.

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<sup>244</sup> Id., para. 8.

<sup>245</sup> Id., paras. 251-252.

<sup>246</sup> See, *mutatis mutandis*, Eur. Ct. HR (GC), *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, cited above.

## 7. CONCLUSIONS AND RECOMMENDATIONS: STRENGTHENING THE IMPLEMENTATION OF THE CHARTER OF FUNDAMENTAL RIGHTS

### KEY FINDINGS

- By building on the Charter of Fundamental Rights, and by strengthening its means of implementation, the institutions of the EU and the Member States could improve the trust of the Union's citizens in the process of integration. The recommendations summarized below may be seen as different steps towards that imperative.

This study is presented at a time when the gap between the expectations of public opinion and what the European Union can deliver has never been so wide. The Union is perceived as distant ; as prioritizing fiscal discipline above growth ; as doing too much to protect the rights of corporations and as doing too little to reduce inequalities through robust social policies ; and as operating top-down, in a technocratic fashion, rather than by building on people's participation and on local innovations. As an instrument that has a strong legitimacy and that operates across all sectors of the Union's activity, the Charter of Fundamental Rights is uniquely positioned to serve as an instrument to bridge this gap and to dispel this perception. It can serve to redirect the agenda of the Union towards meeting people's needs. It can serve to rebalance the macro-economic steering of the European Union between its economic and social components. It can serve to energize participation in the design and assessment of EU policies. The Charter is, in other terms, far more than a bill of rights, with a strictly legal function to fulfil. Important though that role of the Charter may be, it pales in comparison to the role of the Charter in defining the identity of the Union as a community of values. The Charter provides an opportunity. The opportunity must be seized.

In order to help launch this conversation, a total of 24 recommendations are made, based on the assessment provided in this study. They are presented in the table below. These recommendations are of course of unequal importance. No attempt has been made, moreover, to evaluate which recommendations are realistic, in the current political context, and which not. Some recommendations however have already been referred to in pledges made by the addressees (recommendations 1.2., 1.3., 1.4., 5.1.), or can be seen as implications of the Treaties themselves (recommendations 1.4., 3.5., 6.1.); indeed, apart from the core duty to "respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties", imposed by Article 51(1) of the Charter on all its addressees, at least one recommendation can be seen as a requirement under the TEU (recommendation 6.1., which derives directly from Article 19(1) TEU). It has been a deliberate choice not to include recommendations that would require an amendment to primary Union law: in that sense, all these recommendations are "à droit constant", and can be implemented within a reasonable timeframe provided the political will is there. (Some recommendations, however, although still remaining short of a Treaty amendment, would require a commitment at the highest political level of the Member States: this is the case for recommendations 2.2., 4.1. and 6.2.).

**TABLE 1: Recommendations**

<b>1. The Charter in the legislative process</b>	
1.1. Extend compatibility checks and Impact Assessments to international human rights law instruments, beyond the Charter of Fundamental Rights (see also recommendation 5.2.)	Commission, Council, Parliament
1.2. Prepare Impact Assessments to ensure that the choice between different policy options is guided by the contribution of each to the fulfilment of fundamental rights	Commission, Council, Parliament
1.3. Rely more systematically on the independent expertise of the Fundamental Rights Agency in the preparation of compatibility checks	Commission, Council, Parliament
1.4. Strengthen the participation of civil society organizations, representatives of those potentially affected by the measures, or people or organisations working in the field considered, in the impact assessment procedure	Commission, Council, Parliament
1.5. Establish a mechanism to ensure that developments in international human rights law and therefore in the interpretation of the Charter are taken into account, where such developments could shed doubt on the continued validity of Union law or influence its interpretation	Commission <sup>247</sup>
1.6. Establish a mechanism to systematically screen developments in the Union in order to identify the need to take action at EU level in order to protect and fulfil the rights, freedoms and principles of the Charter	Commission
<b>2. The Charter in the economic governance of the Union</b>	
2.1. Ensure that the Charter of Fundamental Rights is complied with in the European Semester, and that the country-specific recommendations as well as the annual growth survey recommendations the Commission submits to the Council take into account the normative components of the social rights of the Charter.	Commission
2.2. Stipulate that the notion of "exceptional circumstances" allowing under the Treaty on Stability, Coordination and Governance within the Economic and Monetary Union (TSCG) for a deviation from the medium-term objective or the adjustment path announced (Article 3(3)(b) of the TSCG), may include the inability for a country to comply without compromising its obligations under the social provisions of the Charter	25 EU Member States that are currently parties to the TSCG
2.3. Ensure that Article 7(7) of Regulation (EU) No. 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, which specifies that the budgetary consolidation efforts required following the	Commission

<sup>247</sup> Recommendations 1.5. and 1.6. are primarily to the Commission, since the Treaties attribute to the Commission the monopoly to make legislative proposals. These recommendations, indeed, would lead to proposing amendments to existing legislation, where it appears either that existing legislation may be in violation of fundamental rights (as they may have evolved) (recommendation 1.5.), or that a new legislative initiative is required (recommendation 1.6.).

macroeconomic adjustment programme must "take into account the need to ensure sufficient means for fundamental policies, such as education and health care", is interpreted in line with the requirements of the social provisions of the Charter	
2.4. Ensure that the lending practices of the European Stability Mechanism are systematically assessed for their compatibility with the social provisions of the Charter	Commission and European Central Bank
<b>3. The Charter in the work of the EU agencies</b>	
3.1. Adopt a fundamental rights strategy, with time-bound objectives	All EU agencies
3.2. Define fundamental rights as part of a Code of Conduct applying to all staff members	All EU agencies
3.3. Set up mechanisms ensuring that any violation of fundamental rights be detected and reported, and that risks of such violations be swiftly brought to the attention of the main bodies of the agency	All EU agencies
3.4. Establish the position of a fundamental rights officer, reporting directly to the management board to ensure a certain degree of independence vis-à-vis other staff	All EU agencies
3.5. Develop a regular dialogue with civil society organisations and relevant international organizations on fundamental rights issues	All EU agencies
3.6. List compliance with fundamental rights in the terms of reference defining the collaboration with external actors, including national administrations	All EU agencies
<b>4. The Charter and national authorities</b>	
4.1. Adopt a declaration to the effect that Protocol (No. 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom does not intend to, and does not have the effect of, questioning the status of the provisions of Title IV of the Charter	EU Member States / European Council
4.2. Provide the EU Member States with guidance as to how fundamental rights should be taken into account in the adoption of measures implementing Union law, where the instrument implement is vague or silent in this regard	Commission / Fundamental Rights Agency
<b>5. The Charter and the external relations of the Union</b>	
5.1. Further strengthen the visibility of fundamental rights in the Impact Assessments accompanying the negotiation and conclusion of trade and/or investment agreements	Commission
5.2. Improve the consistency and coherence between the internal and external policies in the area of fundamental rights, by referring on a more systematic basis to international human rights standards in the design and implementation of the Union's internal policies and legislation (see also recommendation 1.1.)	Commission, Council, Parliament
5.3. Review the accepted recommendations addressed to the EU Member States under the UN Human Rights Council's Universal Periodic Review	Council (Council Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP))
5.4. Move towards the adoption of a fundamental rights strategy for the EU	Commission, Council, Parliament

<b>6. The role of judicial remedies in enforcing the Charter</b>	
6.1. Consistent with Article 19(1) TEU, establish a procedure allowing an individual applicant to <i>preventatively</i> apply for judicial protection, where a plausible allegation is made that the application of a legislative act of the Union would lead to a violation of fundamental rights	EU Member States
6.2. Adopt a declaration recognizing that the EU Member States adopting measures in the framework of an action decided by the Council or the EU under the CFSP, remain fully accountable for any impacts on fundamental rights that may result from such action.	EU Member States

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DIRECTORATE-GENERAL FOR INTERNAL POLICIES

## POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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PHOTO CREDIT: iStock International Inc.



ISBN 978-92-846-0326-8 (paper)  
ISBN 978-92-846-0327-5 (pdf)

doi: 10.2861/34319 (paper)  
doi: 10.2861/144481 (pdf)